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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA

MAY AND SEPTEMBER TERMS, 1920.

BY
U. G. WHITNEY
REPORTER

VOLUME 189

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By
STATE OF IOWA

JUN 2 1922

JUDGES OF THE SUPREME COURT

SILAS M. WEAVER, Chief Justice, Hardin County.

SCOTT M. LADD, O'Brien County.

WILLIAM D. EVANS, Franklin County.

*FRANK R. GAYNOR, Plymouth County.

BYRON W. PRESTON, Mahaska County.

BENJAMIN I. SALINGER, Carroll County.

TRUMAN S. STEVENS, Fremont County.

†THOMAS ARTHUR, Harrison County.

OFFICERS OF THE COURT.

H. M. HAVNER, *Attorney General*, Iowa County.

B. W. GARRETT, *Clerk*, Decatur County.

U. G. WHITNEY, *Reporter*, Woodbury County.

* Died August 3, 1920.

† Appointed September 15, 1920.

JUDGES OF THE COURTS

JANUARY 1, 1921.

DISTRICT COURTS

- First District*, two judges—WILLIAM S. HAMILTON, Ft. Madison; JOHN E. CRAIG, Keokuk.
- Second District*, four judges—C. W. VERMILION, Centerville; D. M. ANDERSON, Albia; F. M. HUNTER, Ottumwa; SENECA CORNELL, Ottumwa.
- Third District*, three judges—HIRAM K. EVANS, Corydon; HOMER A. FULLER, Mt. Ayr; P. C. WINTER, Creston.
- Fourth District*, three judges—GEORGE JEPSON, Sioux City; W. G. SEARS, Sioux City; C. C. HAMILTON, Sioux City.
- Fifth District*, three judges—J. H. APPLGATE, Guthrie Center; LORIN N. HAYS, Knoxville; H. S. DUGAN, Perry.
- Sixth District*, three judges—CHAS. A. DEWEY, Washington; D. W. HAMILTON, Grinnell; H. F. WAGNER, Sigourney.
- Seventh District*, five judges—A. J. HOUSE, Maquoketa; ARTHUR P. BARKER, Clinton; WILLIAM THEOPHILUS, Davenport; MAURICE DONEGAN, Davenport; F. D. LETTS, Davenport.
- Eighth District*, two judges—R. G. POPHAM, Marengo; RALPH OTTO, Iowa City.
- Ninth District*, five judges—HUBERT UTTERBACK, Des Moines; JOSEPH E. MEYER, Des Moines; LESTER L. THOMPSON, Des Moines; JOHN D. WALLINGFORD, Des Moines; JAMES C. HUME, Des Moines.
- Tenth District*, three judges—H. B. BOIES, Waterloo; E. B. STILES, Manchester; GEORGE W. WOOD, Waterloo.
- Eleventh District*, four judges—R. M. WRIGHT, Ft. Dodge; H. E. FRY, Boone; EDWARD M. MCCALL, Nevada; G. W. THOMPSON, Webster City.
- Twelfth District*, three judges—C. H. KELLEY, Charles City; J. J. CLARK, Mason City; M. F. EDWARDS, Parkersburg.
- Thirteenth District*, two judges—WILLIAM J. SPRINGER, New Hampton; H. E. TAYLOR, Waukon.
- Fourteenth District*, three judges—D. F. COYLE, Humboldt; N. J. LEE, Estherville; JAMES DE LAND, Storm Lake.
- Fifteenth District*, five judges—ORVILLE D. WHEELER, Council Bluffs; EUGENE B. WOODRUFF, Glenwood; JOSEPH B. ROCKAFELLOW, Atlantic; EARL PETERS, Clarinda; GEORGE W. CULLISON, Harlan.
- Sixteenth District*, two judges—M. E. HUTCHISON, Lake City; E. G. ALBERT, Jefferson.
- Seventeenth District*, two judges—B. F. CUMMINGS, Marshalltown; JAMES W. WILLETT, Tama.
- Eighteenth District*, four judges—F. O. ELLISON, Anamosa; MILO P. SMITH, Cedar Rapids; JOHN T. MOFFIT, Tipton; F. F. DAWLEY, Cedar Rapids.
- Nineteenth District*, two judges—JOHN W. KINTZINGER, Dubuque; D. E. MAGUIRE, Dubuque.
- Twentieth District*, two judges—JAMES D. SMYTH, Burlington; OSCAR HALE, Wapello.
- Twenty-first District*, two judges—WILLIAM HUTCHINSON, Alton; C. C. BRADLEY, Le Mars.

SUPERIOR COURTS

- Cedar Rapids*—ATHERTON B. CLARK.
- Council Bluffs*—FRANK J. CAPELL.
- Grinnell*—J. H. P. ROBISON.
- Keokuk*—W. L. MCNAMARA.
- Oelwein*—JAY COOK.
- Perry*—W. W. CARDELL.*
- Shenandoah*—FREDERICK FISCHER.

MUNICIPAL COURTS

- Clinton*, one judge—F. M. FORT.
- Des Moines*, four judges—W. G. BONNER; O. S. FRANKLIN; J. E. MERSHON; T. L. SELLERS.
- Marshalltown*, one judge—B. O. TANKERSLEY.
- Waterloo*, two judges—O. B. COURTRIGHT; JOHN W. GWYNNE.

* Resigned, December 31, 1920.

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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA
AT
DES MOINES, MAY AND SEPTEMBER TERMS, 1920.

JOHNSON OIL REFINING COMPANY, Appellant, v. FEDERAL
OIL & SUPPLY COMPANY, Appellee.

SALES: Calling for Quotations—Effect. A written request by a prospective vendee for quotation of prices, and a compliance therewith by the prospective vendor, followed at once by an order by such vendee for a *definite* quantity, does not constitute a contract of sale.

Appeal from Polk District Court.—THOS. J. GUTHRIE,
Judge.

MAY 15, 1920.

ACTION to recover damages for a breach of contract to

ship oil. At the conclusion of plaintiff's evidence, the court directed a verdict for the defendant. Plaintiff appeals.—*Affirmed.*

John L. Gillespie, for appellant.

Stipp, Perry, Bannister & Starzinger, for appellee.

GAYNOR, J.—This is an action to recover damages for an alleged breach of contract to deliver ten cars of fuel oil, at \$1.75 per barrel. The plaintiff is an Illinois corporation, and located near the city of Chicago. The defendant is an Iowa corporation, doing business at Des Moines, Iowa. Each handles oil products. On the 3d day of November, the plaintiff wrote the defendant the following letter, properly addressed to and received by the defendant:

"We are interested in receiving *quotations on fuel oil, gasoline, for shipment into Illinois and Indiana, also for shipment into eastern points. If you have anything to offer for immediate shipment, we shall appreciate your quotations by wire.*"

On November 5th, the defendant answered:

"We have your letter of the third asking for quotations, etc. * * * and we are very pleased to enclose one of our sales sheets showing what we have to *offer.* * * * In regard to fuel oil, we can quote you \$1.75 for Illinois and Indiana delivery. * * * We have a good supply of these commodities, and would be very glad to open some business with your company.

"P. S. We are asking our Mr. Wolfe who is located in the Peoples' Gas Building, to call on you at the earliest possible opportunity.

"Note: All quotations are for immediate acceptance and subject to change or withdrawal without notice. All agreements are contingent on strikes, accident and other delays unavoidable or beyond our control. Any tax imposed by the government must be added to our price."

With this letter, or attached to it, were the sales sheets referred to in the letter, showing quotations of prices on oil commodities, including the commodity referred to in plaintiff's letter.

On the 6th day of November, plaintiff wired the defendant:

"Your letter fifth. Enter our order ten cars fuel oil one seven five, barrel group, three points, Oklahoma. Wire when can ship."

On the same day, they followed this telegram by a letter, properly addressed to and received by defendant, as follows:

"Please deliver the following as per instructions indicated, and charge to Johnson Oil Refining Company, Chicago Heights, Chicago, Illinois. Ship to Johnson Oil Refining Company, Chicago Heights, Illinois, by C. I. I. delivery, terms 1-10-30, F. O. B. Group three points. Mail invoice Chicago Heights, Illinois: 1-8000 Gal. Tank Car 26-30 Fuel Oil at \$1.75 per barrel, Group three points. Confirming wire. If shipment cannot be made on day requested above, notify us when you will ship."

On the 8th day of November, 1917, the defendant answered:

"We have your wire asking us to enter your order for ten cars Fuel Oil at \$1.75, and we have been checking over our supply with our refinery, and are as yet unable to say if we can enter your order. We have sold pretty heavily the last few days, and we will know, no doubt, by tomorrow at which time we will advise you. Thanking you for your desire to give us some business, we are," etc.

On the 10th day of November, defendant wrote the plaintiff as follows:

"As per our letter to you yesterday, we have checked our orders for fuel oil, and we regret very much to find that we cannot accept your order for ten cars as we are so heavily sold that it would be useless to take on additional business. We are very sorry, indeed, to turn down this initial business from you, and hope to be more fortunate next time. Assur-

ing you we appreciate your desire to patronize us, we are," etc.

These letters are the only direct communications between the plaintiff and defendant touching the purchase and sale of the oil in question, and it goes without saying that these letters fail to show an acceptance on the part of the defendant of the order of November 6th, and, therefore, no contract. In fact, they affirmatively show that the order of November 6th was refused. If nothing further appeared, there would be no occasion for proceeding further in the discussion of the case. Plaintiff, however, claims that, before the letters hereinbefore set out, rejecting the order, were received by it, the defendant had, in fact, accepted the order, and, therefore, became bound to perform, by delivering to the plaintiff the oil called for by its order of November 6th. The only evidence upon which the plaintiff relies to show this is found in letters written by the defendant to the Mr. Wolfe referred to in defendant's letter of November 5th, enclosing the quotations. These letters are as follows:

"Nov. 5, 1917.

"Mr. E. B. Wolfe, Chicago, Illinois.

"Dear Sir: We enclose copy of letter received from the Johnson Oil Company, together with our reply. Won't you please make a trip to see them and endeavor to secure their business. *I was wondering* if their inquiry was to find out our prices, as I believe they are largely tank car dealers themselves."

"Nov. 8, 1917.

"Mr. E. B. Wolfe: I have your letter of the 7th regarding the order for ten cars given us by Johnson Oil Refining Company. Of course you understand that I am waiting for Roxana to cover me on this transaction, and I have not heard from them, although I wired them this morning as follows: 'Have you entered our orders fuel oil totaling twenty cars, wire answer.' I have not acknowledged this order yet to the Johnson people as I do not want to make myself liable until I hear from Roxana. I suppose on ac-

count of W. O. being in Tulsa, there is some delay in hearing from them. If you can throw any light on the matter, I would like to hear from you."

"Nov. 12, 1917.

"Mr. E. B. Wolfe: I enclose a copy of letter received this morning from the Johnson Oil Refining Company to which I am making no reply until I can hear from you. I would like to know if you took this order under the name of the Great Lakes Petroleum Company or under the name of the Federal Oil & Supply Company. It is impossible for us to fill this order, and I feel sure that you understand the situation, and that you will protect us as much as possible in your conversation or in your correspondence with the Johnson people from now on."

"Nov. 13, 1917.

"Mr. E. B. Wolfe: Enclosed find copy of letter just received from Johnson Oil Refining Company, together with copy of our reply. Did you have any correspondence with them regarding this order, or was your transaction with them all verbal? If any letters passed between you, please send me copies and greatly oblige."

The letter, referred to above, we take it, is a letter written by the plaintiff to the defendant on November 10, 1917, as follows:

"We acknowledge receipt of yours of the 8th with reference to our order for ten cars of fuel oil at \$1.75, noting carefully what you have to say in this connection. We respectfully refer you to your letter of Nov. 5th wherein you made us a flat offer on fuel oil at \$1.75 for Illinois and Indiana delivery, also in this letter you state you had a good supply of this commodity and desired to open some business with us. Also in regard to the above, your Mr. Wolfe, in Chicago, called us by phone and asked us for shipping instructions. We asked him to have all cars started for Chicago Heights, C. & E. I. delivery.

"The above is conclusive evidence of your acceptance of

the order, and we therefore look to you for early fulfilment of the obligations, and hope to have your advices in the very near future that all ten cars are coming forward.

“Awaiting to hear from you,” etc.

The record discloses that Mr. Wolfe had no authority to bind this defendant by accepting any orders; that all the authority he had touching the sale of oil was simply to submit orders to the company for its acceptance. It affirmatively appears that he had no authority to bind the company by accepting any order for and in behalf of the company.

This presents the entire record upon which the plaintiff predicates its right to recover damages on account of the failure of the defendant to ship the oil called for by its letter and telegram of November 6th. The only question presented here is whether or not there was a completed, binding contract between the plaintiff and defendant, on which the plaintiff may predicate a claim for damages for a failure to perform. It would seem almost unnecessary to discuss the record, in order to make it plain that this record does not show the existence of a binding contract, or to show that the minds of the parties did not meet upon the proposition contained in plaintiff's letter of November 6th. The first letter discloses simply a request for quotation of prices. This request was complied with. The plaintiff thereupon assumed to order a definite quantity of the articles held by the defendant for sale, in conformity with its prices, as evidenced by the sales sheet. There is nothing to show that defendant ever agreed to sell to plaintiff any definite number of gallons of oil at the price fixed in its sales sheets. The most that can be argued on this proposition is that the defendant said it had a good supply of these commodities. It is evident that, in the letters written by the defendant to this agent, Wolfe, it did not have in its mind the purpose of accepting the order, and the answer to the inquiries indicated that they were skeptical as to whether or not plaintiff's inquiry as to prices was in good faith.

The second letter indicates a purpose not to accept until they received assurance that they could supply an order, if accepted. The third was written after defendant had definitely notified plaintiff that they would not accept the order, and was simply a tentative inquiry as to whether or not anything had been done which might possibly bind the company, other than was evidenced by the conduct of the defendant itself. The same was the purpose of the fourth letter. There certainly is nothing in these letters to Wolfe that indicates that the defendant had accepted the order of November 6th, and there is certainly nothing in the record which shows that Wolfe, even if he had authority to act for the defendant, had done anything to bind the defendant to ship the oil called for by the order of November 6th.

It requires no citation of authority to show that no action for a breach of contract can be maintained until the existence of the contract is first shown. There is such a total failure of evidence to establish the contract relied upon that no verdict for the plaintiff could be sustained. The court was, therefore, right in directing the jury to do what it did do, and its action is, therefore,—*Affirmed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

HENRY MAXWELL, Appellant, v. C. A. MAXWELL, Appellee.

INSANE PERSONS: Justifying Reasonable Restraint. An insane person who is dangerous to himself and others if permitted to go at large may, without process of law, be reasonably restrained by one who, by relationship or otherwise, is the natural or proper custodian of such insane person. But the one who does so restrain has the burden to justify his conduct by proof of every fact called for by the rule.

Appeal from Jasper District Court.—HENRY SILWOLD, Judge.

MAY 15, 1920.

ACTION to recover damages for alleged false arrest and imprisonment. Verdict for the defendant. Plaintiff appeals.—*Reversed and remanded.*

Holly & Holly and Campbell & Campbell, for appellant.

J. E. Cross and C. O. McLain, for appellee.

GAYNOR, J.—This action is to recover damages for an alleged false arrest and imprisonment. The plaintiff and the defendant are father and son. At the time of the happening of the matters herein complained of, plaintiff was about 78 years of age. He complains that, on or about the 18th day of October, 1916, his son, the defendant, without probable cause for believing there was any necessity therefor, maliciously caused him to be arrested by the sheriff of Jasper County, and transported in an automobile to the defendant's home, and from thence to the Soldiers' Home at Marshalltown. There is no dispute in the evidence that, on or about the date alleged, the defendant caused the sheriff of Jasper County to take plaintiff into his custody, and transport him to the Soldiers' Home at Marshalltown; that the sheriff did take possession of plaintiff's person, against his will, and did transport him to the Soldiers' Home at Marshalltown, and left him there, free to remain or leave; that he voluntarily remained a few days, and then returned to his home.

The defendant urges in justification that the plaintiff was of unsound mind, suffering from delusions which involved him in a state of mental uncertainty as to the true relationship which existed between himself, the members of his family, and the world; that these delusions consisted of an unfounded belief that members of his family were persecuting him in various ways, without cause; that he had important rights of action against persons, especially members of his own family, which must be preserved and real-

ized upon through extensive litigation; that these delusions, operating upon his mind, led him to walk and ride about the country, seeking evidence of his imaginary wrongs; that these excursions exposed him to all kinds of inclement weather, and endangered his health and life; that, in these migrations through the country, he threatened various parties with litigation and with physical violence, without having any rational reason therefor, and without any basis in fact for his conduct; that, in fact, the disordered condition of his mind rendered him dangerous to himself and to others; that the defendant, being the son of the plaintiff, and noting the danger to which he was exposing himself and the peril to others involved in his conduct, caused the said sheriff to come to plaintiff's home and take him into custody, but only for the purpose of returning him to the Soldiers' Home at Marshalltown, at which place he had previously been on his own initiative; that the only thought and purpose of the defendant in the matter was to change the surroundings of the plaintiff, in the hope that a change would be beneficial to him, through rest and quiet, and to afford the public the protection it was justly entitled to.

The defense may be divided into two parts:

(1) That the plaintiff was in such a condition of mind as rendered it unsafe for him to be at large, subject to the vagaries of his own mind; that he was, in fact, of unsound mind; that the restraint placed upon him was only such as was reasonably necessary to protect him from himself, and to protect the public from injury.

(2) That the relationship existing between the plaintiff and the defendant was such that the defendant owed the plaintiff a moral and legal duty to exercise some supervision over him; that the condition of plaintiff's mind was such that he appeared to be in need of supervision, and restraint was necessary to that end; that, in doing what he did, he acted as a reasonably prudent person would act under like circumstances, honestly believing that the plaintiff was so mentally deranged as to be incapable of rational self-control, and that the best interests of the plaintiff and the pub-

lic required the action taken; and that what was done was without malice, and was done for the sole benefit of the plaintiff.

It will be noted that this second defense omits a charge of actual necessity for restraint. If the plaintiff was, at the time he was restrained, of unsound mind, and, by reason thereof, incapable of caring for himself, and incapable of exercising rational self-control, and this condition of mind imperiled his own safety, and rendered reasonable restraint necessary, to protect him from injury, or if, by reason of his mental condition, he was incapable of exercising rational self-control, and the lack of such power imperiled the safety of others, then one sustaining the relationship to him which this defendant sustained would be justified, under the law, in placing him under such restraint as was reasonably necessary to protect himself against himself, and to protect the public, from the dangers incident to his condition. Or, in other words, if the mental condition of the plaintiff was such that there was danger to himself or to others in permitting him to be at large, subject to the whims and caprices of an insane mind, then reasonable restraint would be justified, and would afford him no basis for complaint. We think the general rule is that, where it is made to appear that one is not capable of rational self-control, and, by reason thereof, his own safety or the public safety is imperiled, one who, by relationship or otherwise, is the natural or proper custodian of an insane person, may lawfully restrain him in some proper place for treatment, for the good of the patient or for the protection of the public; and this without warrant, and without judicial proceedings. The right to restrain an insane person is not governed by the general law, which provides that no one shall be deprived of life, liberty, or property without due process of law. Restraint under such conditions does not offend against the constitutional inhibition.

We find no authorities going so far as to say that one sustaining the close relationship which this defendant sustained to this plaintiff is not justified in temporarily re-

straining him of his liberty, when such restraint is made necessary for his own protection or the public safety. If this were the only question, and the record sustained the necessity for the restraint adverted to, we would have no hesitancy in affirming this case. For a full discussion of this phase of the question, see *Van Duesen v. Newcomer*, 40 Mich. 90, 127. In that case, Judge Cooley laid down the doctrine thus:

"The conclusion is that restraint of insane persons in an asylum is lawful, and, being lawful, the placing them there, whether it be done by way of protecting the persons or property of others, or for the benefit of the insane persons themselves, is, in itself, due process of law, though there may have been no judicial investigation whatever."

He further said:

"Insane persons are dangerous to others, from their propensity to commit mischief, which they are liable at any moment to manifest, though it may have never been exhibited before; and that, therefore, the state, through its organized action, or any member of the political society, without other warrant than the imperious law of self-defense, may restrain their actions, and, when no other restraint is provided, may properly remove them to the retreat the state has provided for their benefit."

Further:

"The helpless condition of insane persons, and the possibility of cure which is present in the early stages of most cases, imposes upon their relatives the solemn duty to take steps for their cure by placing them in the institutions specially provided for their treatment, and clothes them with all necessary power for the purpose, that they may restrain them of their liberty with a view to their cure, as they might a person in the delirium of fever, or one who, in any case of mere bodily disease, was in danger, either purposely or through ignorance or temporary loss of prudence and discretion, of inflicting or causing self-injury."

Quoting further from that opinion:

"The safety of society, it is said, does demand that every

insane person should be placed under restraint, because the going at large of every such person is dangerous to others; and, for self-protection, they may be restrained by others, without awaiting any judicial hearing. * * * For their own good, they should be restrained, in order that they may be treated for their malady, and, if possible, cured; and this should be allowed without a preliminary inquisition, because the inquisition itself must be exciting and injurious to the subject of it, and tend to defeat the very purpose for which it would nominally be had."

The consensus of judicial opinion seems to be that, while everyone is ordinarily entitled to direct his own actions, yet, where one is, in fact, insane, and there are manifest probabilities of injury to himself or the public, if he is permitted to go unrestrained, even though those have not been made manifest, he may be restrained by anyone for a reasonable time, in the interests of the public good. The authorities limit the right to restrain an insane person of his liberty to proof of actual insanity and immediate danger to himself or to the public, and they unite in holding that the right to restrain for his own benefit and for the protection of others is not questioned; but it is discussed as analogous to cases where one is in delirium of fever, and would break away from his attendants, or is afflicted with a contagious disease. As bearing upon this question, see *Colby v. Jackson*, 12 N. H. 526. In this case, it was said:

"Upon the obvious necessity of the case, if no authorities could be found, the original restraint of the plaintiff by the defendant was justifiable. There was evidence that the plaintiff, at the time of his confinement, was so insane that it would have been dangerous to himself and his family to permit him to be at large. If it be lawful 'to lay hands upon another,' to preserve public decorum; to imprison persons till their anger shall be cooled, lest they should kill each other; to break into a man's house and imprison him, lest he should murder his wife,—it was certainly lawful for the defendant to imprison the plaintiff, whose state of mind was such as to expose himself and those dependent upon

him to physical suffering, and perhaps to death. To do this, he needed no warrant; his duty as a citizen called on him to interfere, in a case of such extreme urgency. But when the immediate safety of the lunatic and his family had been cared for, the duty and right of interference by the defendant ended."

Where one restrains another of his liberty, he must justify his conduct, and he must show a legal right in him to do so. Under our statute, Section 5197 of the Code of 1897, a private person may make an arrest for a public offense committed or attempted in his presence. See *Snyder v. Thompson*, 134 Iowa 725. When a private person arrests another without a warrant, the burden rests upon him to show that a crime was committed or attempted in his presence by the party charged. Where a public offense is committed or attempted in the presence of a private citizen, the public interest demands, and the public good requires, that the citizens be invested with the right to restrain the defendant of his liberty; but, when called into court to answer for the arrest, the burden rests upon him to show that a public offense was actually attempted or committed in his presence. The right of one to arrest and restrain another of his liberty on the ground of insanity is dependent upon the existence of the fact upon which the right is predicated. A citizen has not the right to arrest any member of society who may be deranged in his mind; and, therefore, in order to justify his act, when charged with wrongful arrest, he must show, not only that the person was insane at the time, but also that to permit him to go at large imperiled his own safety or the safety of the public. It is not sufficient to show that he was lacking in mental capacity or had hallucinations, but the person causing the arrest must go further, and show that to permit him to go unrestrained imperiled his own safety or the safety of the public. It is not sufficient to show, in cases of this kind, that he had probable grounds for suspecting that the person arrested was insane, or probable reason for believing that his being at large would imperil the safety of the public. He must justify it

by proving the fact upon which his right to restrain rested. As said by Judge Cooley, in *Van Duesen v. Newcomer*, *supra*:

“Whoever takes into his own hands so serious a responsibility as the confinement of a citizen upon his own judgment merely, assuming it to be necessary in self-defense, must show that, upon the evidence, danger from his being at large was not merely possible, but was probable. Many sane persons, under the influence of strong excitements, are subject to serious and perhaps dangerous fits of passion; but another could not be allowed, on this ground alone, to seize and imprison them, in anticipation that possibly the occasion for excitement might arise, and the passion be manifested.”

He further says:

“I concede that the right to restrain these unfortunate persons, for their own benefit or for the protection of others, is as clear as the right to restrain one who, in the delirium of fever, would break away from his attendants, or one who, with a contagious disease upon him, should attempt to enter a public assembly. But the first thing to be determined is whether there is insanity in fact.”

This involves the necessity for restraint. One who arrests another and restrains him of his liberty, on the theory that he is incapable of rational self-control, assumes the burden of showing that fact, and the imminent necessity for the restraint. This, we think, is the true rule, and the sane and safe rule in matters of this kind.

There was a conflict in the evidence as to the fact of insanity, though we are inclined to think the preponderance of the evidence tends to show that the plaintiff was not possessed of a sane mind. That, however, was a question for the jury, and should have been submitted to the jury, under proper instructions. We are satisfied from this record that the defendant acted in good faith in what he did; that he had the best interests of his father at heart. We are, however, forced to order a retrial of this case, for error committed in giving the eighth instruction, which is as follows:

“If, in the judgment of the defendant at the time, the plaintiff had received such care at the hands of his children as they were able to give, or if the plaintiff would not stay with them or either of them, and had no suitable home of his own, but roamed around the neighborhood, or failed to take proper care of himself, and if defendant honestly believed plaintiff demented, and honestly believed and considered the Soldiers’ Home at Marshalltown a proper place to care for the plaintiff, and if, in having plaintiff taken there, and the means adopted to that end, the defendant did not act maliciously toward the plaintiff, but acted with that care, caution, and prudence as would an ordinarily careful and prudent person, or if you find that, in what he did or had done for the plaintiff, the defendant had only his father’s best interest at heart, and defendant was endeavoring to provide proper care for his father in his then condition, and that defendant honestly believed that the means and method adopted by him and by his agent, W. S. Gove, in getting the plaintiff to the Soldiers’ Home, then, in doing what he did, defendant was acting within his right, and not illegally.”

While a careful examination of this record leads us to think that there is but little merit in plaintiff’s contention, yet the plaintiff was entitled to have the judgment of the jury, under proper instructions, upon the merits of his contention. This he did not have, with the instruction hereinbefore set out submitted to the jury, and for this reason the cause is—*Reversed and remanded.*

WEAVER, C. J., LADD and STEVENS, JJ., concur.

FRITCH & HIMES, Appellees, v. S. V. REYNOLDS, Appellant.

LANDLORD AND TENANT: Holding Over—Effect. Under a lease

- 1 providing that the lessee might have an extension for a named time by giving a prescribed notice, the naked holding over, without giving such notice, will not be deemed such extension.

FORCIBLE ENTRY AND DETAINER: Limitation on Action. A

- 2 landlord who serves his tenant at will with a 30-day notice of the termination of the tenancy, and then allows the tenant to remain in possession for 30 days following the expiration of said notice, may not resort to an action of forcible entry and detainer.

Appeal from Mahaska District Court.—H. F. WAGNER, Judge.

FEBRUARY 23, 1920.

REHEARING DENIED MAY 17, 1920.

ACTION of forcible entry and detainer, commenced in justice of the peace court, and, by agreement, transferred to the district court, where same was tried without a jury. Judgment for plaintiff. Defendant appeals.—*Reversed.*

C. C. Orvis and *J. C. Heitsman*, for appellant.

Malcolm & True, for appellees.

STEVENS, J.—Defendant leased and occupied an office in a building situated on Lot 5, Block 13, Official Plat Oskaloosa, Iowa, under a written lease, for a term of 3 years, with the privilege of 5 years, upon giving the landlord notice of his election to extend the term at least 60 days before the expiration of the shorter term. The petition

1. **LANDLORD
AND TEN-
ANT:** holding
over: effect.

alleged that defendant had occupied said premises with the assent of the owner since March 1, 1918, and that the usual notice to terminate the tenancy and to quit were given; and asked judgment for possession. Defendant admitted that the notices were given, as charged, and averred that he exercised the option given him by the lease to extend the term until March 1, 1920, by giving notice to plaintiff, as provided in said lease, and that the action was barred by Section 4217 of the Code. Plaintiff, in reply, alleged that the lease was forfeited for the nonpayment of rent. A statement of the facts, so far as material to an understanding of the questions decided, follows:

Three questions presented by appellant's appeal require decision: (a) Did defendant exercise the option given him by the lease to extend the term from March 1, 1918, to March 1, 1920? (b) If not, was he, at the time the notice was served, on June 11, 1919, a tenant at will? (c) Was plaintiff's cause of action barred, under Section 4217 of the Code?

Defendant testified that he gave oral notice of his election to extend the term to March 1, 1920, and that he was, therefore, not, under Section 2991 of the Code, a tenant at will. The court evidently found against him upon the facts, and, as there is a dispute in the evidence, this finding is final and binding upon this court.

It is, however, further claimed by defendant that, as he continued in possession for many months after March 1, 1918, the law will presume that he availed himself of the right under the option, and that he was in possession under the terms of the lease. If the lease gave defendant a mere option to occupy the premises for an extended term, holding over after the expiration thereof will constitute an election to hold for the additional term, and a tenant holding over, without a new arrangement, is bound for the additional term; but, where the lease contains an agreement for a mere option to renew, some affirmative act upon the part of the tenant is necessary, to extend the term. *Andrews v. Marshall Creamery Co.*, 118 Iowa 595.

As the court found that no affirmative action was taken, an extension of the term will not be presumed from the mere continuance of the tenant in possession of the premises. The court must have held that the term expired March 1, 1918, and we are bound by this holding.

Section 2991 of the Code provides as follows:

2. **FORCIBLE ENTRY AND DETAINER: limitation on action.** "Any person in the possession of real estate, with the assent of the owner, is presumed to be a tenant at will until the contrary is shown, and thirty days' notice in writing must be given by either party before he can terminate such a tenancy. * * *

We have frequently had occasion to apply this statute. *Kellogg v. Groves*, 53 Iowa 395; *Martin v. Knapp*, 57 Iowa 336; *Goldsmith v. Wilson*, 68 Iowa 685; *O'Brien v. Troxcl & Bro.*, 76 Iowa 760; *Heiple v. Reinhart*, 100 Iowa 525; *McClland v. Wiggins*, 109 Iowa 673; *German State Bank v. Herron*, 111 Iowa 25; *Denecke v. Miller & Son*, 142 Iowa 486; *Hall v. Henninger*, 145 Iowa 230; *Wixom v. Hoar*, 158 Iowa 426; *Halligan v. Frey*, 161 Iowa 185; *Sanders v. Sutlive Bros. & Co.*, 163 Iowa 172. He does not, however, become a tenant at will until 30 days after the expiration of the lease. *Hall v. Henninger*, supra.

A tenancy at will may be terminated by either party, by serving upon the other a 30 days' notice in writing to that effect. On April 22, 1919, plaintiff served a 30 days' notice upon the defendant, in writing, fixing the 22d day of May, 1919, as the date for terminating the tenancy, and again on June 7, 1919, another 30 days' notice, terminating the tenancy, and, on July 3d, a 3 days' notice was served upon the defendant, and, on the 11th day of July, this action was commenced.

It is argued by counsel for appellant that defendant had 30 days' peaceable possession of the premises after May 22, 1919, the date fixed by the first notice for terminating the tenancy, and that plaintiff's cause of action is, therefore, barred by Section 4217, which provides as follows:

"Thirty days' peaceable possession with the knowledge

of the plaintiff after the cause of action accrues is a bar to this proceeding."

On the other hand, it is the theory of appellee that the failure of plaintiff to take the necessary steps to obtain possession upon the expiration of the 30 days' notice, expiring May 22d, did not interrupt the tenancy, and that the service of another 30 days' notice to terminate the same was necessary, before an action of forcible entry and detainer could be commenced. If the contention of appellee is sound, then, clearly, plaintiff's cause of action was not barred at the time of its commencement.

The defendant in *Heiple v. Reinhart*, supra, was in possession of premises under a life lease, which required her to pay the taxes thereon, and provided that, if default was made in the performance of any of the covenants of the lease, or she permitted the taxes to become delinquent, then same should be forfeited, and the lessors might re-enter, and take possession thereof. Defendant failed to pay the taxes for the years 1892 and 1893, and permitted them to become delinquent, and, on April 24, 1894, was served with a 3 days' notice to surrender possession of the premises. An action in forcible entry and detainer was commenced on the 2d of May. There was a demurrer to the petition, upon the ground that the petition showed upon its face that defendant had her 30 days' peaceable, uninterrupted possession, with the knowledge of the plaintiff, after the cause of action accrued, and the same was, therefore, barred. The taxes due for the year 1893 did not become delinquent until the first of April, 1894, but more than 30 days elapsed before the action was commenced. The demurrer was sustained.

In *McCelland v. Wiggins*, supra, the lessee in possession under a lease that had not yet expired, agreed in writing, on March 8, 1897, with the purchaser of the premises from the lessor, to surrender the lease and possession of the premises; but one of the parties refused to give possession, and, on the following day, a 30-day notice to quit and surrender the premises was served on him, and, on the 9th day of

April, a 3 days' notice. Action was commenced on the 13th of the same month. The court held that, as defendant was in the peaceable possession of the premises for 30 days with the knowledge of the plaintiff, after the cause of action accrued, same was barred.

The facts found by the court in *McRobert v. Bridget*, 168 Iowa 28, were as follows: On the 14th of April, 1912, notice of the forfeiture of certain contracts, under which the defendant was in possession of certain real property, was served, fixing May 20th as the date for such forfeiture. On June 19, 1912, a 30-day and a 3-day notice to quit was served. Action was commenced August 1, 1912. The statute was held to bar the action. It will be observed in this case that more than 30 days elapsed after the notice of forfeiture before the action was commenced, which was within 30 days after the expiration of the 30-day notice.

It will also be noticed that, in the case at bar, more than 30 days elapsed after the time fixed by the first notice for terminating the tenancy, before this action was commenced. From the service of that notice, appellant ceased to occupy the premises with the assent of the owner. It is true that the tenancy did not cease to exist until the expiration of the time fixed by the notice, but the steps taken by the landlord were the necessary legal steps for the removal of the tenant from possession. Action was not commenced, however, until more than 30 days after the time fixed by the notice, and, surely, the defendant was not thereafter in possession with the assent of the landlord. The 3 days' notice to quit must be given, preliminary to the commencement of an action of forcible entry and detainer; but it was said in *McRobert v. Bridget*, supra, that this notice could not be given until the cause of action accrued. It follows that plaintiff's cause of action at the time same was commenced was barred by Section 4217 of the Code. Forcible entry and detainer is designated by the statute as a summary remedy, and is, in fact, a rather drastic one, and the statute conferring the right thereto will be given strict construction. Plaintiff is not, however, without the remedy

given him by Section 4182 of the Code. His petition could have been amended at any time, so as to invoke the provisions of this statute. *Denecke v. Miller & Son*, supra.

The facts in *Newell v. Sanford*, 13 Iowa 191, relied upon by counsel for appellee, are not analogous to the facts in the case at bar. The defendant in the cited case remained in possession of the premises for years after a notice terminating the tenancy had been served, and the court held that he continued to be a tenant at will. This fact, which is emphasized in the opinion, left no doubt that the possession was with the assent of the landlord. The statute of limitations was not involved.

Other questions discussed by counsel for appellant are without substantial merit, and, in view of our conclusion that plaintiff's cause of action was barred by the statute, it is unnecessary to discuss or decide the same. It follows that the judgment of the court below must be, and is,—*Reversed*.

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

ALLIE GROEN, Appellee, v. A. G. FERRIS, Appellant.

TRIAL: Combining Equitable Issues Arising at Law and in Equity.

- 1 Equitable issues, practically identical, and arising in two actions, one at law (replevin) and one in equity, between the same parties, over the same subject-matter, may very properly be consolidated and tried in the equitable action, especially when a trial of the equitable issues will be determinative of the entire controversy.

EQUITY: Doing Equity—Forfeiture. Equity will not permit a contract forfeiture for nonpayment of a balance due, when it appears that the property has already been paid for in an amount greatly in excess of its value.

Appeal from Cherokee District Court.—C. C. BRADLEY, Judge.

FEBRUARY 16, 1920.

REHEARING DENIED MAY 17, 1920.

SUIT in equity for an accounting and other equitable relief. Decree for plaintiff. Defendant appeals.—*Affirmed.*

Claud M. Smith, for appellant.

Herrick & Herrick, for appellee.

STEVENS, J.—A somewhat extended statement of the record is necessary to a complete understanding of the questions involved upon this appeal. On January 16, 1917, plaintiff and defendant entered into a contract in writing, by the terms of which the defendant, in consideration of \$5,000, agreed to sell to the plaintiff the following described personal property, to wit:

1. TRIAL : combining equitable issues arising at law and in equity.

“All the furniture, fixtures, draperies, booth, two (2) picture machines (2 power 6-A), picture screen, and other accessories now in and used for the operation of the theater known as the ‘Happy Hour,’ in the two-story brick building located on Lot 29, 222 West Main Street in Block eight (8), New Cherokee, Iowa; and consisting principally of the following described property, to wit:

“Two Powers 6-A, N. P. one concrete booth, twelve electric fans, three hundred and fifty chairs, one piano, six ceiling lamps, one electric sign, one Meroid screen, one small electric ad sign, four brass one-sheet lithograph boards, one brass three-sheet board, one combination one-sheet and folder frame, two lavatories, one hot air furnace, one connected cooling system, one large writing desk, one organ, one large mirror, and all electric fixtures, including ornamental front and all other draperies, furniture and fixtures that are now being used and connected with the said Happy Hour Theater.

“Also the fixtures, draperies, scenery and properties now being used in the Grand Opera House, such as scenery, drops, one Powers 6-A N. P., one galvanized iron booth, one transformer, two sets of scenery, one double drop, two single drops, one street, one wood, one new garden drop, pass-out checks, coupon tickets, and such other properties and accessories, now being used in said Grand.”

The contract provided for the payment of the purchase price as follows: \$600 cash, upon the execution of the contract; \$2,900 by the conveyance to defendant of a certain residence property owned by plaintiff, in Rock Rapids, Iowa; the balance in monthly payments of \$40 each, payable on the first day of each month, commencing March 1, 1917, and ending on December 1, 1918, except that the payment on January 1, 1918, was to be \$300, and the one on January 1, 1919, \$360. The contract further provided that, if plaintiff failed to make the payments, as specified in the contract, she would forfeit \$1,500 to defendant as liquidated damages, and all her rights under the contract. Time was made of the essence of the contract, which further provided that, in the event plaintiff failed to make her payments as agreed, defendant might terminate the contract by serving upon her a 30-day written notice of his intention to declare such forfeiture. The effect of the giving of such notice was to render the contract null and void, and to forfeit all rights of plaintiff to the property and to the portion of the purchase price paid. The last payment made by plaintiff was \$300, due January 1, 1918, but same was not paid when due. A notice of forfeiture was served, July 10, 1918, and on August 13th, written demand was made for the possession of the property situated in and belonging with the Happy Hour Theater. Plaintiff having refused to permit defendant to take possession of the property referred to in the written demand, defendant, on August 19th, commenced an action in replevin, and thereby obtained possession thereof. On August 23d, this action was commenced by Mrs. Groen, and a temporary injunction, restraining the defendant from selling, incumbering, or using the property seized by the

sheriff under the writ of replevin, was granted.

Plaintiff alleged in her petition that, before the contract above referred to was entered into, defendant represented that he was the owner of a piano and numerous other articles described in said contract, of the value of \$500, which she had since learned that he did not own; that, at the time the notice of forfeiture was served, and the replevin action commenced, he was not the owner thereof, and could not deliver the same to plaintiff; that nothing was due under the contract; that defendant had wrongfully taken possession of the opera house, and deprived plaintiff thereof; that an accounting was necessary, to ascertain the exact amount, if anything, due plaintiff under the contract; and that he was insolvent. She prayed that an accounting be had; that plaintiff be declared to be the owner of the property in controversy; and that defendant be held to have acquired no right to the property by his attempted forfeiture of the contract; for a temporary injunction, as stated, and general equitable relief.

On August 28, 1918, the defendant herein filed an answer in the equity suit, and a motion to dissolve the temporary injunction. On October 30th, this motion to dissolve was overruled. On November 18, 1918, plaintiff in this suit (defendant in the replevin action) filed her answer, which is in two divisions, in the replevin action. In the first division, she denied generally the allegations of plaintiff's petition, and admitted the execution of the contract, the service of the notice of forfeiture, and written demand for possession of the property, and that no payments had been made on the contract since January 1, 1918; and in the second division, set up substantially the same matters as are contained in her petition in the equity suit, and asked for the same equitable relief.

On November 26th, plaintiff herein (defendant in the replevin suit) filed a motion to have the issues set forth in the second division of her answer in the replevin action tried in equity, and that same be consolidated with the equity suit for that purpose. This motion was sustained.

On January 25, 1919, the defendant herein (plaintiff in the replevin action) filed a motion to vacate and set aside the order of the court to try the second division of the answer in the replevin action in equity, upon the ground that no equitable issue was tendered thereby. The court having overruled this motion, a trial was had of the equitable issues, as consolidated.

Appellant complains of all adverse rulings of the court, and proceeds to argue the case upon the theory that the court ordered the replevin action transferred to equity for trial.

During the progress of the trial, plaintiff herein withdrew from her petition, and also from her answer in the replevin suit, the prayer for an accounting; but the trial was concluded upon the remaining issues, without further objection on the part of the defendant. The court, in its decree, found that the defendant herein did not have a right to forfeit or rescind the contract of purchase, and that the notice served was ineffectual for that purpose, and that, at the time the replevin action was commenced, Mrs. Groen was the absolute owner of the property described in the petition, and entitled to the possession thereof; and ordered same returned to her, and entered judgment for costs against the defendant herein; but did not determine what amount, if anything, was yet due the defendant upon the contract, leaving that matter open for subsequent determination.

I. Section 4164 of the Code provides that actions for the recovery of specific personal property shall be by ordinary proceedings, without joinder of any other cause of action, and that no counterclaim shall be allowed therein. Code Section 3435 authorizes the trial of issues heretofore exclusively cognizable in equity, tendered in a law action, in equity. This statute is applicable to equitable defenses interposed in actions for the recovery of specific personal property. *Palmer v. Palmer*, 90 Iowa 17.

The statute does not, however, in such cases, authorize the court to try the law issues in equity, and thereby de-

prive plaintiff of a trial thereof to a jury. *Johnston & Son v. Robuck*, 104 Iowa 523. The transfer of equitable issues in a law action does not, however, affect the right of the plaintiff to a jury trial on the other issues presented. *Tufts v. Norris*, 115 Iowa 250.

If, therefore, the court in the case before us transferred the replevin action to equity for trial, the ruling was erroneous. The record discloses, however, that the motion to transfer, referred only to the second division of defendant's answer, which set up the alleged equitable issues. Whether the court committed error in sustaining the motion to transfer the second division of defendant's answer to equity for trial, depends upon whether an issue heretofore exclusively cognizable in equity was presented thereby. We think it did; but it is not really necessary for us to pass upon this question, for the reason that both actions were between the same parties, based substantially upon the same transaction, and a decision of the issues in the equitable suit alone would necessarily have decided the issues in the law action. Under such circumstances, the court, in the exercise of a sound discretion, should have tried the equity suit first. *Twogood v. Allee*, 125 Iowa 59; *Dille v. Longwell*, 169 Iowa 686; *Tinker v. Farmers State Bank*, 178 Iowa 972.

Plaintiff in the replevin action alleged in his petition that he was the absolute and unqualified owner of the property in controversy. His right to maintain the action de-

2. EQUITY :
doing equity :
forfeiture. depended upon the truth of this allegation, which, in turn, depended upon whether the attempted forfeiture of the contract would be sustained by the court. It is unnecessary to cite authorities to the point that equity does not favor forfeitures, and especially where the result thereof will be to give one party an unconscionable advantage over another.

In this case, the property in controversy, according to the testimony of the defendant herein, and the value placed thereon in the replevin petition, was about \$1,000. The record discloses that plaintiff has, in fact, paid him \$4,200

upon the purchase price, and he still claims a balance due thereon of \$800. By his attempted forfeiture of the contract, he claimed the right to receive the property back, and also to retain the portion of the purchase price paid. Surely, a court of equity will not permit a forfeiture, under such circumstances. The court below could not properly have reached a different result, if, instead of a consolidation of the equitable issues in the two cases, a trial had been had of the equity suit alone. The right to forfeit the contract must, in any event, have been denied. As above stated, the court, under the circumstances of this case, had a right, in the exercise of a sound discretion, to try the equity suit first. Defendant was not, therefore, in any way prejudiced by the consolidation of the equitable issues in the two cases for trial. The court made no specific finding as to whether any of the property described in the contract was not owned by the defendant at the time he served the notice of forfeiture, but it satisfactorily appears from the evidence that he did not own the piano and some other articles which we need not enumerate. The court did not try the replevin action in equity, as counsel for appellant contends; but the necessary effect of the decree entered therein is to render a successful prosecution thereof impossible. The court tried and decided equitable issues only.

Other questions are discussed by counsel for appellant, but a decision thereof favorable to his contention would not affect the conclusion above announced. It follows that the decree and judgment of the court below must be and is—*Affirmed.*

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

IN RE ESTATE OF JOHN SWAIN.

MARGARET DALTON et al., Appellees, v. PATRICK SWAIN et al.,
Appellants.

WILLS: Abnormal Nature of Testator. Prima-facie incapacity to
1 execute a will is established by testimony tending to show:

1. That testator was an inebriate.
2. That he practiced indescribably filthy and immoral habits.
3. That he was of violent passions, and devoid of self-control.
4. That he was quarrelsome, abusive, and profane.
5. That such conditions indicate mental decay.

WILLS: Intoxication and Mental Competency. Testimony insuffi-
2 cient to show that testator was drunk at the time of the execu-
tion of a will may still remain in the record for its bearing on
the general issue of mental competency.

WITNESSES: Will Contest—Testator's Physician as Witness. Phy-
3 sicians may testify to knowledge acquired by them while treat-
ing testator during his lifetime, even though called by con-
testant.

Appeal from Plymouth District Court.—W. D. BOIES,
Judge.

NOVEMBER 11, 1919.

REHEARING DENIED MAY 17, 1920.

JOHN SWAIN, a resident of Plymouth County, Iowa, died, April 27, 1917. Shortly after his death, a written instrument purporting to be the last will and testament of the deceased, was filed for probate by four of his children, Patrick Swain, Thomas Swain,¹ George Swain, and Ellen Ackerman. Others of his children and heirs at law contested the admission of the instrument to probate, on the

ground that, at the date thereof, the deceased was, of unsound mind, and that the execution of the alleged will was obtained by undue influence, exercised over the testator by Patrick Swain and others. On trial to a jury, a verdict was returned against the validity of the alleged will. Judgment was entered accordingly, and the proponents appeal. The material facts, so far as reference to them may be necessary, are stated in the opinion.—*Affirmed.*

T. M. Zink, for appellants.

Shull, Gill, Sammis & Stilwill, for appellees.

WEAVER, J.—John Swain lived to the age of about 87 years. He had been a farmer, during most of his adult life, was thrifty in a financial way, and at his death was the owner of 460 acres of land in Plymouth County. To him and his wife, Charlotte, who survived him, there have been born 13 children, of whom 9 were living at the date of the will, as were also 6 grandchildren, the heirs of other children, then deceased. On July 26, 1915, when about 85 years of age, John Swain executed the will which is now the subject of contest. It was drawn by experienced counsel, who now represents the proponents, and gives evidence of painstaking care and intelligence in its preparation. By its terms, his five daughters, Margaret, Ellen, Mary, Agnes, and Catherine, his son Martin, and two of his grandchildren, John and Mary, were bequeathed sums of money varying from \$400 to \$2,750. Of his real estate, he devised to his son Patrick 120 acres, subject to a charge of \$6,000 in favor of his estate; to his son George 80 acres, subject to a charge of \$2,000; and to his son Thomas another tract, subject to a like charge of \$2,000. He also provided for his wife by a devise to her of 160 acres of land, together with the residuum of his estate, after satisfying the provisions above mentioned and the payment of debts and claims properly chargeable against it. In November, he executed a brief

1. WILLS:
abnormal
nature of
testator.

codicil to the will, for the purpose of identifying with more particularity the grandchildren intended to be provided for in that instrument.

On the trial of the contest, the court below withdrew the issue of undue influence from the jury, and submitted for its verdict the one question of the testator's testamentary capacity. As usual in this class of cases, the question thus presented is one of fact, and involves very little difference between counsel as to the fundamental principles of law applicable thereto. The record is very voluminous, filling about 500 closely printed pages; and we shall not attempt to embody it in this opinion, even in outline, except as it may seem necessary to make clear our position in disposing of the appeal. As we have said, the one issue is upon the testamentary capacity of John Swain at the date of the will, and upon this fact the finding of the jury is final, unless we are able to say, as a matter of law, that the verdict is without substantial support in the record, or that we find error to the prejudice of the proponents in the rulings of the court upon questions arising pending the trial.

I. We first consider whether the contestants' case is so clearly without support in the evidence that the verdict in their favor should be set aside. We have to concede that there is much testimony tending to support and strengthen the usual presumption of mental soundness in the testator, and that, if the case were triable here *de novo*, and the credibility of the witnesses and weight and value of their testimony were matters for our determination, some of us would be strongly inclined to sustain the validity of the will. But the function of the court in law actions is limited to the consideration and correction of alleged errors in the proceedings below, and this does not include the right or authority to correct possible errors of judgment in the jurors, if their verdict has any reasonable basis in the evidence before them.

A careful survey of the entire record convinces us that, upon the pivotal fact, the mental capacity of the testator at the date of the will, there was sufficient evidence upon which

an honest and impartial jury could find with the contestants. Stated only in a brief, general way, and giving the testimony, as we must, the more favorable interpretation of which it is fairly capable in support of the verdict, it is to be said that the jury could find therefrom that John Swain was by nature a man of violent passions and very little self-control; that he was from his youth a user of intoxicants, a habit which increased with age; and that, during the last few years of his life, he was in an almost continual state of intoxication; that, as years grew upon him, he became indescribably filthy in his person, and indulged in practices too indecent and disgusting to be here specified; that, even at the age of 85, he frequented houses of ill fame, consorted with harlots, and contracted syphilis; that he abused and cursed his wife, and called her a whore; was exceedingly profane, angry, and abusive, without cause; that he had attacks of dizziness and pain in the head; that he would weep, without any apparent cause; that he would pound the table and chairs with his fists; that he would, at times, leave the house in cold weather, dressed only in his underclothes, bareheaded and barefooted; that, on the day he executed the will, and on the day before, he drank large quantities of whisky, was sleepless during the night before, and was intoxicated when he left his home to execute the will. There was still other evidence, which we need not repeat, along the familiar lines of proof pursued in cases of this character, having more or less tendency to show advance in senile weakness and mental decay which sometimes mark the progress of old age.

Altogether, we think, as already indicated, that to hold that these things, if believed, are insufficient to take the question of the testator's testamentary capacity to the jury, would be a clear invasion of the province of the jury. We use the words "if believed," because it is within the province of the jury to believe that to which the court, if a trier of facts, might not give any credit. The writer of this opinion, speaking for himself only, would hesitate long to give credit to the story of any son or daughter who comes

into a court of justice and, to secure a larger share of a father's estate, is willing to brand him as a filthy degenerate or an insane beast. We read in the Good Book that, when Noah, far gone in senility and drunkenness, lay helplessly exposed to the scorn and contempt of the passing crowd, his two sons, Shem and Japheth, hearing of his condition, caught up a garment which they carried over their shoulders, and, walking backward, covered their father's shame, and themselves "looked not upon his nakedness;" and it is little to the credit of this day and generation to reflect that, had Shem and Japheth been reared under modern conditions, when reverence is swallowed up in greed, instead of uniting to shield their father's good name and fame, they would have rushed to summon witnesses and a photographer, to preserve the sorrowful picture as evidence for use in contesting the old gentleman's will.

But the facts in the present case were all before the jury, and we must respect its verdict. We cannot say that it is an unreasonable finding. It is true that a man may be a drunkard, and yet not necessarily incapable of making a valid will. He may be grossly immoral and filthy, and still not be of unsound mind, in the legal sense of the word. He may be quarrelsome or abusive or profane or eccentric, and yet not necessarily incompetent; but, when we find very many of these characteristics uniting in a single character, and add thereto the testimony of experts that such a showing indicates a loss or decay of mentality, a verdict to that effect by the jury cannot be disregarded.

II. Assuming, then, that the case made by the contestants was sufficient to take the issue of fact to the jury, we have next to inquire whether any substantial error is disclosed in the rulings of the court upon the trial.

To some extent, what we have already said is controlling upon questions raised in the several assignments of error, but there are others which call for our consideration.

Much of the complaint made by counsel relates to the refusal by the court to instruct the jury that evidence showing that the testator had syphilis, that he frequented houses

of prostitution and indulged in other unclean and filthy practices, was immaterial, and should not be considered as having any bearing upon the question of his mental soundness. None of these objections is sound. It is true, as we have already said, that no one of such acts, practices, or habits is, as a matter of law, necessarily inconsistent with the theory of testamentary capacity; but this is not to hold that proof of such facts may not be considered, with other facts, as tending to show mental unsoundness. Men of sound mind do not, as a rule, so conduct themselves. With the normal man, a sense of shame and a regard for the decencies of life operate as some restraint upon his conduct, and this is especially true with the normal man who has outlived his youthful follies, and has left mentality enough to realize that his career is drawing to a close.

Counsel's expressed view, which is, in substance, that all men, however sane, are "tarred with the same stick," and that the only difference between indiscriminate intercourse between the sexes and their association in lawful wedlock is the "mumbling of a few words by a clergyman from a ritual," may, perhaps, be a legitimate argument, when addressed to a jury, made up of the kind of men who are popularly supposed to "hang together;" but he can hardly expect the court to give it the stamp of judicial approval, as a legal principle.

There was no error in refusing the requested instructions.

The court withdrew from the jury the charge or claim made by the contestants that the will in question was executed while the testator was intoxicated. No exception is

2. **WILLS:**
intoxication
and mental
competency.

taken to this ruling, but it is insisted that all the testimony relating to the testator's indulgence in intoxicants should also have been withdrawn. We think otherwise. The

testimony as to the man's habits in this respect has a legitimate bearing upon his mental condition. Long-continued and excessive indulgence in the use of intoxicating liquors may not always undermine or destroy strength of mind in

the user, but it is a matter of common observation that it very frequently does have that effect, and it was the right of the contestants to have the facts, as developed by the testimony, go to the jury.

Exceptions were preserved by appellants to the overruling of their objection to certain evidence as not proper cross-examination, and other evidence as not being proper rebuttal. The extent to which cross-examination of a witness may be pursued, and the allowance of evidence in rebuttal, if not otherwise objectionable, are matters left very largely to the discretion of the trial court—a discretion which does not appear to have been here abused; and the objection cannot be sustained.

Physicians who had treated the deceased in his lifetime were examined by the contestants, over the appellant's objection, concerning knowledge so acquired by them in their

3. WITNESSES:
will contest:
testator's
physician as
witness. professional capacity. The admission of
this testimony is assigned as error, as being
a violation of professional confidence, which
is protected by our statute, Code Section

4608. Whatever may be now said or thought upon the proper interpretation and effect of this statute as an original proposition, the objection here raised has been fully settled adversely to the contention of the appellant. *Denning v. Butcher*, 91 Iowa 425; *Winters v. Winters*, 102 Iowa 53; *Barry v. Walker*, 152 Iowa 154, 156; *In re Harmsen*, (Iowa) 167 N. W. 618 (not officially reported).

A few other exceptions are taken to rulings on matters of testimony, but we shall not extend this opinion for their discussion, as they involve only familiar principles of the law of evidence. We have examined them all in the light of the record as shown by the abstract, and find no error in them.

The judgment of the trial court is—*Affirmed*.

LADD, C. J., and STEVENS, J., concur.

GAYNOR, J., concurs in the result.

INTER-URBAN RAILWAY COMPANY, Appellant, v. BOARD OF
SUPERVISORS OF POLK COUNTY et al., Appellees.

DRAINS: Maximum Flood Conditions as Bearing on Assessment.

Substantial benefits may be assessed when it appears that the improvement in question will afford substantial relief from normal flood conditions, even though it is made to appear that the improvement will not afford *complete* relief from maximum—extraordinary—flood conditions. Record reviewed in detail, and *held* that the assessment against a railway right of way, as fixed by the board of supervisors, was *excessive*, and that, as reduced by the court, it represented a *fair proportional part* of the total cost.

Appeal from Polk District Court.—JOSEPH E. MEYER, Judge.

JANUARY 20, 1920.

REHEARING DENIED MAY 17, 1920.

BOTH parties appeal from the decree of the court below, involving an assessment against the plaintiff for drainage benefits. Plaintiff first gave notice of appeal, and is designated herein as appellant.—*Affirmed.*

W. H. McHenry and *A. B. Howland*, for appellant.

Don B. Shaw and *Oscar Strauss*, for appellees.

STEVENS, J.—A brief statement of the situation, as it existed prior to the establishment of the district, and the situation as it will be, if the improvement is completed and operated as planned by the engineer in charge of the district and approved by the board of supervisors, will help to make clear the respective claims of counsel and the real issue for decision.

The district, which is known as Drainage District No. 21, adjoins, and a small part thereof is situated within, the limits of the city of Des Moines. The district is traversed from north to south by the right of way and tracks of the Chicago, Rock Island & Pacific Railway Company, the Chicago Great Western Railway Company, and the Fort Dodge & Des Moines Railway Company, which lie substantially parallel to each other; and also the right of way of the Chicago & Northwestern Railway Company; and from east to west by the Interurban Railway Company, appellant herein. The Northwestern tracks are located about 2,500 feet west of the other tracks, which are located near the east end of the district. The district has an area of about 790 acres, which includes 17.38 acres comprising appellant's right of way. Appellant's tracks cross the right of way of the other railway companies at undergrade crossings.

The surface water drains from a watershed of about 390 acres to a point near the crossing under the tracks of the Fort Dodge & Des Moines Railway Company, and formerly flowed northwest on the south side of appellant's right of way, through open ditches, constructed and maintained by it, and was discharged through a 12-inch tile into a pool or reservoir, on the right of way of the Chicago & Northwestern Railway Company, at the intersection thereof with appellant's right of way, from which point it was carried south through a 24-inch tile, also maintained by appellant, for a distance of about 1,100 feet, and discharged upon the Northwestern right of way. Appellant also has dug a sump, or well, having a depth of 15 or 20 feet, near the reservoir, from which water is pumped through a 6-inch pipe into the reservoir by an automatic electric pump, from which it is carried off through the 24-inch private tile. By this means, the water is lowered about 2 feet below the top of appellant's ties. There is a bridge, 900 feet east of the reservoir, under which the surface water from a comparatively small area also flows into the open ditch on the south side of the right of way, and thence into the reservoir.

It is conceded that, in times of excessive rainfall, appellant's tracks at the Northwestern crossing are overflowed, and, to some extent, the movement of its cars is interfered with.

The system of drainage adopted by the board of supervisors provides for an 18-inch tile on the north side of appellant's right of way from its intersection with the Fort Dodge & Des Moines Railway Company west for a distance of about 1,600 feet, at which point it joins a 24-inch tile, extending southwest a distance of about 1,400 feet to the Northwestern tracks, where it joins a 28-inch tile, and, further on, a 30-inch tile, through which the water is finally discharged into a creek. The intake of the 18-inch tile is located at the point where the water from the north and east pass under the bridge of the Fort Dodge, Des Moines & Southern Railway Company. The fall of the 18-inch tile is 1.3, of the 24-inch, .5, and of the 28-inch tile, .2 of a foot, to the hundred. The total fall from the intake to the intersection of appellant's right of way with the Northwestern is approximately 15 feet. There is a manhole on each side of the right of way of both appellant and the Northwestern Railway Company. It is also planned to extend a tile from near the bottom of the manhole on the north side of appellant's right of way northwest to receive the water from an area of about 160 acres.

The improvement, according to the testimony of the engineer in charge, is so designed that, by appellant's lowering its 24-inch tile 2 feet below the top of its ties at the reservoir, or by substituting a 12-inch tile therefor at the same elevation, and connecting same with the 28-inch tile where it crosses the Northwestern right of way, the difficulty at that point will be greatly reduced, and the necessity and expense of maintaining an automatic electric pump avoided.

Many obstacles in the way of the successful operation of the plan, with consequent benefit to appellant, are suggested by counsel. First, it is argued that the 28-inch tile is inadequate, and will be filled to capacity by the water discharged through the 18-inch tile, and that, if appellant's

private drain is connected therewith, when the 28-inch tile is completely filled, the water will be held back at the reservoir, and the difficulty at that point increased, rather than relieved. It is also contended that, when the 28-inch tile is filled to capacity, the resistance, on account of the great fall of the 18-inch tile, will force the water out through the tile at the manhole, if one is connected therewith, on the north side of appellant's right of way, and cause it to gather through the ditch on the south side thereof at the Northwestern crossing, and further increase the difficulty at that point.

Numerous expert drainage engineers were called as witnesses, by both plaintiff and defendant, and examined as to the practicability and probable efficiency of the improvement, a large part of which was, at that time, completed. The opinions expressed are various and wholly irreconcilable. T. L. Blank, the engineer in charge, testified that the drain will carry off the surface waters from an inch of rainfall in 24 hours. The other witnesses testifying upon this point in behalf of appellee corroborated this statement. Several of the witnesses called by plaintiff testified that the capacity of the tile is insufficient to take care of the run-off from a rainfall of an inch in one hour, and that same will not be efficient for storm drainage. It is conceded by all of the expert witnesses that the system will not carry all of the water as rapidly as it accumulates in the vicinity. Substantially all agree that it is sufficient for the drainage of agricultural lands, for which, of course, it was primarily intended.

Practically all of the objections urged against the adequacy of the proposed tile drains are based upon maximum conditions. Of course, this is the true test of perfect drainage, but is not the sole basis upon which substantial benefits are estimated. It may be that enough water, during a period of extraordinary rainfall, will be discharged through the 18-inch tile to fill both the 24-inch and 28-inch tiles to capacity; but the improvement was not designed to overcome extraordinary conditions. The fall of the larger tile

is much less than that of the smaller. The engineers who testified, differ in their opinions upon this point. It may be safely assumed that no such condition will result from usual and ordinary rainfalls in this vicinity. Whether the tile drain is partially or completely filled, all of the water entering the same is prevented from reaching appellant's tracks at the Northwestern crossing, and must necessarily afford some relief at that point. T. L. Blank and the other engineers who testified on behalf of the defendant stated that, in their opinion, a 12-inch tile may be substituted for appellant's 24-inch private tile, and, if it is lowered at the reservoir 2 feet below the top of the ties, and connected with the 28-inch tile at the manhole on the east side of the Northwestern right of way, it will carry substantially all of the water that will accumulate at the reservoir, except in times of unusual rainfall, and render the maintenance of the automatic electric pump unnecessary. The carrying capacity of the 28-inch tile is greater than the combined carrying capacity of the 24-inch and a 12-inch tile. To what extent water in the reservoir may be prevented from flowing out through appellant's private drain into the 28-inch tile when it is filled to capacity, we need not undertake to decide. The fall of the 28-inch tile is .2 of a foot, and of appellant's private drain, if laid as planned by the district engineer, slightly in excess of 3 inches to the 100 feet, which is greater than the fall of the present tile.

Whatever of defects there may be in the proposed system, it will serve as an outlet for very large quantities of surface water, and materially improve the condition of the agricultural lands intended to be benefited thereby. We have, however, upon this appeal, to deal only with the assessment laid upon the property of the Inter-Urban Railway Company. The total assessment laid against the property in the district is \$33,391.90, of which \$8,000 was assessed by the board against appellant's right of way. Upon appeal to the district court, this sum was reduced to \$2,800. It is true, as claimed by counsel for appellee, that we have often said that, because of the greater opportunity of the

board of supervisors and the commissioners appointed to classify the land for assessment, in the absence of fraud, gross error, or evident mistake, the classification adopted by the board and approved by the district court will be presumed to be correct. *In re Johnson Drainage District*, 141 Iowa 380; *Guttormsen v. Drainage District*, 153 Iowa 126; *Chicago, R. I. & P. R. Co. v. Wright County Drainage Dist.*, 175 Iowa 417. Nevertheless, we have no hesitation in saying, in the case before us, that the assessment of \$8,000 was clearly inequitable. Both parties have, however, appealed, and we are called upon to determine whether the amount fixed by the district court shall stand, be increased, or further reduced. If we had only to consider the usual and ordinary benefits to the roadbed, ties, fences, bridges, and other matters frequently present, we would have no further difficulty in reaching the conclusion that the amount is yet too high.

The record discloses, without conflict, that no water at any time stands upon appellant's right of way east of its intersection with the tracks of the Northwestern Railway Company, but, on the contrary, it appears without dispute that it runs off quickly through the open drainage to the reservoir before referred to. The track is laid upon a grade, of from a few inches to 2 or 3 feet in height, and the water does not interfere therewith. Several of plaintiff's witnesses, however, express the opinion that some benefit would accrue from the improved drainage facilities, and that an assessment of \$500 would not be in excess of probable benefits. As these witnesses were of the opinion that the situation at the Northwestern crossing would in no wise be relieved, we assume that they had in mind only benefits to the right of way east of that point. All of the witnesses for defendant testified that, in their opinion, the assessment of \$8,000 was just and proper. As before stated, all of the water coming to that point from the east and the north side of appellant's right of way entered the reservoir through a 12-inch tile. The dimensions of the open ditch are not shown, but one or more of appellant's witnesses,

whose duties furnished ample opportunity to know the truth, stated that the water never overflowed the open ditch, and that all of it passed through the 12-inch tile. The water from about 5 acres northwest of the sump, and from a somewhat larger area northeast thereof, drains to the low point at the Northwestern crossing. No relief is provided for this area. We are not persuaded that the water which will run off through the 18-inch tile will not substantially relieve flood conditions at the sump. If all of the water escaping through the open ditch on the south side of the right of way, together with all of the water that passes through the bridge east of the Northwestern crossing, was discharged through a 12-inch tile into the reservoir, without ever overflowing the adjoining land, surely the 18-inch tile will take care of much of the water formerly reaching the reservoir. Some of the witnesses testified to having seen the 24-inch private drain of appellant filled to its full capacity. This, however, was not frequent, and for a brief time only. By lowering the 24-inch tile, or substituting a 12-inch tile therefor at a proper elevation, doubtless most of the water reaching the reservoir during periods of usual or ordinary rainfalls will be discharged into the 28-inch tile, and the automatic pump may be dispensed with. It is not claimed that extraordinary floods will not overflow the track at this point, but material improvement will result at other times. It is unfortunate that there is no method by which the matter may be exactly ascertained.

Much reliance is placed by counsel for appellant upon the alleged insufficiency of the drainage already provided for its right of way and at the sump. The evidence shows, however, that traffic has frequently been interfered with by water overflowing the tracks at this place. Appellant's lines within the district are used extensively and exclusively in handling freight. A delay in the operation of its trains, on account of water, is necessarily attended with some loss and inconvenience. The actual expense of maintaining the sump is from \$100 to \$125 per year. The benefit accruing from the elimination of the pump will, however, be

largely, if not entirely, offset by the expense of lowering the 24-inch tile, or the substitution of a smaller tile therefor, so that the sum total of benefits to appellant is that which accrues from the drainage of its right of way, and whatever improvement will result at the Northwestern crossing. We think this, particularly at the latter point, will be substantial, although perfect drainage is not provided.

But it is also contended by counsel for appellant that the assessment fixed by the court below is greatly in excess of the special benefits conferred, and proportionately inequitable and unjust. The test is not whether the assessment is in excess of actual benefits, but whether it represents a fair proportional part of the total cost. *Jackson v. Board of Supervisors*, 159 Iowa 673; *Collins v. Board of Supervisors*, 158 Iowa 322.

The statute contemplates that the board of supervisors shall grant the petition for the establishment of a drainage improvement, only when it appears that its probable cost will not be excessive, and a greater burden than should properly be borne by the land benefited thereby. Section 1989-a6, Code Supplement, 1913, authorizes an appeal from the order of establishment by anyone aggrieved thereby, to the district court. No appeal was taken therefrom in this case. Manifestly, no one owning property in the district believed that the burden to be borne by the district was in substantial excess of the actual benefits to be realized from said improvement. If, as sometimes happens, it is subsequently shown that the engineer recommending and the board of supervisors establishing the improvement were mistaken in the estimated benefits, the total cost must, nevertheless, be borne by the property located within the district. It can be met in no other way. An assessment of \$125 per acre was levied upon all land classified at 100 per cent. It is, of course, difficult to determine proportional benefits, where the property is of a different character, and used for entirely different purposes. Ordinarily, and primarily, public drainage systems are established for the im-

provement or reclamation of agricultural lands. The officers and chief engineer of the Interurban Railway Company were active in promoting the improvement in question, and, at the suggestion or request of the engineer, the 28-inch tile was lowered at the Northwestern crossing so as to provide a fall of 3 inches to the 100 feet from the reservoir, for the benefit of plaintiff. We are convinced, from a careful consideration of the record, that the proportion of benefit is much larger to the farm land than estimated by the classification committee, but there is no way of accurately determining the exact proportion that should be borne by the farm land, or the exact proportion that should be borne by appellant. Only an approximation is possible.

The varying opinions of the experts are about as bewildering as enlightening in this case. Much depends upon the successful operation of the system as a whole. It will not provide perfect drainage. We are, however, of the opinion that the amount fixed by the district court is proportionately equitable. It is true that, before appellant will receive the full benefit of the improvement, it must incur the additional cost and expense of lowering its 24-inch tile, or substituting for the same one of smaller dimensions. The improvement is intended, however, to be permanent. We reach the conclusion that the decree of the court below should be, and it is,—*Affirmed on both appeals.*

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

CLARA NOTHEM, Appellee, v. CLEM J. VONDERHARR, Appellee,
et al., Appellant.

ATTORNEY AND CLIENT: General Authority—Settlements. *General authority in an attorney to defend the validity of a will does not embrace authority to consent to a settlement. The settlement being a nullity, the decree entered thereon is a nullity.*

INFANTS: Guardian Ad Litem—Authority—Stipulation of Settlement. A guardian ad litem, appointed to defend a minor in the probate of a will, has no authority to enter into a stipulation of settlement covering the minor's interest.

JUDGMENT: Vacation—Ratification as Bar. One may not, in the absence of a showing of full knowledge of all the material facts, be held to have ratified an unauthorized and void judgment by receiving benefits thereunder.

Appeal from Plymouth District Court.—WILLIAM HUTCHINSON, Judge.

JANUARY 20, 1920.

REHEARING DENIED MAY 17, 1920.

THE present action was commenced in partition. A cross-petition was filed by certain of the defendants, asking that a certain stipulation and decree be set aside and held for naught. The rights of the parties in the action of partition are based upon the decree here attacked. There was a decree for the plaintiffs as prayed, and the cross-petitioners' petition dismissed.—*Reversed and remanded.*

Milchrist, Scott & Pitkin, for appellant.

Kass Bros. & Sievers, J. U. Sammis, J. F. Kass, and *Molyneux & Maher*, for appellees.

GAYNOR, J.—On the 13th day of June, 1915, John Henry Vonderharr died testate, leaving surviving him, as his only heirs at law, the following named children: Clara Nothem, Clem J., Bernard H., Frank, Henry, and Anton Vonderharr, Anna Siemonsma, Frances Schnieders, Rosa Siemonsma, Mary Plagge, and John Vonderharr, and the following grandchildren, to wit: Henry Hulsing and Mary Matthias, children of a deceased daughter; Elizabeth Hul-

sing; and Bernard, Mary, Aloysius, Edward, Lawrence, and Cecelia Vaske, children of Josephine Vaske, the deceased daughter of Henry. His wife had died some years before.

As said before, he died testate, leaving the following will:

"I, John Henry Vonderharr, being of sound and disposing mind and memory, do hereby make, publish and declare this instrument as and for my last will and testament, in manner following:

"I hereby will, devise and bequeath all my property, real and personal, in manner following, and hereby revoke all previous wills at any time heretofore made by me.

"I will, devise and bequeath to John Vonderharr and Frank Vonderharr, share and share alike, Section No. Ten, in Township No. Ninety-four, north of Range Forty-three, west of the 5th Principal Meridian, in East Orange Township, Sioux County, Iowa, subject to the condition that they pay the sum of ten thousand dollars to Clem Vonderharr, that they pay the sum of ten thousand dollars to Ben Vonderharr, that they pay the sum of one thousand dollars to Mary Plagge, formerly Mary Vonderharr, that they pay the sum of three thousand six hundred and twenty-five dollars to each of my following named children: Anna Siemonsma, formerly Anna Vonderharr, Francis Schnieder, formerly Francis Vonderharr, Rosa Siemonsma, formerly Rosa Vonderharr, Henry Vonderharr, Clara Vonderharr, Antonie Vonderharr. And further that they pay the sum of three thousand six hundred and twenty-five dollars to the children of Lizzie Hullsing, formerly Lizzie Vonderharr, and the sum of three thousand six hundred twenty-five dollars to the children of Josephine Vaske, formerly Josephine Vonderharr, and by the use of the word children in these last two respective payments, is meant such children as shall survive me after my death and said payments to go to them share and share alike; I further hereby make these payments a charge and lien on the land until the same are paid, said payments to be paid within five years after my

death and to bear interest at the rate of five per cent. after my death.

"The rest, residue and remainder of my said property, I will, devise and bequeath as follows:

"That out of my said residue and remainder should first be paid the expenses of my last sickness and funeral, and any other debts that I may owe. I then bequeath to John Vonderharr the sum of five thousand dollars. I further bequeath to Frank Vonderharr the sum of five thousand dollars; all the rest, residue and remainder to be equally divided between Anna Siemonsma, Francis Schneider, Rosa Siemonsma, Henry Vonderharr, Clara Vonderharr, Anton Vonderharr, Mary Plagge, Ben Vonderharr, and Clem Vonderharr, and the children of Lizzie Hullsing, said children inheriting the respective share of their mother, and the children of Josephine Vaske, said children inheriting the respective share of their mother.

"I hereby nominate and appoint my son, John Vonderharr, executor of my last will and testament, and ask that he be allowed to serve without giving bond.

"In witness whereof, I have to this, my last will and testament, written upon two sheets of paper, subscribed my name this 19th day of January, 1915."

This will was presented and filed for probate in the district court of Plymouth County, Iowa, on the 17th day of June, 1915, and the following notice of probate was issued by the clerk of said court, and duly published as required by law:

"Estate of John Henry Vonderharr, Deceased.

"State of Iowa, Plymouth County, SS.

"To John Vonderharr, Frank Vonderharr, Clem Vonderharr, Anna Siemonsma, Frances Schniders, Rosa Siemonsma, Henry Vonderharr, Clara Vonderharr, Anton Vonderharr, Ben Vonderharr, Mary Plagge, children of Lizzie Hullsing and children of Josephine Vaske, known heirs at law of John Henry Vonderharr, late of said county, deceased, and all others concerned:

"You are hereby notified that, on the 17th day of June,

1915, there was filed in the office of the clerk of the district court of the state of Iowa, in and for Plymouth County, and opened and read by said clerk, an instrument in writing purporting to be the last will of John Henry Vonderharr, deceased, late of said county.

"And you are further notified that the 29th day of September, 1915, had been fixed for the final proof and hearing of said will, at which time all persons interested may appear and show cause why the same should not be admitted to probate."

Prior to the date fixed for probate, the following objections were filed to the probate of the will:

"Come now Clem J. Vonderharr, Bernard H. Vonderharr, Henry Vonderharr, Anton Vonderharr, Clara Vonderharr, Anna Siemonsma, Frances Schnieders, Rosa Siemonsma, Mary Plagge and Mary Mathias and Henry Hulsing, children of Elizabeth Hulsing, formerly Elizabeth Vonderharr, now deceased, and the children of Josephine Vaske, formerly Josephine Vonderharr, now deceased, all of the foregoing being the children and grandchildren respectively of said deceased.

"That there is filed in the court and probate is asked of a pretended last will and testament of the said John Henry Vonderharr, deceased.

"That said pretended last will and testament is not the last will and testament of said John Henry Vonderharr, deceased, and should not be admitted to probate for the following reasons, to wit:

"1. That the testator was of unsound mind when it was executed.

"2. That it was procured by undue influence and fraud.

"Wherefore, contestants ask that the said will be not admitted to probate, and that the same be held for naught; also judgment against proponents for costs."

After said will was filed for probate, and before the day fixed for its probate, John Vonderharr, son of Henry, and named in the will hereinbefore set out, died, leaving a will in which his wife, Anna, was made sole beneficiary.

On or about the 7th day of October, 1915, Anna Vonderharr appeared in said cause, and filed the following application for leave to defend against the claims of the objectors to the probate of the will of Henry:

"Comes now Anna Vonderharr, and respectfully states to the court:

"That her husband, John Vonderharr, died a resident of Sioux County, Iowa, on the 18th day of June, 1915, and that his last will and testament has been duly admitted to probate in Sioux County, Iowa, as Number 1888 probate; that, on the 22d day of September, 1915, your petitioner was duly appointed sole executrix of the estate of her late husband, the said John Vonderharr, and has duly qualified as such, and is now acting as such executrix.

"That John Henry Vonderharr, the father of this petitioner's husband, died a resident of Plymouth County, Iowa, on the 13th day of June, 1915, and that he left a last will and testament which was duly filed with the clerk of the district court in and for Plymouth County, Iowa, on the 17th day of June, 1915; that the clerk of said court thereupon issued the usual citation, fixing the probate of said will for the 29th day of September, 1915, and publisher's proof showing due publication of said citation and notice has been duly filed in this cause; that, on the 17th day of June, 1915, Frank J. Vonderharr, a son of the said John Henry Vonderharr, and one of the legatees named in the will of said decedent, filed in this cause a petition, asking that the will of the said John Henry Vonderharr be duly admitted to probate. That, in said will of the decedent, John Vonderharr, the deceased husband of this petitioner, is named as sole executor; that, by reason of the death of her said husband, John Vonderharr, and her appointment as executrix of his estate, the duty devolves on this petitioner to take such steps as may be necessary to procure the probate of the will of the said John Henry Vonderharr.

"That, on the 20th day of September, 1915, there was filed in this cause a contest and exceptions to the probate of the will of John Henry Vonderharr, in which said contest

all the legal heirs of said decedent appear to join, save and except Frank J. Vonderharr and this petitioner's husband, John Vonderharr, deceased; that John Henry Vonderharr, deceased, left an estate of the value of approximately \$100,000, consisting in the main of a section of land located near Granville, in Sioux County, Iowa, and money, notes, and mortgages, now in the possession of one W. G. Sievers, special administrator, of Remsen, Iowa; that the contest aforesaid is based upon the grounds of the testator's mental incapacity, and alleged undue influence exerted upon him in the matter of making and publishing of said will.

"That, in order to make a proper defense to the attack that has been made upon said will, it will be necessary for your petitioner to employ counsel, so that all reasonable preparation may be made to carry out and enforce the last will and testament of the decedent, and that preparations may be made for obtaining evidence and investigating the same in relation to the charges that are brought and preferred by the contestants; that your petitioner desires to employ Messrs. McDuffie & Keenan, of Le Mars, Iowa, and Messrs. Van Oosterhout & Kolyn, of Orange City, Iowa, as attorneys for the proponents and executor in the matter of the probate of the will of the said John Vonderharr.

"Wherefore, your petitioner prays the court that an order be entered herein, authorizing her to employ counsel as aforesaid, and to incur such expenses as may be reasonable and necessary in the matter of the summoning and subpoenaing of witnesses in the matter of the investigation of their testimony, and for such other and further orders as may be requisite in the premises."

Upon said application, the following order was made:

"Now, to wit, on this 8th day of October, 1915, the application of Anna Vonderharr, executrix of the estate of John Vonderharr, comes on for hearing before the court, and the court having examined said application and being now fully advised in the premises:

"It is hereby ordered that the prayer of said petitioner be granted, and she be authorized and directed and per-

mitted to employ Messrs. McDuffie & Keenan, and Messrs. Van Oosterhout & Kolyn, as attorneys to represent the estate of John Henry Vonderharr, deceased, in the matter of resisting the contest and objections filed to the probate of said will, and that said petitioner be authorized to incur such expenses as may be reasonably necessary to investigate the evidence and secure the attendance of the necessary witnesses in the matter of the probate of the aforesaid will."

Anton Vonderharr, one of the sons of Henry, was then a minor, about 17 years of age, and had no regularly appointed guardian. Before the trial of the cause, J. F. Kass and J. U. Sammis, attorneys for the contestants, were appointed guardians ad litem for him, and also for Bernard, Mary, Aloysius, Edward, Lawrence, and Cecelia Vaske, who were minors, and children of Josephine Vaske, deceased daughter of Henry, and filed answer for them as such. The record discloses no notice upon any of these minors, except the general notice that the will had been filed and would be called for probate, as hereinbefore set out.

The record discloses that Kass Bros. and Sammis appeared for contestants, and McDuffie & Keenan and Van Oosterhout & Kolyn for proponents. The cause came on for hearing on the 29th day of November, 1915, Hon. W. D. Boies presiding. A jury was called, and the following proceedings had: Opening statements made by respective counsel. The following evidence introduced:

"Mr. Sammis: It is admitted and conceded by contestants that the will sought to be probated was executed according to the formalities of law, and was signed by the testator, John Henry Vonderharr, and the same purports to be his last will and testament, and was witnessed by the subscribing witnesses whose names appear thereon.

"It is further admitted that the instrument (being the will in question, a copy of which is hereinbefore set out) was signed and executed by said John Henry Vonderharr, on the 16th day of January, 1915, and that the same purports to be the last will and testament of said John Henry Vonderharr, and was duly witnessed by the subscribing wit-

nesses whose names appear thereon."

Thereupon, the contestants offered said will in evidence, and the court took a recess. On the reconvening of court, the court was advised by counsel for contestants that the case might be settled. A further recess was taken. It appears that the settlement was proposed by Mr. Kass, representing the contestants. Mr. Sammis and Mr. McDuffie were called into consultation. The testimony of Mr. Van Oosterhout on this point is:

"We entered into negotiations, and propositions of settlement were made by Mr. Sammis and Mr. Kass, representing the contestants, as to what their people were willing to do, and I talked with Mr. McDuffie, who was associated with me for proponents, and also with Mr. Frank Vonderharr and Mr. Bert Christianson, as representing Mrs. Vonderharr. Negotiations were had, back and forth, lasting a considerable time. When the matter got down to a point where Mr. McDuffie and I figured we could afford to accept it, we went out—Mr. Keenan, Mr. McDuffie, Mr. Frank Vonderharr, Bert Christianson and myself. We went into the back room, and went all over it, and they seemed to be of the same opinion, that it would be all right if we could get a settlement on the basis suggested. We went over it with Christianson and Frank: that is, the proposed terms of the settlement."

After this consultation, it was proposed that Christianson, who was Mrs. John Vonderharr's hired man, should go out and get in communication with Mrs. Anna Vonderharr. He was instructed to tell her what the proposed settlement was, and to tell her that Frank (her husband's brother) was satisfied to have the thing settled on that basis; that Mr. McDuffie and Mr. Van Oosterhout felt that the settlement was a good one, and to tell her that there were a number of nice questions in the settlement; that, by including attorneys' fees, she would have coming \$50,000, and the other heirs, \$175,000; that it was the opinion of her attorneys that, by all means, she ought to accept the offer, but to talk to her, and come back and tell what she said; that, unless

it was satisfactory to her, of course, the trial would go on. Bert Christianson, the hired man, was gone about 15 or 20 minutes. Mr. Van Oosterhout further testified:

"When he returned, he wanted to know if I didn't want to talk with her myself, and I said 'No. You are more familiar with her than I am, and you can tell her this plan. You understand it fully. Go and tell her what the proposition is and everything, and bring back word, and let me know what she says.' So Christianson went down. He returned, and said that he had talked with her, and that Mrs. Vonderharr said that, if Frank was satisfied, she was, and go ahead and get the papers drawn up and sign the matter up. Of course, that is the report that Bert Christianson brought back to me. After the report was made, we told Judge Boies that the parties had agreed upon a settlement, and asked for time to draw up a stipulation. Then the following stipulation was made out, signed by the attorneys, and submitted to the court:

" 'It is hereby stipulated and agreed by and between all of the parties hereto, and their legal representatives, including the guardians ad litem of the minor heirs of said deceased, and including John Vaske, the legal and duly appointed guardian of said minors, except the minor, Anton Vonderharr, as follows, to wit:

" '1. That all controversies between each and all of the parties hereto are hereby settled, adjusted and determined, as hereinafter set forth.

" '2. That J. T. Keenan, of LeMars, Iowa, and W. G. Sievers of Remsen, Iowa, shall be duly appointed administrators of said estate, with full authority to take possession of all property of every kind and nature, wheresoever found or located, belonging to said estate, and to convert the same into money.

" '3. Unless the contestants shall pay or cause to be paid the several sums hereinafter provided, within 18 months from this date, all the real estate belonging to said estate shall be sold by the administrators, and the proceeds distributed as hereinafter provided.

“ ‘4. That said administrators shall first pay out of any moneys coming into their hands all claims against said estate, as by law provided, and in addition thereto, they shall pay the costs incurred in the contest of the will of said deceased, including an attorney’s fee of \$2,500 to McDuffie & Keenan, of LeMars, Iowa, and Van Oosterhout & Kolyn, of Orange City, Iowa, attorneys for proponents, the estate of John Vonderharr and Frank Vonderharr, and the estate of John Henry Vonderharr, deceased, and the further sum of \$2,500 to Kass Bros. & Sievers, of Remsen, Iowa, and Sammis & Bradley, of LeMars, Iowa, attorneys for all of the contestants, including all the minor heirs of said deceased.

“ ‘5. That said administrators shall pay from moneys coming into their hands the sum of \$25,000 to the estate of John Vonderharr, deceased, and the sum of \$22,500 to the proponent, Frank Vonderharr, in full settlement of all claims of the said estate of John Vonderharr and of Frank Vonderharr against the estate of John Henry Vonderharr, deceased, and that said payments shall be made on or before two years from this date, or as soon as final distribution of said estate can be effected, and any portions of said sums that may remain unpaid on and after December 1, 1916, shall draw interest at the rate of 5 per cent per annum.

“ ‘6. That, upon the payment of said sums to the said estate of John Vonderharr, deceased, and to Frank Vonderharr, the said parties, or their legal representatives, hereby agree to execute and deliver any deeds or conveyances or releases or transfers that may be necessary to perfect the title to the real property belonging to the estate of John Henry Vonderharr.

“ ‘7. That any and all moneys or other property remaining in the hands of said administrators, after the settlement and payment of the claims and costs and attorneys’ fees hereinabove enumerated, and after the payment of said sums of money to the estate of John Vonderharr, deceased, and to Frank Vonderharr, as hereinbefore set forth,

shall be surrendered and turned over to Kass Bros. & Sievers, of Remsen, Iowa, the attorneys for said contestants, for the use and benefit of said contestants, and proper receipts taken therefor.

“‘8. That said administrators shall pay any and all additional costs of administration incurred in the final settlement and distribution of said estate, except that they shall not pay to the said J. T. Keenan, as administrator of said estate, any fees on account of services he may render therein, but any such fees that may be due and owing to him shall be paid by the said Frank Vonderharr and the estate of John Vonderharr, deceased.

“‘9. It is hereby further stipulated and agreed that the probate of the wills, Exhibits A and B, or either of them, offered for probate as the last will and testament of said deceased, shall be and is hereby denied.

“‘10. It is further agreed that this stipulation shall be submitted to the court for its approval, and, upon being approved by the court, it is stipulated and agreed that a final decree may be entered in accordance with this stipulation and agreement.’”

Upon the filing of stipulation with the court, the following decree was entered:

“And now on this day, to wit, November 29, 1915, it being one of the days of the November term, A. D. 1915, of said court, the above-entitled matter coming on for hearing of proofs in relation to the instrument purporting to be the last will and testament of said deceased, John Henry Vonderharr, filed herein for probate on the 17th day of June, 1915, and the objections and exceptions to the probate thereof, the proponents, Frank Vonderharr and Anna Vonderharr, the widow and sole beneficiary of John Vonderharr, son of the above-named deceased, appearing in person and by their attorneys, Van Oosterhout & Kolyn, of Orange City, Iowa, and McDuffie & Keenan, of Le Mars, Iowa, and the contestants, Clem J. Vonderharr, Bernard H. Vonderharr, Henry Vonderharr, Anna Siemonsma, Frances Schnieders, Rosa Siemonsma, Clara Nothem, formerly Clara Vonder-

harr, Mary Plagge, Mary Mathias and Henry Hulsing, appearing in person and by their attorneys, Kass Bros. & Sievers, of Remsen, Iowa, and Sammis & Bradley, of Le Mars, Iowa, and it appearing that Anton Vonderharr, son of said deceased, and Bernard Vaske, Mary Vaske, Aloysius Vaske, Edward Vaske, Lawrence Vaske, and Cecelia Vaske, minor children of Josephine Vaske, the deceased daughter of said above-named deceased, are minors, and that due and legal notice of the hearing of the probate of said instrument has been given, as by law provided; it is therefore ordered that J. U. Sammis and J. F. Kass, attorneys, are hereby appointed guardians ad litem herein for said minors and each of them. And said parties appearing and said guardians ad litem appearing, and filed answer, it is therefore ordered that this cause proceed to final determination on the issues joined herein.

“And now on this day, to wit, November 30, 1915, the said parties and their attorneys appearing, thereupon the parties having entered into a stipulation and agreement in writing, filed herein, providing for the settlement of this controversy, which stipulation is thereupon in open court submitted to said court for approval, and the court having examined said stipulation and the records and files herein, and being fully advised in the premises, finds that it had jurisdiction of all the parties and subject-matter of this proceeding, it is thereupon ordered, adjudged, and decreed by the court: That the probate of the wills, Exhibits A and B, or either of them, offered for probate as the last will and testament of said deceased, shall be and is hereby denied. And that this proceeding be and hereby is settled, adjusted and determined, as provided by the said stipulation of the parties in writing filed herein, and which stipulation is hereby approved and ordered filed herein and made a part of this decree.

“And it is further ordered, adjudged, and decreed by the court, upon the stipulation of the parties filed herein, that J. T. Keenan, of Le Mars, Iowa, and W. G. Sievers, of Remsen, Iowa, be and they are hereby appointed administrators

of the estate of John Henry Vonderharr, deceased, with the power and authority, as by law and said stipulation provided, and that, upon the filing in the office of the clerk of said court a bond in the penal sum of \$20,000, with surety to be approved, letters of administration shall issue to them accordingly."

The record stood as hereinbefore set out until the 6th day of September, 1916, at which time Clara Nothem, the plaintiff herein, being one of the children of John Henry Vonderharr, filed her petition, making all the parties hereinbefore named defendants, and alleging that, under and by virtue of the decree above set out, the parties to the proceedings are entitled to receive from the estate of John Henry Vonderharr the sums recited in said decree, and alleging that, under and by virtue of said decree, the only means with which to pay the said claims is out of the proceeds to be derived from the sale of property left by the said John Henry Vonderharr, and that it will be for the best interests of all parties concerned that such premises be sold, and the proceeds applied toward the payment of the same; that, under and by virtue of the decree, all moneys or property remaining in the hands of the administrators of said estate, after the settlement and payment of claims, costs, and attorneys' fees, and after the payment of the sums of money due said Frank and Anna Vonderharr, be turned over to Kass Bros. & Sievers, for the use and benefit of the plaintiff, and the other defendants, as provided in the decree, alleging that the property cannot be equitably divided, and praying judgment, confirming the share of the parties, as provided in the stipulation of settlement.

Anna Vonderharr, wife of said John Vonderharr, appeared, and filed answer and cross-petition, in which she alleged substantially the matters hereinbefore set out, but averred that the order and decree is and ought to be held void, for that said order and decree was rendered and entered in a proceeding under Sections 3283 and 3284 of the Code of Iowa for the probate of wills; that the only issue tendered or joined in said proceeding was as to whether

John Henry Vonderharr was mentally competent to make a will, and whether or not the will made was the result of undue influence; that no trial was had in said proceedings upon said issue, and no evidence offered or received; that the order and decree relied upon by plaintiffs in this suit was entered in pursuance of a stipulation between the plaintiff, Clara Nothem, and some of the defendants; that said stipulation was the result of an unlawful, fraudulent, and collusive agreement between the plaintiff, Clara Nothem, and the defendants, Clem J. and Bernard H. Vonderharr and the other adult heirs at law of said John Henry Vonderharr, and was entered into and made to their advantage, and for the purpose of securing to them a larger share of the estate than they would receive under the will or in case of intestacy; that, at the time the stipulation was made, they well knew that John Vonderharr, this cross-petitioner's husband, had died, leaving this defendant and cross-petitioner, his widow, pregnant with child, and that said child was about to be born; that they withheld said knowledge from the court before whom such proceedings were pending; that this cross-petitioner was not present at the time of the making of the stipulation or of the rendering or entering of the decree and order, being, at the time, about to give birth to Elizabeth Vonderharr, who is joint cross-petitioner with her, and who was born on the day the stipulation was made; that the court in said proceedings had no jurisdiction of the defendants Anton Vonderharr, Lawrence Vaske, and Cecelia Vaske, for the reason that they were minors, and that the only notice to them of the proceeding was the statutory notice hereinbefore set out; and that Lawrence and Cecelia Vaske were wholly without authority to act for said minors in the making of said stipulation, and in agreeing to stipulation thereof; that said Anton Vonderharr was without guardian, and was only represented by a guardian ad litem, appointed on the 30th day of November, 1915; and that, there being no service other than the notice hereinbefore set out, upon the said Anton, the guardian ad litem appointed by the court was entirely without authority to act for said

minor in the matter of said stipulation; that this defendant and cross-petitioner never signed or agreed to said stipulation, or authorized any person to sign said stipulation for her, and was entirely ignorant of the terms and provisions of the same, when the same was signed, and when the judgment and decree was entered; that, at the time the stipulation was signed, she was confined to her home in bed, and about to give birth to the defendant her cocross-petitioner, Elizabeth Vonderharr, and was incapable of comprehending or exercising judgment upon the subject-matter of the settlement; that the stipulation was signed only by the attorneys appearing as counsel in the will contest; that, in signing said stipulation, the attorneys acted beyond their legal authority. She denies that the plaintiff or any of the defendants have any interest in the real estate sought to be partitioned, other than as provided in the will and testament of John Henry Vonderharr, and states that, after the entry of said order and decree, she was advised by her attorney that she could not interfere with said order and stipulation; that she only recently, and within the last 30 days, learned fully of her rights in the premises; that she had been dissatisfied, and opposed to the said stipulation and to the entry of said decree; that she desired and now desires the probate of said will, and a trial of the issues touching the validity of said will. Her prayer is that the plaintiff's petition be dismissed; that the order and decree entered upon the stipulation be adjudged and set aside; that the stipulation be adjudged void; and that it be ordered and decreed that the last will and testament of John Henry Vonderharr be offered for probate, and a trial of any issue touching the legality of said will be had, and for such other equitable relief as may be granted by the court within the premises.

A trial was had upon this cross-petition, and the court dismissed the cross-petition, and granted the prayer of plaintiff's petition.

Anna Vonderharr, in her own right, and as guardian of

Elizabeth, her posthumous child, appeals, and asks here for the relief denied them in the court below.

The case is triable *de novo*. The case is submitted here upon the foregoing record, with the following added testimony: It was stipulated that the only notice served upon any of the heirs in the matter of said will contest was the general notice issued by the clerk, hereinbefore set out.

It will be noted in the foregoing statement of the record that Mr. Van Oosterhout testified that, before the agreement was signed, he directed one Bert Christianson, who was, at that time, Mrs. Anna Vonderharr's hired man, and who was present at the trial, to communicate with her touching the alleged settlement, to tell her the terms of the settlement, and to see whether or not she would consent thereto, and said that, unless it was satisfactory to her, they would go on with the trial; that Christianson reported that he had talked with her over the phone, and that she said that, if Frank was satisfied, she was, and to go ahead and get the papers drawn, and sign the matter up.

Christianson testifies, and it is not disputed:

"They asked me to tell Mrs. Vonderharr about the settlement, and I did tell her, as nearly as I remember, that they had settled the case; that the will case had been settled. I talked with her over the phone. I was authorized to call her up. I told her they had settled the case, but I didn't seem to make her understand. I said to her, as nearly as I remember, that she was to get \$25,000, and she kept asking, 'What?' and I said it over. She didn't seem to understand. I don't know which it was—that she didn't understand, or she couldn't hear it; and that was all that was said. All I told her was that she was to get \$25,000, and that the case was settled. I didn't know what was in the stipulation of settlement. I had not read it. I had not seen it. I was subpoenaed there as a witness. I didn't represent Mrs. Vonderharr in any capacity. I had no authority, and I had received no directions from Mrs. Vonderharr to act for her at all. I was in the room during the conversation relative to the terms of settlement. Mr. Van Oosterhout told me that

she was to get \$25,000, and for me to go and tell her. I didn't ask her if she would be satisfied with that. Before I telephoned, I didn't know the terms of the settlement. I told Mr. Keenan it was not my place to telephone, but Mr. Van Oosterhout told me that he thought she would understand me better than him."

Mrs. Anna Vonderharr testified:

"I employed Van Oosterhout & Kolyn and McDuffie & Keenan as my attorneys. This was at my farm. We talked about only they were going to fight this case for me--the will contest. Nothing was said about their settling the case for me. I never authorized them to make a settlement of the will contest. I first heard of it,—it was phoned to me. I was in bed, about to give birth to a child. I was helped to the phone. I talked with Mr. Christianson. He was our hired man. He was at LeMars. Mr. Christianson said, 'They have made a settlement;' and I said 'Is that so?' I was then taken back to bed. No one advised me, at the time, of the terms of the settlement. Nothing was said as to how the estate was to be divided. Nothing was said about setting aside the will. Up to that time, I had not talked with anyone with reference to the settlement of the case. The first I learned of what was in the stipulation was the following March. I then spoke to Mr. Van Oosterhout, and he said it was a thing of the past; that he did not want to speak of it. I asked him how Elizabeth [the posthumous child] was coming out. He said she had no claim whatever. Mr. Christianson was in LeMars, but not to represent me. He was working for me simply as a hired man. He was there as a witness, a witness to the will. The day I hired Mr. Van Oosterhout to fight the case, he was at my place about an hour. I didn't see him between the day I hired him and the time the case was called for trial in LeMars. I didn't see any of my attorneys during that time. When I talked with Mr. Christianson over the phone, I could not understand him, and he seemed not to be able to understand me. I don't know whether it was the phone's fault or my sickness. I was not able to stand up there. I didn't

speak with Christianson again for about two weeks after the child was born. When I spoke to him, I didn't ask him about the settlement. I was too weak. The doctor strictly forbade me to put anything on my mind. I was not in a condition to talk business before March. I had seven children before Elizabeth was born. I had a hard time after the birth of each, but I never was so sick as the last time. I never received any money, but I was living on this farm, and they charged me rent for it, and had me sign a receipt for \$1.500, which they applied on what they claimed to be rent owing by me for the use of the farm. When I received the receipt, I sent Mr. Christianson to Orange City, to see what the paper meant, and Mr. Christianson reported that Mr. Van Oosterhout said it was all right; that I should put my name to it."

The only other testimony upon which is predicated a claim that Anna Vonderharr consented to the settlement is testimony to the effect that Mr. Van Oosterhout told her, at the time he visited her and was employed to defend the will against the contestants, that a situation might easily develop where it would be to her interest to compromise the matter, rather than to risk everything in a trial to a jury; and she replied that she looked to Mr. Van Oosterhout and Mr. McDuffie to do the best they could for her.

It may be said further that Mr. Van Oosterhout testified that, soon after the settlement, he sent a copy of the settlement and decree to Mrs. Vonderharr, at Granville, Iowa; that he didn't hear directly in response to that, but that she made no complaint in respect to the settlement. He testified, however, that he had never discussed with Mrs. Vonderharr any particular terms of settlement, before the stipulation was entered into, except as indicated above. He said:

"I never discussed with her any possible terms of settlement, or any terms of settlement agreed upon."

Mr. McDuffie and Mr. Keenan both testified that they knew of no authority to make the settlement, other than was found in their general employment to defend against

the will contest; that they had never talked with or communicated with Mrs. Anna Vonderharr touching any settlement, or any disposition of the case such as was made in the settlement relied on. It seems that Mr. McDuffie and Mr. Keenan assumed that the authority was invested in Mr. Van Oosterhout to make the settlement, and it would seem that Mr. Van Oosterhout, in making the settlement, or consenting to the settlement, assumed, from what Christianson said, that Mrs. Anna Vonderharr had been informed of the terms of the settlement, and had consented thereto before the settlement was made. The statement made by Mr. Van Oosterhout is significant, touching the directions which he gave to Christianson, to wit:

"Go somewhere and get in communication with Mrs. Vonderharr. Tell her just what this settlement is, as proposed, and tell her that Frank is satisfied to have the thing settled on the basis, and Mr. McDuffie and I feel it is a good settlement. Tell her we think she ought to accept the offer, talk to her, and come back and let us know what she says. Unless it is satisfactory to her, of course we will go on with the trial of the case."

There is no question in this record but that these attorneys representing proponent acted in good faith. They believed that Christianson had communicated with her, and that she had consented to the settlement; but the record, without dispute, shows that Christianson did not communicate with her as directed by Mr. Van Oosterhout and Mr. Keenan; that he did not communicate to her the facts which he was told to communicate to her; and his report "that she was satisfied if Frank was satisfied," was unwarranted by anything that Mrs. Vonderharr said.

So we have in this record no evidence of intentional fraud committed by the attorneys to the prejudice of their clients. But we have evidence that they were mistaken as to the existence of a fact essential to their right to make the settlement, to wit, the consent of their client to the making of the settlement. If they assumed the right to make the settlement simply upon the ground of their general employ-

ment by Mrs. Vonderharr to represent her in the will contest, the assumption was not well founded. If they made the settlement on the supposition that she had been communicated with, and had consented to the settlement, that assumption was not well founded, as disclosed by this record. It will be noted that these attorneys were employed by Mrs. Vonderharr to defend against an effort on the part of the contestants to set aside the will. She was interested in having the will probated, and they were employed to secure its probate. Nothing in the conversation which these attorneys had with Mrs. Vonderharr indicates that she understood or intended or thought, or by any word conveyed to them the thought, that they were employed other than as her attorneys to defend against the contest. Indeed, when we turn to the application which these attorneys themselves filed, requesting permission on the part of Mrs. Vonderharr, as administrator of her husband's estate, to appear and defend against the contest, and to employ attorneys for that purpose, we find them saying that, in order to make a proper defense to the attack that is made upon the will, it is necessary for her to employ counsel, so that all reasonable preparation may be made to carry out and enforce the last will and testament of the decedent, and praying that the court authorize and allow her to employ Messrs. McDuffie & Keenan and Messrs. Van Oosterhout & Kolyn, as attorneys to make such defense. We find the court, upon this application, ordering and permitting her to employ these attorneys, to represent the estate of John Henry Vonderharr, deceased, "in the matter of resisting the contest and objections filed to the probate of the will," and to incur such expense as was reasonably necessary to investigate the evidence and secure the attendance of necessary witnesses in the matter of the probate of the will. There is nothing in this record to show that Mrs. Vonderharr employed these attorneys for any purpose, or gave them authority to represent her in any way, except in defending the will against the attacks made upon it.

It is to this proposition that we first address ourselves,

and it involves this question: Were the attorneys who made and signed this stipulation authorized and empowered to make the settlement herein relied upon, without the knowledge and consent of their client, Mrs. Vonderharr? If they had no such authority, then it follows logically that what they did in making the settlement and in signing the stipulation was not binding on her, at the time it was done.

1. ATTORNEY
AND CLIENT:
general
authority:
settlements.

Courts have disagreed greatly as to the extent of the powers of attorneys to bind their clients, under general employment. This court, however, has taken a positive stand upon that question, and has said:

"It is undoubtedly true that an attorney cannot consent to a judgment against his client, or waive any cause of action or defense in the case; neither can he settle or compromise it without special authority. But he is, by his general employment, authorized to do all acts necessary or incidental to the prosecution or defense which pertain to the remedy pursued. The choice of proceedings, the manner of trial, and the like, are all within the sphere of his general authority; and, as to these matters, his client is bound by his action. * * * It cannot be doubted that, under these rules, counsel for parties in several suits involving the same issues may, in the exercise of their general authority, consent to the consolidation of all for trial, or stipulate that the trial of one shall determine the others. This pertains to the remedy pursued,—to the manner of trial,—and is not an agreement for judgment or a compromise. The parties are not deprived of a trial, nor is judgment rendered by consent. The counsel simply assent to a trial in a particular manner; that one trial shall settle the same issues in several cases." *Ohlquest v. Farwell & Co.*, 71 Iowa 231.

This court has also said that an attorney under general employment to prosecute an action has no authority to dismiss it. Referring to the case last above cited, the court said:

"The foregoing language seems to have support on authority, and its effect is to deny the rights of an attorney,

under a general employment to prosecute a suit, to dismiss it. His employment is to prosecute, and, in an important sense, it is inconsistent with a power to dismiss the suit. It is reasonable to say that such power should be specially delegated. The quoted language above indicates strongly that an attorney so employed shall not do what will deprive his client of a trial. His implied powers are such as are necessary or incidental to the prosecution or defense which he is employed to conduct." *Rhutasel v. Rule*, 97 Iowa 20.

The rule announced in the foregoing cases was emphasized again in *Kilmer v. Gallaher*, 112 Iowa 583, and it is said:

"It is an undisputed fact that the attorney for defendant agreed to a settlement of the case and a judgment against his client, without his knowledge or consent, and he was an attorney under a general employment."

In *Rhutasel v. Rule*, 97 Iowa 20 (supra), we cited and quoted from *Ohlquest v. Farwell & Co.*, 71 Iowa 231, and held that an attorney under a general employment had no authority to consent to judgment against his client, or waive any cause of action or defense in his case. We approved the same rule in *Martin v. Capital Ins. Co.*, 85 Iowa 643. The case of *Bigler v. Toy*, 68 Iowa 687, holds the same rule. In that case, a compromise was made by an attorney for plaintiff, and this court said:

"We are of the opinion that the compromise in no respect binds the plaintiff, because Irwin had no power or authority to make it."

These authorities were approved in *Kwentsky v. Sirovy*, 142 Iowa 385, Division 5, page 395. They were again approved and applied in *Lingenfelter Bros. v. Bowman*, 156 Iowa 649, Subdivision 3, page 654.

So we say that, under the general employment of counsel in this case, they had no authority to bind Mrs. Anna Vonderharr by the stipulation in this suit, and, the stipulation being unauthorized and in no way binding upon her, the judgment or decree entered upon that stipulation is equally without force and effect as to her.

We might say here that Judge Boies, by whom the stipulation was approved, and who was the presiding judge at the time the judgment was entered, testified:

"There was no trial of the issues joined in that cause as to the mental soundness of the decedent, or as to the question of undue influence having been exercised upon him at all. Counsel came to me and announced that they had agreed upon a settlement, and presented the decree and stipulation to me, and I signed them at their request."

It does not appear that knowledge was conveyed to the court that counsel was acting only under the general authority to secure the probate of the will. It was not brought to the knowledge of the court that Mrs. Vonderharr was not informed of the settlement or the terms of the settlement, or that a settlement had been made or was contemplated, or that the application for probate should be dismissed. We have no criticism of counsel at this point; for we take it that counsel, at that time, assumed that she had consented, by reason of what Christianson had said. But Christianson did not represent Mrs. Vonderharr. It was at counsel's request that he communicated with her, and, if he brought a false answer to them, it does not change the fact that the settlement was made without her knowledge and without her consent, and was, therefore, not binding upon her.

It follows that a judgment based upon a decree which, for its validity, rests on the consent of the parties to the decree, is not binding, when it appears that consent was never given. So we say that there was no authority in these attorneys to make this stipulation of settlement as to Anna Vonderharr and her posthumous child, and the stipulation is void for want of such consent, and the decree entered upon this stipulation is a constructive fraud upon the court, and vitiates the judgment, and is equally void.

This brings us to a consideration of the right of counsel to stipulate the minors out of court.

It will be noted that Anton, one of the sons, was a minor, and no guardian was appointed for him. No service was

made upon him, other than the general notice that the will would be called for probate. On the day of the trial, the attorneys for contestants were appointed his guardians ad litem. Our statute provides that no judgment can be entered against a minor until after defense has been made by his regular guardian, or one appointed by the court for that purpose. The appointment by the court is for the purpose of defending the minor, and the authority of the guardian so appointed is limited to that. And further than that, no guardian ad litem can be appointed to defend a minor, except for those purposes over which the court, by the notice, has acquired jurisdiction of the minor; and in this case, the jurisdiction acquired was only as to the probate of the will, and not as to settlement, compromise, or distribution of the estate among the heirs of John Henry Vonderharr.

Some argument is made as to the other minors, to the effect that they were represented in class; but it is not material to this controversy that we pass upon these questions. These minors are not here asking any affirmative relief, or any relief against the actions complained of by Mrs. Anna Vonderharr. We are inclined, however, to think that they were not bound by the action of counsel.

It is next contended that Mrs. Vonderharr is now estopped from claiming that the stipulation and judgment were not binding upon her; that she did not speak in time; that she was guilty of laches; that she ratified the judgment by accepting some of its benefits.

We have examined the records in vain to find any affirmative act on her part, done in recognition of the binding force of this judgment upon her, or that she knowingly received any benefits from the judgment. It appears that she was occupying a portion of the land of which John Henry Vonderharr died seized, and was owing rental therefor; that someone representing interests adverse to hers undertook to relieve her of the payment of this rental, by assum-

2. INFANTS:
guardian ad
litem:
authority:
stipulation
of settle-
ment.

3. JUDGMENT:
vacation:
ratification
as bar.

ing to credit her on the amount allowed her in the stipulation. To accomplish that purpose, they sent her a receipt to be signed, for \$1,500. When she received this receipt, she had no information as to what the receipt was for, nor does it appear that any was communicated to her. She consulted her attorney, and was directed to sign the receipt, and she did so without knowledge. Now, it is elementary that one cannot be said to have ratified an act done by another, without authority, until it is first shown that the party who is sought to be charged with the ratification had full knowledge of all the facts and circumstances concerning the act which it is claimed was ratified. Or, in other words, the ratification, to be binding, must be made with full knowledge of all the facts and circumstances essential to be known, and with a proper understanding of the effect the act sought to be ratified has upon his rights.

Other questions are discussed, which we do not deem it necessary now to dispose of.

The stipulation and decree as to Mrs. Anna Vonderharr and her posthumous child are absolutely void, for want of authority in her attorneys to make the stipulation upon which the decree was entered. The court, therefore, erred in granting the plaintiff the relief prayed for, and its action is reversed. The court further erred in denying the cross-petitioner, Anna Vonderharr, the relief prayed for in her petition. The cause is, therefore, reversed, and the court directed to proceed in the trial of said cause involving the probate of the will, the same as if no stipulation or decree had been entered, so far as the cross-petitioners are concerned.

It is apparent that the stipulation as to the other parties concerned in this suit was made under a misapprehension as to its effect upon Anna Vonderharr. It was made with the understanding that it was mutually agreed by all the parties that the stipulation would be binding upon all the parties, under a mistake of fact as to the attitude and relationship of Anna and her posthumous child, and the binding force of the stipulation and decree upon her.

If the plaintiff and other defendants so elect, they too may have the decree set aside as to them, on motion, and the cause proceed to trial as it stood on the day the stipulation was signed, and the unwarranted decree, heretofore referred to, entered upon the record of the court.—*Reversed and remanded for proceedings in accordance with this opinion.*

WEAVER, C. J., LADD and STEVENS, JJ., concur.

JAMES M. PATTERSON. Appellee, v. J. W. CARR, Administrator, et al., Appellants.

DESCENT AND DISTRIBUTION: Right of Heir—Release of Inheritance. Evidence reviewed, and *held* that a release by an heir "of all claims against him [intestate] or his estate" was not intended by either party to release the heir's right of inheritance.

Appeal from Poweshiek District Court.—D. W. HAMILTON, Judge.

FEBRUARY 17, 1920.

REHEARING DENIED MAY 17, 1920.

Suit for decree that plaintiff, an adopted son, is entitled to the estate of James Patterson, deceased. Collateral heirs pleaded that plaintiff had relinquished his right to inherit. On hearing, decree was entered, as prayed. Defendants appeal.—*Affirmed.*

Lewis & Dickson, for appellants.

T. K. Kase, Harold L. Beyer, and J. H. Patton, for appellee.

LADD, J.—On the former appeal, plaintiff was adjudicated the adopted son of decedent, James Patterson. 166 N. W. 449 (not officially reported). He was born January 1, 1859, adopted August 30, 1862, married June 15, 1881, and was a member of decedent's family from the time of his adoption until September 19, 1881. On that day, there was a settlement of some kind between them, in pursuance of which decedent paid him \$150, and he executed the following writing:

"Montezuma, Iowa, September 19, 1881. Received of James Patterson one hundred and fifty dollars in full of all claims against him or his estate. James Patterson."

This was construed on the former appeal not to be so plain as that parol explanation should be excluded. The issue to be determined is whether the consideration for the payment was wages for services rendered and money due, or for the relinquishment of the adopted son's right to decedent's estate. James Patterson died intestate, unmarried, and without issue, February 23, 1916, leaving an estate consisting of 286 acres of land and considerable personal property. The defendants, other than the administrator, claim the estate as collateral heirs, and base such claim on the alleged relinquishment thereto, evidenced by the writing above quoted, contending that it was so intended by the parties thereto, and also that the adopted son, when he signed, had good reason to suppose decedent so understood. The evidence fails to establish either of these contentions.

I. Previous to James Patterson's death, plaintiff had no right or interest in or to his property which the law recognized. It was pointed out in *Mally v. Mally*, 121 Iowa 169, that the current of authority is to the effect that an assignment of a naked possibility or expectancy of an heir apparent to an estate, if in good faith and for an adequate consideration, will be enforced after the death of an ancestor. See *Stolenburg v. Diercks*, 117 Iowa 25. The word "claim" is so wide that it might include either wages and money due or the expectancy of an heir apparent. In the last edition of Webster's Dictionary, it is defined as:

"(1) A demand of a right or supposed right; a calling on another for something due or supposed to be due; an assertion of a right or fact. (2) A right to claim something; a title to any debt, privilege, or other thing in possession of another; also, a title to anything which another should have or concede to, or confer on, the claimant."

The Century Dictionary defines it as:

"(2) A demand of a right or alleged right; a calling on another for something due or asserted to be due, as a claim of wages for services. (3) A right to claim or demand; a just title to something in one's own possession or at the disposal of another."

See, also, *Tally v. Brown*, 146 Iowa 360, 364; *Marsh v. Benton County*, 75 Iowa 469; *Fallon v. Butler*, 21 Cal. 24 (81 Am. Dec. 140); 11 C. J. 816. We must ascertain, then, from the evidence, what was intended. But the receipt is of claims "against him or his estate." Claims against an estate are in the nature of pecuniary demands which could have been enforced against the decedent, had he not departed this life. *Knutsen v. Krook*, 111 Minn. 352 (127 N. W. 11). Plaintiff had no claim against his foster father, save for the money paid him, nor against any estate he might leave. His claim, if any he had, was "to" the estate, as heir apparent. The word "against," in ordinary parlance, is used in an antagonistic sense, and the lexicographers so define it. Thus, Webster says it means:

"(1) Abreast of; opposite to; facing; towards; as, against the mouth of a river; in this sense, often preceded by 'over.' * * * (3) From an opposite direction, so as to strike or come in contact with; in contact with; upon; as, hail beats against the roof. (4) In opposition to, whether the opposition is of sentiment or of action; on the other side of; counter to, as in competition; in contrariety to; hence, adverse to; as, against reason; against law; to set off one item against another."

The courts have made like use of the word, and, as appears from cases collected in 2 Corpus Juris 400, and defini-

tion there given, are in accord with the definition above quoted.

That the writing was drawn with the notion of including all obligations of the decedent, and to obviate the assertion of any thereafter against him or against the estate he might leave, is quite consistent with the language of the writing, and more probable than that it was intended as a relinquishment of the right of inheritance by the heir apparent. Moreover, the evidence, without conflict other than circumstantial, discloses the consideration for the money paid. The plaintiff's wife testified that she was present, and took no part in the conversation then had between decedent and plaintiff; that decedent said to her husband:

“ ‘One hundred dollars of that money belongs to Eliza. You had better not spend it, as you may need it when you get to California.’ He always called me Eliza. ‘The rest of the money is your wages.’ ”

In answer to another interrogatory, she reported him as saying, “That is what is coming to you children.” Objection was interposed to the competency of the witness, under Section 4604 of the Code; but, under previous holdings, the testimony was admissible. She had said that she took no part in the conversation, and, according to her story, all that decedent said was addressed to her husband. *Hart v. Hart*, 181 Iowa 527. Evidence was adduced, tending to show friendly relations between plaintiff and his wife and decedent at the time. Shortly thereafter, plaintiff and wife departed for California, and neither visited decedent during 27 years. Not infrequently, natural sons separate themselves from parent as long; and that a man not related by consanguinity should become too diligent in his own affairs to respond more generously to the paternal ties which once bound him, is entitled to little consideration, as bearing on the issue to be decided.

In March, 1916, J. W. Satchell informed plaintiff of his foster father's death, and, shortly afterwards, he wrote to Mrs. Cooper, the father's sister, recalling a visit at which,

as he said, she "had expressed the opinion I was heir to father's estate," and proceeded:

"How much property did father leave, and who is claiming it? * * * Please let me know what the administrator is doing, and whether you think there is any chance of my being recognized."

It is argued that this inquiry tends to confirm the thought that he had relinquished. Not so. He was a blacksmith by trade, and, it is likely, may not have been familiar with the inheritance laws of a state other than that of his residence, after an absence of 35 years. Moreover, the inquiry was quite natural for a son by adoption to make, and we are of opinion that no inference unfavorable to plaintiff's insistence upon the right to inherit is to be drawn from the letter. The writing was found in an old trunk left by decedent, among papers left by him, some of which were old and useless; and no more significance is to be given to its preservation than to that of others. All of them seem to have been retained without discrimination. We find nothing in the record tending to throw doubt on the testimony of Mrs. Patterson, and we are inclined to the conclusion that there was no purpose, on the part of either decedent or his foster son, that the writing should operate as a relinquishment of the latter's expectancy as heir apparent to the former's estate.

II. Our statute, Section 4617 of the Code, provides that:

"When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it."

Appellants contend that plaintiff had reason to suppose that decedent understood that, in executing the writing, he released his expectancy of inheritance. Satchell testified that plaintiff so admitted to him, and, in determining whether he so did, resort must be had to the evidence. Satchell testified that, at the request of the administrator, he called on plaintiff and wife, at their home in Los Angeles,

California; that he and plaintiff talked about the writing. He was asked:

"Did he say anything to you about what he thought James Patterson receipted that paper for, in reference to whether it was a release of his share of the James Patterson estate or not? A. Yes, sir. Q. What did he say about what he thought James Patterson receipted that paper for? A. He said he thought James Patterson understood it to be a settlement of his in the estate. Q. Now, is that all the statement he made to you on that particular subject? A. I think that was all. * * * Q. Did he or his wife tell you in his presence that, what the \$150 consisted of, or any part of it; just what they said to you? A. Mr. Patterson said that, at one time, Uncle Jimmy gave him \$50, and that he asked him, when he gave him the money, to sign a receipt for it. He asked Uncle Jimmy what the receipt was for, and he said: 'Nothing, only for what money I am paying you.' Q. Was there any more said about the rest of the money? A. I suggested to him that he was probably mistaken about the amount, as I understood it was \$150, instead of \$50. After talking, they agreed that it was \$150, instead of \$50; but the \$100 of the money was his wife's, a specified sum per month for staying there at Uncle Jimmy's, and taking care of his things while he went out to California to sell some land. They did not explain as to what the other \$50 was for."

On cross-examination, the witness was asked:

"Q. While you were talking the matters over, Mr. Patterson, the plaintiff, told you he understood that his father, James Patterson, thought this was a receipt in full for his interest in the estate? A. Yes, sir. Q. That he had heard that from some source? A. He said that he had no doubt but that his father understood it. Q. Didn't he tell you, in substance, that the money that was paid to him by his father, for which he gave his receipt, was for wages? A. Yes, sir. * * * Q. Some of it was for something else? A. Yes, sir, didn't express what the other paid was for. * * * Q. You were trying to figure out what the \$150 was for?

A. I think Mrs. Patterson suggested that the \$100 was for wages; they talked about it. * * * Q. In that conversation between you and plaintiff and his wife, was anything said about that, that was a relinquishment of his interest in the estate? A. I think he said that he had no recollection of having relinquished his interest in the estate. Q. Did he say, in that conversation with you, that his father, when he paid him \$50, told him he just wanted a receipt for money paid? A. Yes, he said that. * * *

The witness remarked to Patterson that:

"There was a receipt that Capt. Carr had that purported to be a relinquishment to his inheritance in the estate. Q. Didn't he deny it? A. Said he didn't understand it that way. Q. He told you at that time, in substance, that he had not relinquished his right to the estate? A. He said he had no recollection that he signed anything or any receipt to relinquish his interest in the estate. Q. He stated to you at that time, in substance, that he may have given his father a receipt for wages due him? A. He said it was for wages due him,—yes. Q. And then, the rest of the time there, you just visited back and forth? A. Yes, sir."

If this testimony requires any refutation of what the witness said of plaintiff's knowledge that decedent understood that the writing was "a settlement of his interest in the estate," it is to be found in other portions of his deposition. If Uncle Jimmy said, in requiring a receipt, that it was for "nothing, only for what money I am paying you," he surely did not have the understanding attributed to him, nor did plaintiff so suppose. The witness admitted that plaintiff told him the receipt was for wages, and that he had no recollection of having relinquished his interest in the estate, or of having signed a receipt so doing. How were it possible that, at the same time, he supposed that his foster father understood he was relinquishing his interest in the estate? The plaintiff and his wife admit having had a conversation with Satchell, and relate the substance thereof, which did not include what plaintiff supposed decedent understood; and they say, "That was all the conversa-

tion between us." No other evidence was adduced, and we are of opinion that the court did not err in finding that plaintiff, in executing the writing, which we regard as no more than a receipt in full, did suppose or have reason to suppose it a relinquishment of plaintiff's expectancy as an apparent heir.—*Affirmed*.

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

GRACE A. REYNOLDS, Administratrix, Appellant, v. NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Appellee.

INSURANCE: Preliminary Insurance Dependent on Insurability.

1 An application for life insurance, accompanied by the premium, under an agreement that the insurance shall be effective from the date of the medical examination, provided the insurer is satisfied that the applicant is then insurable, creates preliminary insurance, but with reserved right in the insurer in good faith to reject the application, for noninsurability at the time of the application.

INSURANCE: Estoppel to Dispute Health Certificate. The stat-

2 utory provision that a certificate of health and insurability, made by the company's medical examiner, may not be disputed, does not apply *until a policy* has been issued. (Sec. 1812, Code, 1897.)

Appeal from Johnson District Court.—R. G. POPHAM, Judge.

FEBRUARY 16, 1920.

REHEARING DENIED MAY 17, 1920.

ACTION upon an alleged preliminary contract for insurance for \$1,000 upon the life of one Clarence A. Reynolds. There was a trial to a jury, which, by direction of the court, at the conclusion of all the testimony, returned a verdict in favor of the defendant, and plaintiff appeals.—*Affirmed*.

Baldwin & Baldwin, for appellant.

W. J. McDonald and Deacon, Good, Sargent & Spangler, for appellee.

STEVENS, J.—On December 5, 1916, Clarence A. Reynolds, residing at Iowa City, Iowa, made application, in writing, to the Northwestern Mutual Life Insurance Company of

1. INSURANCE:
preliminary
insurance
dependent
on insurabil-
ity.

Milwaukee, Wisconsin, for a 20-year endowment policy for \$1,000, and on the same date submitted to an examination by the company's medical examiner, and paid to M. L.

Deaton, the soliciting agent, \$13.19, the full amount of the first quarterly premium on such policy, from which the receipt copied below was detached from the application, and delivered to him. The material portion of the application and the receipt is as follows:

"It is understood and agreed (1) that if the amount of the premium on the insurance herein applied for is not paid at the time of making this application there shall be no liability on the part of the said company under this application unless nor until a policy shall be issued and delivered to me and the first premium thereon actually paid during my lifetime; and (2) that if the amount of such premium is paid to the said company's agent at the time of making this application the insurance (subject to the provisions of the said company's regular form of policy for the plan applied for) shall be effective from the date of my medical examination therefor and such a policy shall be issued and delivered to me or my legal representatives, provided the said company in its judgment shall be satisfied as to my insurability, on the plan applied for, on the date of such medical examination; and (3) that if said company shall not be so satisfied the amount of the premium paid shall be returned."

"No other form of receipt for advance payment of amount of premium will be recognized by the company.

"Received of Clarence A. Reynolds, who has applied to The Northwestern Mutual Life Insurance Company for

\$1,000 insurance on the 20 year End. plan, the sum of Thirteen 19/100 dollars, the amount of the first quarterly premium on such a policy; the said payment being made by him subject to the terms and conditions of agreements (2) and (3) contained in his said application.

"Iowa City, Ia., Dec. 5, 1916. M. L. Deaton, Agent."

The following appears on the left-hand margin of the above receipt:

"If the amount of the premium is paid at the time of application, this receipt must be completed and given to the applicant; if it is not so paid, the receipt must not be detached."

The application and answers made by Reynolds to the medical examiner, and also his special report, which were made out on the company's regular forms, furnished the agent and medical examiner respectively for that purpose, were, on the same day, forwarded to H. L. Williams, state agent for the company at Davenport, who, in turn, forwarded the same to the company at Milwaukee, in time to be received at its office in that city on the 7th of December.

On the morning of December 8th, the applicant died suddenly, of a disease of the heart known as Stokes-Adams disease. After his death, the application was rejected, upon the ground that he was not insurable on the date of the medical examination, and the premium returned to the widow of the applicant, on December 20th.

I. Much of the argument of counsel on both sides is devoted to a discussion of the proper construction to be given that portion of the agreement copied above. Before proceeding, however, to a decision of the questions presented upon plaintiff's appeal, it is necessary to dispose of a question raised by motion in this court to dismiss plaintiff's appeal, and also upon the appeal of defendant from the order and judgment of the court below, directing the clerk to correct his record, so as to make it show the filing of plaintiff's notice of appeal. The application of plaintiff for the correction of the clerk's record was submitted upon evidence introduced by both sides, and sustained by the court. We

have examined the record upon this appeal, and are not inclined to interfere with the ruling of the court below. It should be and is affirmed.

II. The dispute over the construction of the above agreement relates to the provisions of divisions "(2)" and "(3)" thereof. Counsel for appellant construes it as a contract for preliminary insurance, binding upon the company at all events; whereas counsel for appellee contends that the application was a mere proposal for a contract of insurance, of the kind and upon the terms therein stated, and did not become binding upon the company until accepted by it at the home office in Milwaukee. Preliminary contracts for insurance are quite common, and are well sustained by courts generally. *Gardner v. North State Mut. Life Ins. Co.*, 163 N. C. 367 (79 S. E. 806); *Cooksey v. Mutual Life Ins. Co.*, 73 Ark. 117 (83 S. W. 317).

Clearly, the first clause of the contract relieves the company from liability until a policy has been issued, delivered, and the premium paid; but does the second clause contemplate nothing more than that the liability of the company, when the premium is paid at the time of making the application, and medical examination had, shall not commence until the application has been received and accepted by it? The provision of the contract is that, if the amount of such premium is paid to "the said company's agent at the time of making this application, the insurance (subject to the provisions of the said company's regular form of policy for the plan applied for) shall be effective from the date of my medical examination therefor and such a policy shall be issued and delivered to me or my legal representatives." Construed, independent of what follows, the clause just quoted makes the insurance effective from the date of the medical examination therefor, and sustains appellant's construction. The contract must, however, be construed as a whole, and effect be given to the following provision thereof:

"Provided the said company in its judgment shall be satisfied as to my insurability, on the plan applied for, on the date of such medical examination."

Counsel for appellant arrives at his conclusion by treating this clause as a limitation upon the following language only, "and such a policy shall be issued and delivered to me or my legal representatives:" that is, he contends that the insurance, becoming effective upon the date of the medical examination, continues in full force until the application is rejected by the company.

There can be no question, under the form of contract in question, that, if the insurance applied for ever becomes effective, it is as of the date of the medical examination. This is true if the application is accepted and a policy issued. That the contract contemplates that liability of the company will attach before the issuance of a policy is clearly indicated by the parenthetical clause of the contract which makes the insurance subject to the provisions of the company's regular form of policy applied for. The receipt, signed by the company's agent and delivered to the applicant, for \$13.19, recites that this sum is the amount of the first quarterly premium on such policy. The quarter for which the premium was paid commenced on the date of the medical examination, because that was the date upon which the insurance would have commenced, if a policy had issued. With a somewhat similar contract under consideration, the Supreme Court of South Dakota, in *Albers v. Security Mut. Life Ins. Co.*, (S. D.) 170 N. W. 159, said:

"If the company did not intend that there should be insurance effective pending the date of the application and the date of the approval of the risk and the issuance of the policy, then the company would be charging and obtaining the full amount of the premium for one year, while the period of actual insurance would be as many days less than one year as there were days intervening between the date of the application and the approval. This would not be dealing honestly with the insured. By the payment of the premium for one year, an insured is entitled to insurance for one year."

We have no doubt that the proviso in the contract relates to all of Clause 2 that precedes it; but it is our con-

clusion that the contract became binding, and the insurance effective, on the date of the medical examination, subject, however, to the provisions of the company's regular form of policy for the plan applied for, and the insurability of the applicant on the date of such medical examination. The insurability of the applicant on the date of the medical examination is, by the contract, made the test of the company's liability.

By the third clause of the contract, the company agrees, in case the application is rejected, to return the premium paid. Unless the application is, in the proper exercise of the company's rights, under the law and the contract, rejected, and the insurance refused, the preliminary contract provides protection from the date of the medical examination; and, if death results from some cause arising after the date of such examination, the company is liable upon the contract, according to its terms; but, if the company, in the proper exercise of its legal rights under the law and the contract, which it is unnecessary for us to define in this opinion, rejects the application, upon the ground that the applicant is not insurable, and returns the premium paid, no liability can arise thereunder.

Counsel for appellee cites a few cases from other jurisdictions, which, it is argued, reach a different conclusion from that reached herein; but these cases deal with contracts differing materially from the one under consideration, and, when carefully analyzed, are not out of harmony with the views expressed in this opinion. The cases cited and relied upon by counsel are as follows: *State v. Robertson*, (Mo.) 191 S. W. 989; *Travis v. Nederland Life Ins. Co.*, 104 Fed. 486; *Whellock v. Clark*, 21 Wyo. 300 (131 Pac. 35); *Northwestern Mut. Life Ins. Co. v. Neafus*, 145 Ky. 563 (140 S. W. 1026); *New York Life Ins. Co. v. McIntosh*, 86 Miss. 236 (38 So. 775); *Mohrstadt v. Mutual Life Ins. Co.*, 115 Fed. 81; *Citizens Nat. Life Ins. Co. v. Murphy*, 154 Ky. 88 (156 S. W. 1069); *Cooksey v. Mutual Life Ins. Co.*, supra; *Wilson v. Interstate B. M. A. Assn.*, 160 Iowa 184; *Straight v. American Life Ins. Co.*, 184 Iowa 301.

III. Counsel for appellant also assigns as error the refusal of the court below to submit to the jury the question whether the refusal of the company to issue a policy was due to the death of the applicant. We find nothing in the record that would have justified the submission of this question to the jury. It is hardly claimed by counsel that deceased, on the date of the medical examination, was, in fact, entitled to insurance; and it appears without conflict in the evidence that, when the application was received at the home office of the company, it was, in the usual course of office routine, turned over to the clerk in charge of the Library Bureau records, a department maintained by various life insurance companies, co-operating for the purpose of furnishing information touching applications received by the various companies, to ascertain whether there was any information on file in defendant's office as to the applicant. A record was found from which it appeared that deceased was reported by some other company as having indigestion, or catarrh of the stomach, in February, 1915. The medical examiner, on December 9th, wrote to the state agent at Davenport, giving him this information, and requesting that he obtain a statement, signed by the applicant, giving full details as to these matters, including the frequency and symptoms of the attacks, the physician consulted, if any, and also a statement from such physician, advising as to diagnosis and finding. Because of the death of Reynolds before the receipt of this letter by the state agent, no further investigation appears to have been made. Some time in April, proofs of death were sent to the company, upon blanks in the usual form for that purpose. The affidavit of Dr. Donovan, the physician who attended Reynolds at the time of his death, attached to and forming a part of the proofs of death, recited that he had examined Reynolds, five or six months before his death, and that he was then afflicted with a heart trouble known as Stokes-Adams disease; that death resulted therefrom; and that he had probably had this trouble for two or three years. The

original proofs of death, including this affidavit, were offered in evidence upon the trial, the latter, however, by the defendant. Dr. Donovan was not examined as a witness, but several lay witnesses, who had known and were frequently associated with deceased for several years before his death, testified that he was apparently in good health. They did not, however, know that he was afflicted with a disease of the heart. The company's medical examiner testified that, in making his report to the company on December 5th, he relied in part upon the answers of Reynolds to the questions printed upon the form furnished him by the company. From these questions and answers, we quote the following:

"When did you last consult a physician, and for what? Dr. Mullin, about a year ago—cold. Have you fully recovered, and are you now in good health? Yes. Give name and address of the physician who attended you? Dr. Mullin, Iowa City, Iowa. Have you had any illness, disease, or accident during past ten years not mentioned above? No. Have you had since childhood any of the following diseases or disorders—Palpitation or any disease of the heart? No."

We recite this much from the record for the purpose of showing that Reynolds was not, on the date of the medical examination, in a physical condition entitling him to insurance, and that the company, in failing to approve the application when received, was acting in apparent good faith in soliciting further information touching the insurability of deceased. According to the undisputed testimony, the application was handled in the usual way. The record, we think, leaves no doubt that he was not entitled to insurance, and that no liability existed upon the contract. The fact that the company did not, prior to his death, know that deceased had been, for several months, afflicted with heart trouble, should not be given controlling importance. It goes to the question of his insurability. No question of fact was presented for submission to the jury.

IV. But one other contention of counsel
 2. INSURANCE: for appellant need be referred to:
 estoppel to
 dispute
 health
 certificate. Section 1812 of the Code provides:

"In any case where the medical examiner, or physician acting as such, of any life insurance company or association doing business in the state shall issue a certificate of health or declare the applicant a fit subject for insurance, or so report to the company or association or its agent under the rules and regulations of such company or association, it shall be thereby estopped from setting up in defense of the action on such policy or certificate that the assured was not in the condition of health required by the policy at the time of the issuance or delivery thereof, unless the same was procured by or through the fraud or deceit of the assured."

Fraud is pleaded in this case, but it is not necessary to go into this question. This statute has no application until the policy or certificate has been issued. It was not the purpose of the statute to bind the company to accept as final the report of its local medical examiner, but only to make the acceptance by the company and the issuance of a policy or certificate conclusive thereon. Just what effect, if any, should here be given Section 1783-b, Supplemental Supplement, 1915, to which our attention is called, we need not determine.

We are clear, however, that Section 1812, *supra*, was not intended to limit the investigation of the company as to the insurability of an applicant to the examination and recommendation of its local medical examiner. All applications for insurance in defendant company, according to the undisputed evidence, must be first passed upon and approved by the chief medical examiner at the home office. The estoppel applies only after a policy or certificate has been issued. Having disposed of all the errors relied upon for reversal, it follows that the ruling and judgment of the court below must be and is—*Affirmed*.

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

H. W. STRATMEYER, Appellee, v. S. A. HOYT, Appellant.

TRIAL: Instructions—Failure to Except. Exceptions to instructions not urged until after the instructions had been read to the jury were not in time, under Sec. 3705-a, Code Supp., 1913 (now repealed), and could not be considered in a motion for new trial, or upon appeal, without the statutory showing as to failure to discover the error before the giving of the instructions.

CONTRACTS: Construction and Operation—Recovery. The common-law rule that there could be no recovery on a written contract without a showing that it had been strictly performed has been modified in this state, and there can be a recovery where the other contracting party has been benefited, and there has been substantial performance, and the omissions are inadvertent or unintentional, and deductions can be made from the contract price for the deviations.

APPEAL AND ERROR: Reservation of Grounds—Exceptions to Instructions. Error resulting from an omission in instructions given on a trial before the repeal of Sec. 3705-a, Code Supp., 1913, cannot be considered on appeal, where the record fails to show that exceptions were taken before the reading of the same to the jury, or that additional instructions were asked, and where, although exception is set out in the motion for a new trial, there was no showing of failure to discover the same before the instructions were given.

CONTRACTS: Performance or Breach—Evidence. Evidence reviewed, in an action on a written contract for the furnishing of a monument, and held sufficient to go to the jury on the question of substantial performance of the contract on the part of the seller.

Appeal from Carroll District Court.—E. G. ALBERT, Judge.

OCTOBER 14, 1919.

REHEARING DENIED MAY 17, 1920.

ACTION to recover the contract price of a monument. Verdict and judgment for the plaintiff in the district court. Defendant appeals.—*Affirmed*.

Reynolds & Meyers, for appellant.

E. A. Wissler, for appellee.

GAYNOR, J.—I. It is agreed that, on the 23d day of March, 1916, the plaintiff and defendant entered into the following written contract:

“The said Stratmeyer agrees to furnish and erect on the cemetery lot belonging to M. A. Hoyt estate in the cemetery at Carroll, Iowa, a monument of the following specifications, to wit:

“An exact duplicate as to material, quality, workmanship, finish and dimensions, excepting as to lettering, of the A. B. Cummins family monument in the cemetery at Des Moines, Iowa. The finish of said monument to be what is known as ‘twelve-cut hammered work.’

“The lettering on said monument is to be as follows: The word ‘Hoyt’ is to be made in raised ax square letters on each side of the die and not less than five inches in height, except as may be changed with the consent of said Hoyt.

“The said monument to be placed on a good solid rock concrete foundation of the same dimensions as the base of said monument six and one-half feet deep, the top of said base to be slightly below the surface of the ground. The stone used in said foundation to be either ordinary crushed rock or screened stone of approximately the same size as ordinary crushed rock, and the cement to be used therein to be of first-class Portland cement quality. The bottom half of said foundation to be in the proportions of five to one, and the top half of said foundation to be in the proportions of three to one.

“The said Stratmeyer is also to furnish two markers for the said lot, one at the head of each grave therein. of the

same material, workmanship and finish as the said monument, said markers to be 2 ft. long, 1 ft. 4 in. wide and 1 ft. high at the highest point, and having a slight incline as to the top. Said markers to be lettered as follows:

"In the sloping top of the marker at the head of M. A. Hoyt, the following letters to match the lettering on said monument, to wit: 'Father.' On a line beneath 'M. A. Hoyt.' On a line beneath that 'December 27, 1839.' On a line beneath that 'December 27, 1914.'

"On the sloping top of the marker at the head of the grave of John Truman Hoyt is to be the following: 'John Truman Hoyt.' On a line beneath that 'February 16, 1875.' On a line beneath that 'July 21, 1886.'

"The said markers are to be placed on the same kind of foundation as the said monument except that the depth of said foundation is to be two feet.

"The said Stratmeyer guarantees that the stone used in said job will be the best 'Barre granite,' and that the same will not develop any defects or spots within ten years after the erection thereof.

"Said job to be completed by May 30, 1916, if possible, and in any event not later than August 1, 1916.

"The said job is to be paid for as soon as completed in accordance with the terms of this contract, by the said Hoyt paying to the said Stratmeyer the sum of six hundred dollars."

Plaintiff claims that the provision in said contract requiring the foundation to be made of crushed rock or screened stone was modified by mutual consent, allowing the plaintiff to substitute some crushed cement, taken from cement sidewalks, for the crushed rock or screened stone.

This action is brought to recover of the defendant the amount specified in said written agreement, on the theory that plaintiff has performed the contract on his part, as written and modified.

The answer of the defendant denies that plaintiff has performed said contract, or that defendant has ever accepted said contract as performed, and denies that the de-

fendant is indebted to the plaintiff in any amount.

Upon the issues thus tendered, the cause was tried to a jury, and a verdict returned for the plaintiff for the full amount agreed in said contract to be paid. Judgment being entered upon the verdict, defendant appeals.

In so far as the defendant bases a right to reversal upon alleged errors committed by the court in its instructions, we have to say that Section 3705-a, Code Supplement, 1913, was in force at the time of the trial. This section, speaking of instructions, says:

1. TRIAL: in
instructions:
failure to
except.

“All objections or exceptions thereto must be made before the instructions are read to the jury and must point out the grounds thereof specifically and with reasonable exactness.”

We are limited, therefore, in our consideration to those instructions to which exceptions were taken, as provided in the statute.

Before the instructions were read, they were submitted to counsel, and certain exceptions taken only to Instructions 2, 3, 4, 5, and 5½. In the motion for a new trial, error is urged as to other instructions; but, as there is no *showing* in the motion that the errors complained of were not discovered before they were read to the jury, such alleged errors cannot now be considered, for the reason that the statute specifically says that other objections or exceptions shall not be considered by the trial court upon a motion for a new trial, or by the Supreme Court on appeal, not made as provided therein.

In the second instruction objected to and now complained of, the court said:

“The claim of the defendant is that the plaintiff failed to perform his contract in four different particulars:

- (1) That the die on said monument was one-half inch thicker than the Cummins monument. (2) That the carving on said monument was an eighth of an inch less in depth than that on the Cummins monument. (3) That the

2. CONTRACTS:
construction
and opera-
tion: re-
covery.

base of said monument was not of the same height or thickness as the Cummins monument. (4) That the foundation was not constructed in compliance with the terms of the contract, in that the crushed sidewalk concrete and rock was used, instead of material provided in the contract.

"As to the first three complaints of the defendant, you are instructed that, if they substantially conform to the requirements of the contract, as hereinafter explained, then defendant cannot avail himself of such matters as a defense, and he cannot excuse his failure to pay by reason of such matters."

In the third instruction complained of, the court explains what is meant by substantial compliance, and says:

"It is the law that, where one contracts for the erection of a certain structure, he is entitled to have it erected in conformity with the provisions of his contract; but, in the application of this rule, the law requires only a substantial compliance therewith. By the use of this term, 'substantial compliance,' you are to understand that it does not require absolute accuracy. Slight variations or deviations from the contract as are inadvertent or unintentional, and not due to bad faith, and which in no way impair the structure as a whole, and in no way affect its symmetry, general appearance, or usefulness, are excusable; and, as applied to this case, if the defects complained of are only slight, and in no way detract from the general appearance, symmetry, and style of said monument, or impair the structure as a whole, and the plaintiff acted in good faith in relation thereto, then defendant cannot complain of said defects. But, on the other hand, if the variations from the terms of the contract are not of a slight nature, or if, in any way, affect the structure as a whole, its general appearance, symmetry, or style, or its use for the purpose for which it was intended, or if, in making said changes, the plaintiff did not act in good faith, then your verdict herein should be for the defendant."

In the fifth instruction, the court said:

"It is one of the claims of the defendant that the base stone for said monument is not of the dimensions provided in the contract, and that the same lacks two inches in thickness of being of the same dimension as the Cummins monument. If you find this is true, and in addition thereto you find that this in any way impaired the structure as a whole, or in any way detracts from the general appearance, symmetry, or style of said monument, or its usefulness for the purpose for which it was intended, then the plaintiff cannot recover."

The only objection to these instructions which we may consider is bottomed on the thought that the instructions as a whole allow the plaintiff to recover upon a showing of substantial compliance with the requirements of his contract. It is said that this is not the law; that, to entitle plaintiff to recover, he must show a strict compliance with the requirements of his contract in matters of this kind.

Originally, and at common law, it was the thought of courts that no recovery could be had upon a written contract, without a showing that the contract had been strictly performed. This rule, however, has been relaxed in many jurisdictions, and especially in our own. The courts, looking to substantial justice, and because the other rule worked often great hardship, have modified the doctrine of strict performance, and have allowed recovery where it is shown that there has been a substantial performance of the contract: this, however, subject to the right of the other party to recoup for any damages occasioned him by slight defects in the performance. The common-law rule has, therefore, been modified so that there may be recovery where the thing done under the contract is a benefit to the other contracting party, with this qualification, however: that, in the performance, there must appear only such omissions or deviations from the contract as are inadvertent or unintentional, and are not due to bad faith, and which do not impair the structure as a whole, and are remediable without doing material damage to the other parts, and may, without in-

justice, be compensated for by making proper deductions from the contract price. It is said that, under such conditions, recovery may be had on the contract, because of the hardship to the contractor if slight, unintentional deviations should bar his recovery. See *Littell v. Webster County*, 152 Iowa 206. This is the thought of the instructions complained of. Whether there was a substantial compliance with the contract, with these limitations upon substantial compliance, was a question for the jury, and the jury resolved it in favor of the plaintiff.

II. It is contended, however, that, even if the rule of substantial compliance obtains in this case, the court erred in these instructions, because it appears that there was not

3. APPEAL AND
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a strict compliance; that there were deviations from the requirements of the contract, and the court made no mention of this fact, and did not say that the defendant was en-

titled to have the contract price reduced to the extent of the damage which he suffered by reason of the failure to make strict compliance.

It will be noted, however, that there is no claim for any damages made by the defendant in his answer, based upon this thought, nor does it seem to have been raised in the court below, before the instructions were given. As said in *Gorton v. Moeller Bros.*, 151 Iowa 729, 734:

"If, in the judgment of the appellant, the court should have gone further, and said to the jury that, if the ditch, though made in substantial conformity to the contract, was yet materially incomplete or defective in some particulars, the plaintiff's recovery, if any, must be reduced by the damages resulting therefrom, it was their right to request such modification. No such request was made, and the omission to so instruct was not a prejudicial error."

The thought in that case seems to be that, if there were slight deviations from the contract requirements, which affected in any degree the value of the thing as constructed, defendant should have asked that the jury's attention be

called to it, so that, in determining the amount which plaintiff was entitled to recover, allowance could be made for such slight defects.

This last question, however, we do not find raised in the exceptions taken to the instructions before they were read, and it cannot, therefore, be considered by us. If the defendant had asked an instruction on this point, or if, in his objections to the instructions prepared by the court, he had raised this as proper to be submitted to the jury, under the record made, the defendant would stand in a position now to complain. But, since he did not ask an instruction on this point, and did not urge objections to the instructions of the court because they did not involve this point, it is too late to raise it here.

It is true that this question is raised in the motion for a new trial, but there is no *showing* that this question was not discovered by counsel in time to have urged it before the instructions were read to the jury. Without some showing that the objections urged in a motion for a new trial were not discovered by the complaining party before the instructions were read, they cannot be considered here. See *Chumbley v. Courtney*, 181 Iowa 482, in which it is said:

“In order that an objection or exception to an instruction urged for the first time in the motion for a new trial may be considered, the assertion that the error was not discovered at the time of the trial by the party claiming it, is not enough. There must be some showing that the assertion is true,—some proof thereof. This may be by affidavit, testimony in open court, or any other mode which will make it satisfactorily appear to the court that the error was overlooked at the trial of the cause to the jury.”

Now, we say that the original abstract filed in this case does not show that this error was urged before the instruction was given, nor is there any showing in the motion for a new trial that it was not discovered in time to have made it then. The defendant's argument filed in this cause is denominated “Argument and Amendment to Abstract.”

The record shows the argument closed on page 35. On page 45, we find the words "Additional Abstract." Between these two pages, there are inserted "Instructions and Exceptions to Instructions." But there is no showing that these exceptions or objections were made before the instructions were read, and they cannot, therefore, be considered by us. Section 3705-a not only requires that the objections and exceptions be taken before the instructions are read to the jury, but says that the objections and exceptions so taken "must point out the grounds thereof specifically and with reasonable exactness, * * * and no other objections or exceptions shall be considered by the trial court upon motion for a new trial or otherwise, or by the Supreme Court upon appeal."

We therefore pass this point, as not before us for consideration. This, too, withdraws from us the power to consider exceptions and objections urged in the motion for a new trial that were not specifically urged before the instructions were read.

This brings us to a consideration of the other errors relied upon.

Grouping the further contentions of the appellant, we say that the court did not err in overruling defendant's motion for a directed verdict at the conclusion of the evidence.

On all essential points, there was dispute in the evidence, and a fair question raised for the jury. We further find that the verdict is not against the instructions of the court; that, with the limitations placed upon substantial performance by the court in its instructions, the jury could well find that there was a substantial compliance with the contract, and, no question having been raised by the defendant, touching defendant's right to recoup for failure to strictly perform, we think the jury was right in returning a verdict for the full amount of plaintiff's claim. There was evidence before the jury upon which they could well find that the contract had been substantially complied with; that the

4. CONTRACTS:
performance
or breach:
evidence.

variations from the plans and specifications in the contract were slight; that they were inadvertent and unintentional; that they were not due to bad faith; that they in no way impaired the structure as a whole; in no way affected its symmetry, general appearance, or usefulness. Whether they did or not was submitted to the jury. The jury found for the plaintiff. The court distinctly told the jury that, if the variations from the terms of the contract were not of a slight nature, or if they in any way affected the structure as a whole, its general appearance, symmetry, or style, or its usefulness for the purpose for which it was intended, or if, in making said changes, the plaintiff did not act in good faith, then they should return a verdict for the defendant. There being evidence upon all these questions, from which the jury might find either way, we cannot interfere with its verdict in finding for the plaintiff.

As to the foundation, the court distinctly instructed the jury that, if they found the oral agreement established, modifying the original contract, and that the plaintiff had substantially complied with the written agreement, as modified, such substantial compliance would justify a verdict in his favor. But if he failed to show the modified contract, or failed to show a substantial compliance with the written contract, as modified, he must fail. There was evidence upon this point supporting a verdict in favor of the plaintiff.

On the whole record, we find no ground for reversal, and the judgment is—*Affirmed*.

LADD, C. J., WEAVER and STEVENS, JJ., concur.

CARRIE B. ANDERSON, Appellant, v. AXEL R. ANDERSON,
Appellee.

DIVORCE: False Charges of Infidelity. False charges of infidelity
1 made in a pleading constitute cruel and inhuman treatment,
especially when aided by oft repeated, vile, and abusive lan-
guage.

DIVORCE: Alimony—Division of Property. Evidence reviewed,
2 and held to require a decree equally dividing the real estate
of the parties.

Appeal from Polk District Court.—JOSEPH E. MEYER, Judge.

NOVEMBER 22, 1919.

REHEARING DENIED MAY 22, 1920.

ACTION for divorce. The ground alleged is cruelty. Af-
ter a trial, the court dismissed the petition. Plaintiff ap-
peals.—*Reversed.*

Henry & Henry, for appellant.

E. J. Frisk and J. L. Gillespie, for appellee.

PRESTON, J.—1. The parties were married December 1,
1901. She was past 49 years of age, and he was about the
same age. She had been married three times, and secured a
divorce from each of her husbands. She told
1. **DIVORCE:**
false charges
of infidelity. defendant of two of her marriages. She had
a son by a former marriage, who was about
18 years of age, at the time these parties were married. She

was a woman of average intelligence. He was a bricklayer, a steady, hard-working man, but could not read or write, and had little, if any, education, and had had but little business experience. He, turned over his wages to her, until she returned from California, in the spring of 1918. Defendant then told plaintiff that she had managed the business for 8½ years, and that thereafter he would manage it himself. They at first lived in Des Moines, but later exchanged the town property for acreage, just outside the city limits, where they built a new brick house, defendant doing the brick work. Plaintiff had some money of her own, which went into the new property. She had, before this, purchased a considerable amount of household goods, which, she testifies, she paid for. The deed to the new property was taken in the name of both of them, or of the survivor of the other. Plaintiff testifies that this was the arrangement, and it seems not to be seriously disputed by the defendant. He says he saw the deed, but doesn't remember whether he heard it read or not. They seem to have gotten along fairly well until about December, 1917, at which time plaintiff claims defendant's treatment of her changed. The doctor testifies that he first treated plaintiff two or three years before that, and that, at that time, she was extremely nervous, had some temperature, from which he suspected she might have tuberculosis (but, at the time of the trial, he was of opinion that she did not have that); that she was broken down in health, and he advised her to go to California through the cold weather. She went to California on December 13th. About February 21, 1918, defendant caused her to be notified to return home at once, and that she would receive all the medical attention that she required. Upon receipt of this letter, she wired for ticket and traveling expenses, and received a wire back that ticket would be furnished at the depot, and \$5.00 in money. She then had \$50, which she had borrowed from her son, who then had a family. On her arrival home, she went to bed, and, a week afterwards, it was decided that she must go to

the hospital for an operation. She testified that he swore and cursed her, in connection with the operation, and said:

"God damn your soul to hell, you are grunting and sick all the time, and you can't work, and what in hell good are you? What are you laying around here for?"

She says that, the night before she went to the hospital, she invited her son and his wife to supper. The daughter prepared the supper. Defendant came in, and found the daughter getting the supper. He got his own supper, and ate it in the kitchen. While she was at the table, he came to the door, and said:

"God damn you, you said you were sick; but, by God, you are able to go to the table and eat like a hog."

This circumstance is testified to by plaintiff and her son and his wife. It is denied by the defendant. She went to the hospital that night, and was operated on the next morning, and was on the operating table $2\frac{1}{4}$ hours. She testifies that she asked defendant to go to the hospital with her, but that he refused to do so. He testifies that the reason he did not go, was because he couldn't stand it to be present; and there is other testimony that, when she started to go, he assisted her into the conveyance, and that he cried and told the doctor to take good care of her. The next Sunday after the operation, which occurred on Friday, he went to her room in the hospital. She testifies that he was so angry he was white, and raised his arms and hands like a crazy man, and cursed her soul to hell, and said everything abusive that he could say, because she had everything cut out of her; that he said she wasn't a woman, and he wasn't going to live with her; that he cursed and swore at her, because she couldn't have children; that, prior to that, he had always objected to children; that he stayed in the room about an hour and a half, but showed no affection of any kind. He testifies that he took her flowers to the hospital three times. The first time, he gave them to the nurse, and thought his wife did not know him. He went to the hospital again, the next Tuesday night after his work, and

brought a note for \$230 from the bank for her to sign. She says it was a renewal note, but he claims it was to pay some of the bills that she had made. She told him she could not sign it, because he had refused to give her any money since she got home, and that he had said he never would, and there would be no use for her to sign it. She testifies that he swore and cursed, and tried to make her sign it, and she said she could not lift her hand, she was so weak and sick. The next Thursday night, he went again, and she testifies that he cursed and swore, and that she finally signed the note. She testifies that, at this time, there was no sign of affection, or at either visit, and that he wanted to know, with an oath, how long she was going to lie there, and that he said:

“By God, I suppose you know what it is going to cost for you to lay here. We will never get that note at the bank paid, as long as you lay around like this.”

He denies that there was any friction or cursing, and says that he kissed her, and inquired how she was getting along. She was in the hospital a little over two weeks. When she returned home, she was not able to move her feet on the floor, or lift them. When she stood up, two persons had to hold her, and a third move her feet. She was in bed two weeks, after she got home, and then began sitting up a little. After she had been home about a month, her son telephoned her to take a ride, and defendant objected to it. He admits that he objected, but puts it on the ground that it was too cold for her to ride, as she had been in bed. Plaintiff testifies that defendant always objected to her son, and referred to him as “that God damn kid.” This he denies. The next morning after plaintiff took the ride with her son, there was trouble between the parties, with reference to a woman who had been helping plaintiff do the housework. Plaintiff testifies that, after that, defendant swore at her and cursed her continuously. She says:

“He was never in the house for an hour at a time without cursing and swearing at me. From that time on, he would

say, 'God damn you, ain't you going to get out of bed?' 'God damn you, ain't you going to fix my lunch?' and just curse. I told him that I could not work, on account of my health, and the doctor had cautioned me about pumping or carrying water; but I had to do it, and he came home and swore at me because I did not pump the water for the chickens. We had a cow and calf and pigs and chickens and garden; and, from the time the woman left, I did my own housework. Mr. Anderson got his own breakfast, but I managed to get his supper and put up his lunch. I often asked for help, but he said, 'By God, you can do it or let it alone.' "

She testifies that the cursing continued, and that, about June, she could not stand it there, was sick and nervous and weak, and nobody to do the work; so she went to her son's, and has been there ever since. Thereafter, this suit was brought, August 6, 1918. She says that, the last twelve nights she was at home, defendant stood over the foot of her bed, and cursed and waved his arms until she was afraid of him, and she told him that, if he did not stop, she would leave. A neighbor woman testifies that she helped plaintiff when plaintiff had typhoid; that there was no nurse. On cross-examination, she says she never heard defendant abuse his wife, but that he was hardly ever there when witness was. As said, plaintiff is corroborated by her son and his wife, as to defendant's abuse. On the other hand, a young girl 14 years of age, testifying for defendant, says that she lived in the Anderson home three months, and that, at that time, plaintiff's health was not poor, that she knows of; that she was up and around, doing the housework, or helping; that she never heard defendant use any vile or profane language towards plaintiff, or mistreat her; but, as we understand the record, this was in September, 1917, before the alleged change in defendant's conduct. Two or three neighbors, testifying for defendant, say that they never heard defendant abuse her; but one of these testifies that he never was there when plaintiff and defendant were both present. Some of these were there more frequently.

Plaintiff says that defendant did not abuse her as much in the presence of neighbors and others. One of defendant's witnesses testifies that, while he never heard defendant curse his wife, defendant sometimes used blasphemous language in talking with witness. Another witness testified that defendant used profane language in conversation, but thinks it was more of a habit than anything else. Defendant denies much of plaintiff's testimony, and denies mistreating her by cursing, and says that he never objected to her having medical treatment. He introduced two or three letters received from plaintiff while she was in California, in which she expresses more or less affection for him. As to the effect upon plaintiff's health, plaintiff testifies that her health is very poor, and says it is the result of defendant's abuse; that she has been advised by different doctors to have an operation for hernia, but hasn't the money to pay for it; that she is only able to be on her feet for a short time, and that the hernia is very painful all the time; that she has never entirely recovered the strength she had prior to the operation. The daughter-in-law testifies that plaintiff's health, since she has been living with them, has been very poor; that she has been sick in bed at two different times, for a week at a time. The doctor testifies that, since the operation at the hospital, plaintiff has developed umbilical hernia, at the point where the incision was made for the operation, which condition still existed at the time of the trial; that she will have to be operated on; that she is nervous, and will suffer more or less pain constantly; that he saw her, a short time before the trial; that she was then extremely nervous; that she is in poor physical condition, on account of the hernia and extreme nervousness; that worry, with physical illness, produces such a condition of nervousness; that her domestic troubles for the period of six months would certainly produce a nervous condition, under some circumstances; that this does not mean that the nervous condition was due to the hernia. Doubtless, plaintiff has exaggerated somewhat in her testimony, and doubtless, defendant has shaded his testimony in his own

favor. We are convinced, from the record, that defendant has mistreated plaintiff to some extent, by cursing her and swearing at her. Up to this point, it may be that the evidence should not be held sufficient to justify a divorce; and yet, considering the state of her health, it is, to say the least, very close.

2. There is, however, in addition to the foregoing, another circumstance that is not and cannot be disputed. The defendant filed a cross-petition, asking for a divorce from plaintiff on the ground of cruelty, setting out a number of circumstances of alleged misconduct on her part: among them, charging her with desertion; and charging that plaintiff has feigned illness at various times, and that she would lie in bed mornings, and that defendant was compelled to prepare his meals, and that, when defendant had gone to his work, plaintiff would arise, and spend the day on the streets and elsewhere; that, without defendant's consent, she went to California, under the pretext that she was ill; and charging that she had been guilty of adultery, with persons to him unknown. This cross-petition was dismissed at the close of the defendant's evidence, but it was dismissed without prejudice. There was no retraction of the charge by defendant. On cross-examination, he testified:

"I don't know of anybody with whom she has committed adultery. I do not know whether she has committed adultery with anybody or not, but I am willing to live with her. I do not know whether I accused her of it or not. I charged her with adultery with persons whose names are unknown to me. I don't want to hurt her feelings, or her standing. I think it would hurt her standing to have a thing of that kind put in the paper. If she would come back and live with me, I would treat her as well as I have treated her, in spite of the allegations in the cross-petition."

Defendant, at the time he so testified, was confronted with the fact that he had charged her with adultery, in his pleading. He does not testify that he will treat her properly, if she will live with him, but that he will treat her as well as he ever did. Under all the circumstances, there may

be some doubt as to whether his testimony on this point was given with entire good faith. Whether the false accusations of infidelity endanger the life of one so treated, must be determined from the attending circumstances, but such accusations are acts of cruel and inhuman treatment. *Blair v. Blair*, 106 Iowa 269. Whether the accusation by defendant in his cross-petition is, of itself, sufficient to justify a divorce, we need not determine; but, in connection with all the other circumstances in the case, we think plaintiff has made out a case for divorce. It is contended by appellant that, where the charge is made in a pleading without reasonable cause, malice will be presumed, and that such an allegation is wanton. We shall not review appellant's cases. They cite, at this point, *Coulthard v. Coulthard*, 91 Iowa 742; *Haight v. Haight*, (Iowa) 82 N. W. 443 (not officially reported); *Turner v. Turner*, 122 Iowa 113; *Shors v. Shors*, 133 Iowa 22; *Rader v. Rader*, 136 Iowa 223; *Pooley v. Pooley*, 178 Iowa 19; 14 Cyc. 606; 1 Bishop on Marriage, Divorce, and Separation (1891 Ed.), Section 1570; *Myrick v. Myrick*, 67 Ga. 771, 782, 783; *Avery v. Avery*, 33 Kan. 1; *Smith v. Smith*, 8 Ore. 100; *Williams v. Williams*, 67 Tex. 198; *Jones v. Jones*, 60 Tex. 451, 460; *Powelson v. Powelson*, 22 Cal. 358; *Rodgers v. Rodgers*, (Ky.) 17 S. W. 573; *Palmer v. Palmer*, 45 Mich. 150 (7 N. W. 350).

Appellee cites a number of authorities on the general proposition that, under the evidence, plaintiff is not entitled to a divorce, and on the question of the charge of adultery cites *Evans v. Evans*, 82 Iowa 462; *Felton v. Felton*, 94 Iowa 739; *Haight v. Haight*, (Iowa) 82 N. W. 443 (not officially reported); *Blair v. Blair*, 106 Iowa 269; *Young v. Young*, 173 Iowa 424. In the *Evans* case, it was held that the wife had so conducted herself toward other men as to provoke the language used by the husband. There is no evidence of that kind in the instant case. In the *Felton* case, there was a dispute in the testimony as to whether the husband had accused his wife of being unchaste. Such is not the situation here. In the *Haight* case, it was held that frequent and false public charges of this kind, where plaintiff

was in ill health, constitute legal cruelty. In the instant case, there were not frequent charges, but the charge was in a written pleading, a public record. In the *Young* case, the evidence was in dispute as to whether the charges were made.

3. Defendant testified that, at the time of the trial, his average daily wage for the last year was \$6.50, and that he had steady employment. She gives it at \$7.00 a day. At the time of the marriage, defendant had a small amount of money, \$50 or \$60, and owned a cottage in the city, which she says he had been offering at \$2,800 or \$3,000, which was traded for the acreage property and \$900. She says that, at that time, the acreage was all in a corn field, with no house, and that they valued it at \$2,500. He puts these figures somewhat higher. She testifies that, when they moved onto the acreage, they lived in a barn, and that they built a hog house, cave, chicken house, and a small shack of a house, where they lived for three years; and that then they built the house which is now there, which cost about \$3,000. She earned some money, selling milk, cream, butter, and vegetables, and at different times worked for the city railroad company, and received about \$75 for that work. She says she put \$1,800 or more into the acreage property, and is corroborated by another witness as to having a considerable sum of money in the bank, which defendant says he never heard of. They own some live stock, a cow, chickens, etc. The amount and value of the personal property is not very definitely shown in the record. The petition alleges that it is of the value of \$1,000. There seems to be at least one Liberty Bond, referred to incidentally, which we understand to be in plaintiff's possession. The value of the acreage property is given by plaintiff at \$9,000; and others of plaintiff's witnesses, who seem to be disinterested, fix the value at \$8,000 or \$9,000. Defendant's estimate is \$6,000, and his other witnesses give it at about that. Somewhere between these two probably is the real value. Under the circumstances, it is somewhat difficult to

2. DIVORCE:
alimony:
division of
property.

determine just what would be an equitable adjustment of alimony and the property rights. In her original petition, plaintiff asked for \$500 permanent alimony, and that she be decreed to be the owner of the real estate, and for attorneys' fees. By an amendment, she asks \$2,000 and the property.

Our conclusion is that the property is of the fair and reasonable value of \$8,000, and that the defendant should be decreed such property, and that the plaintiff should be allowed the sum of \$3,500, established as a lien against said property, payable as follows: \$200 within 10 days from the filing of this opinion, and the remaining \$3,300 within 60 days thereof; that the plaintiff have all the household goods purchased by her; and that the defendant pay \$100 to plaintiff's attorneys, as fees in this case; and that a decree of divorce be entered. The decree is reversed accordingly, and the cause remanded to the district court for the entry of a decree in harmony with this opinion.—*Reversed.*

LADD, C. J., GAYNOR and STEVENS, JJ., concur.

KATHERINE DOLAN et al., Appellants, v. JOHN HENRY et al.,
Appellees.

WILLS: Jury question as to Mental Incompetency. Evidence re-
1 viewed in detail, and held to present a jury question on the
issue of testamentary capacity.

WILLS: Unnatural Distribution as Bearing on Mental Competency.
2 An unequal and unnatural distribution of property by testator,
no explanation appearing, presents a circumstance for con-
sideration on the issue of testamentary capacity.

WITNESSES: Transactions With Deceased. A witness who is in-
3, 5 competent to testify to personal transactions or communica-
tions with a person since deceased, is not incompetent to tes-
tify to matters of observation, bearing on the physical condition
of such person; i. e., (1) "that he was delirious;" (2) "that

he was kind of murmuring and talking to himself about things that happened years ago;" (3) "that he talked incoherently."

EVIDENCE: **Duration of Condition of Mind.** An expert who has 4 personal knowledge of the condition of a testator at a certain time may testify, not only (1) as to testator's mental incompetency at said time, but (2) as to the probable duration thereof.

Appeal from Linn District Court.—JOHN T. MOFFIT, Judge.

MAY 22, 1920.

AFTER the will of James Henry had been admitted to probate, four of his five children sought to have the purported will set aside as the product of undue influence, and for that decedent was of unsound mind when it was executed. At the close of all the evidence, the jury was directed by the court to return a verdict for the proponents, which was done, and judgment entered thereon. The contestants appeal.—*Reversed.*

Deacon, Good, Sargent & Spangler, for appellants.

Johnson, Donnelly & Swab and *B. L. Wick*, for appellees.

LADD, J.—James Henry died February 21, 1916, at the age of about 82 years, survived by five children, the contestants and John Henry, one of the proponents. The other proponents are the sons of John, the grand-
 1. **WILLS:** jury question as to mental incompetency. sons of decedent. The latter's wife departed this life intestate, about 40 years previous to the death of her husband, seized of 160 acres of land, and he had never remarried. At that time, their youngest child, Katherine, who was subsequently married to one Dolan, was 2½ years old, and the eldest child, William, was about 11 years of age. Decedent then owned 80 acres of land, which subsequently was sold by him to his daughter, Maggie Harrington, in payment for which he received

money and the conveyance of her interest in the realty left by her mother. This, with the one-third interest he had inherited from his deceased wife, left him owner, at the time of his death, of 7/15 of the 160 acres, and of 100 acres north of Fairfax, which he had since purchased; and he had personal property, consisting of a horse and deposits in several banks, amounting to about \$6,000. The paper purporting to be his last will and testament, made December 22, 1915, after directing the payment of funeral expenses and the erection of a monument, provided that his property should pass "to my five children, subject to the following items and conditions, to wit: First: I bequeath all of my real estate, including my seventy acres in Section nineteen (19), Fairfax Township, and also including my farm of a fractional one hundred acres lying north of Fairfax to my son John and his sons as follows: my son John is to have the use and crops, rents, etc. from the land during his lifetime. At his, John's death, his sons shall have the use, crops, etc. during their lifetime. However, the land is not to be sold or incumbered during the lifetime of my son John or his sons. Second: To my son William, I bequeath the sum of five hundred dollars (\$500.00), said sum to be held in trust for him and he to have the income derived therefrom. At his death, the principal to revert to my estate to be diverted as the personalty among my daughters, and also subject to the conditions under which my daughters receive their respective portions of my estate. Third: All the balance of my personal property, including my cash, notes, money in bank, stocks, rents, amounts due me, etc. are to be divided among my daughters as follows and subject to the following terms: (a) To my daughter Maggie Harrington I give one third of the personalties and money mentioned and set out in Clause three preceding. (b) To my daughter Katherine Dolan I give one third of my personalty mentioned and set out in Clause three preceding. (c) To my daughter Nellie Horrigan, I bequeath one third of my personalties mentioned and set out in Clause three preceding, said one third to be held in trust for her and she to have the interest

and income derived therefrom during her lifetime and at her death her one third shall revert and be divided equally among the three children, John, Maggie and Katherine."

His son John was designated to act as executor. There is no controversy but that the evidence was insufficient to sustain a finding, were it made, that the will was the product of undue influence. Contestants contend, however, that the court erred in ruling that the evidence was insufficient to raise an issue as to whether the deceased was of unsound mind when he signed the paper purporting to be a last will and testament.

I. Some details are essential to a correct understanding of the relations between deceased and his children, as bearing on the fairness of the will. William was past 53 years of age, at the time of the trial, had never been married, had left home when 15 or 16 years of age, had lost one arm, when about 22 years of age, and, 9 or 10 years previous to decedent's death, was in some way dragged, so as to dislocate his hip joint, after which he was a helpless cripple, and, at the time of the trial, was without means, and was making his home with his youngest sister, Katherine. He had never received any rent or income from his undivided $\frac{2}{15}$ of the 160 acres which he had inherited from his mother, and conveyed such interest to John in 1910 for a consideration of \$3,000, which must have been expended thereafter in caring for himself. Katherine, the youngest child, married, when about 32 years of age, and had five children. Her husband, Dolan, was a fireman in Cedar Rapids, and their only property, at the time the alleged will was made, was a home, valued at \$3,500, with an incumbrance of \$1,000. She had participated in keeping house, worked in the field, husked and plowed corn, pitched hay, harrowed, cultivated, put in oats, shocked grain, milked cows, done chores, and helped in farm work generally which ordinarily is done by men, besides housework, save when attending school in Cedar Rapids during three terms, and teaching one year. When her father purchased the 100 acres north of Fairfax, in about 1900, she accompanied him

to that farm as housekeeper, and did outdoor work, as described, during four or five years, until her marriage. His daughter Nellie had assisted her father in all matters about the farm, as did Katherine, until her marriage, at 29 years of age; and, after her husband's death, she returned to his home on the 100 acres, where she remained about 3½ years, until after Katherine had left, when she married her present husband, Horrigan, and is now living on 80 acres of land which she owns, subject to a mortgage of \$1,400, which is fairly well stocked. Margaret lived at home, save when attending school and teaching about six years, until about 28 years of age, when she married one Harrington. About 1905, she purchased the 80 acres of decedent, as heretofore stated, and it appears that she has four children and an intemperate husband. John Henry has lived, with the exception of a few months, on the 160 acres all his life. From the time decedent moved to the 100-acre farm, he had enjoyed the use of the premises, without accounting therefor to his brother and sisters or father, except, possibly, the rent for one year, until the settlement in 1910, when he acquired the interest of all except that of decedent, which included the share of Mrs. Harrington, paying each of his two sisters and William \$3,000 therefor. His realty is incumbered for something over \$5,000, and he is indebted about \$1,000 besides. His personal property is quite sufficient to offset the indebtedness. He was married in 1903, and has six children. Decedent made his home with John during the last 6 or 7 years of his life.

From this recital it is manifest that John had no claim on the decedent's bounty superior to that of any other of his children, and a much smaller claim than had William.

2. WILLS: unnatural distribution as bearing on mental competency.

True, the latter had left home at 15 or 16 years of age, and John swore that:

"He returned one time, when he got hurt, 9 or 10 years ago, I think; and, up until that time, he hadn't been home for over 30 years.

If he was at home, I never saw him. He used to go to the neighbors' and to Bolands' and stay there, but he never

came to our house. The time he got hurt was the only time he came to our house before my father died. The last time he came back, he didn't come to our house; he was around there, and to Mrs. Harrington's and to Mrs. Horrigan's, I guess, and to Cedar Rapids, but didn't come home. I never saw any letters addressed by him to my father, and I never saw any letters written by my father to him."

On the other hand, Mrs. Dolan testified that:

"He came back and forth, when he first left, and he came back again and stayed probably a year, and worked, and then went away again. He came back and stayed at intervals. When he went to railroading, he left the community, and there was quite a lapse of time before he came back. After he went to Superior, we heard from him occasionally. There might have been a period of a few years that we were doubtful where he was, and his letters might not have come frequently. Before his arm was taken off, there was quite a few years, I think, that we did not hear from him. There were many years that he didn't show up on the home farm at all. He came back, two or three years previous to when he made a division of my mother's estate, and was still there when we made the division. He had been disabled in Superior, and came back to Cedar Rapids and stayed with me about two years. * * * After he got the \$3,000, he went back to Superior and stayed about three months, and then came back and spent the winter with me."

From this and other evidence, which need not be set out, the jury might have found that, though William had been absent many years, his relations with his father had been friendly, for several years at least, and, in view of his helpless condition, it is scarcely conceivable that a father with sound mind should have limited his bounty to his helpless first-born son to the mere pittance of \$25 or \$30 per annum, interest on \$500, and have, at the same time, bestowed on his other son, in the vigor of health, and well-to-do, competent to care for himself, the use of all his land for life, and thereafter a life estate on John's sons, and on the three

daughters, all his personal property. What became of the remainder? Why should he have thus discriminated against this helpless son, and, further, why should he have discriminated between John and his daughters? That he had made his home with John, after Mrs. Horrigan had ceased keeping house for him, surely does not account for this; for, during this time, John was enjoying the use of $74\frac{2}{3}$ acres of land belonging to his father, and no claim is made but that the father met all his expenses, out of the income which he must have derived from the 100-acre farm and moneys on deposit with the bank. No charity, then, was involved in providing a home for decedent. We have discovered in this record no tenable ground for discriminating between his children, as manifested in this will, and the jury might have found that the disposition of his property, as therein directed, was unequal and unnatural, as between the children. If so, this was a circumstance to be considered in determining whether the decedent was of sound mind. *Manatt v. Scott*, 106 Iowa 203; *Mileham v. Montagne*, 148 Iowa 476, 485; *Stutsman v. Sharpless*, 125 Iowa 335; *Cash v. Dennis*, 159 Iowa 28. Nothing to the contrary appears in *Zinkula v. Zinkula*, 171 Iowa 287, where the right of the testator to dispose of his property as he wishes is recognized, as was done in the decisions cited.

II. The evidence disclosed that the deceased was a large man, of positive character and of unusual strength; that, during the latter part of his life, he had done the chores about the premises, and especially when John was away from home; and that, if anyone was there, he would merely attend to his horse. John testified that he continued in usual health until taken sick, on December 19, 1915; and John's wife, that he seemed to be pretty nearly as usual for several weeks before that time. She related that she had seen him start for town, early in the month, when she went to the barn and informed her husband, and then watched him from the window, and saw him fall, after he went over a fence at the railroad track; that he lay a few min-

utes, then got up and went on. Mrs. Dolan related that, two or three years previous, decedent had been very sick at her home, for a few days, and from that time to his last sickness she had "noticed he was larger over the abdomen region. He wasn't so lively; he couldn't get around so well; he wasn't so much of a talker; he would sit around and not have much to say, and very often he would fall asleep in his chair; he would fall asleep, and not rouse easily. I noticed drowsy spells."

Mrs. Harrington swore that her father's abdomen had been enlarging for a couple of years, and that she had observed that "father, for several weeks and months prior to his last sickness, was drowsy." John's wife said that he would get gas on the stomach, and would belch it up. There was room, then, for the jury to find that decedent was in failing health for two years at least, prior to his last sickness.

III. Mrs. Harrington was at the home of John for about three hours on December 19th, and testified that her father "had a cold chill, and was trying to raise gas from his stomach; his abdomen was bloated." Dr. Dvorak was called, and reached the decedent at about 2 o'clock A. M. of the next day, and, shortly thereafter, John telephoned Mrs. Harrington that her father was very sick; and she came in the morning, at 5 or 6 o'clock. She testified that he was then suffering pain; that his skin was of a yellowish color; his abdomen swollen; and that he was feverish. The priest was called, shortly after daylight, and administered the last sacrament of the church and extreme unction. Later, she notified Mrs. Dolan, who arrived about 9 o'clock in the evening, and remained until the 23d. She testified to having found her father in bed; and that he was bloated, was in great pain, and tried to vomit repeatedly until midnight, without raising anything; and that, in the morning, his skin appeared to be yellow; that, when she stepped into an adjoining room, to attend to her child, she heard her father moaning and talking about his troubles; that, after the scrivener had drawn the will and left, she heard her

father say to Mrs. Harrington, "Maggie, I gave you the money." Mrs. Harrington returned again at about 5:30 o'clock in the morning of the 22d, and she swore that, as she entered the house, she could plainly hear exclamations of pain and suffering by her father, and that he was "talking to himself in a kind of rambling way." Dr. Murphy, of Cedar Rapids, had been called by Mrs. Dolan, and he came out by way of Fairfax, bringing Dr. Dvorak with him, and arrived shortly after 8 o'clock in the morning, and immediately proceeded to examine decedent. Shortly after the physician's departure, John called a scrivener to draw the will, and the latter reached decedent in about a half hour, as estimated by one witness, or in an hour or an hour and a half, as estimated by another. Mrs. Harrington swore that she heard the scrivener say to her father, "You want John for your executor, don't you?" but did not hear the answer; that she heard him ask if he knew how much personal property he had, and her father responded that he did not know; that, at times she was in the room, hot applications were applied to decedent; and that, when she was there, her father's eyes were closed. Mrs. Dolan thought Dr. Dvorak left the sick room before Dr. Murphy. She testified, also, that she noticed, during the night before, decedent's urine in receptacle; that it was thick and the color of coffee, or of copper when thrown on the snow; that she was in the room all the time Dr. Murphy was there; that decedent winced, when the doctor tapped him on the shoulder; that, as soon as Little could obtain turpentine from town, after the doctor left, applications of hot water and turpentine were kept on the right side of decedent's abdomen and right shoulder, until 3 o'clock in the afternoon; that her father's abdomen was relieved, by 1 or 2 o'clock in the afternoon; that, previous to that time, he was badly bloated and full of gas, and had great difficulty in breathing; that, after the application of these hot cloths for some time, the gas began to escape from his bowels and through his mouth, and the perspiration started, and he became more restful; that a very large amount of gas es-

caped; that, after this, he became restful and quiet. Mrs. Horrigan did not reach her father's bedside until after the will was signed, and testified that, when she entered the room, she didn't think her father recognized her; that "he was kind of murmuring and talking to himself about things that happened many years ago."

The portion of the answer quoted was stricken, on motion, for that, as was said, the witness was incompetent, because of the bar of Section 4604 of the Code. The ruling was erroneous, for that she had not testified

3. WITNESSES:
transactions
with de-
ceased.

to any transaction or communication between her father and herself. There was no room to infer that the murmuring or talking was directed at the witness. The evidence, then, should be regarded as a part of the record, in passing on its sufficiency to carry the issues to the jury. The witness testified, further, that her father "appeared to be kind of stupid and drowsy," but became better, at about 1 o'clock, after being relieved of the pain and gas.

IV. Dr. Murphy, after qualifying, related that he had known decedent about 15 years, having last seen him about 5 years previous to the examination; that he found him sick in bed; that decedent apparently did not recognize his coming into the room; that he learned the history of the case from his daughters; that he remarked to decedent that he was sorry that he wasn't feeling well, to which no response was made; that he then proceeded to make an examination; that the heart action "was rapid, with impaired compensation, impaired action, common to elderly people;" that his pulse indicated a hardened condition of the arteries; that "he was suffering from arterial sclerosis." He explained that "the blood vessels get hard and tense, and, in the small organs, well defined; the small arteries shut off the normal supply of blood, and the parts of the body are impaired;" that the disease is recognized by shortness of breath, rapid pulse, rapid heart action, and is associated with Bright's disease, particularly in advanced life; that he noticed a slight swelling in the lower extremities, and some

in the abdomen; that his skin was slightly discolored; that small blood vessels were prominent, particularly in the region of the temporal bone, and the lips were dry; that his eyes were slightly watery and considerably discolored; that diminishing the blood supply to the organs of the body, and particularly the brain, impairs them; that the mind or brain of a man suffering from arterial sclerosis is not normal; that the disease had gone on to an advanced degree; that the vessels of the wrist were prominent and hard, rolled under pressure, and were much like pipe stems; that decedent was suffering from the progressive condition that follows arterial sclerosis; that, in his opinion, he was suffering from Bright's disease, which was an aggravation of a chronic condition; it was the flaring up of an old trouble; that a man who was suffering from arterial sclerosis and Bright's disease would very likely be fired up and aggravated; that the diseases he found "would produce intoxication of the system, a failure to throw off the normal secretions," and the poisons would be reabsorbed in the body, and carried in the blood as long as it continued to circulate; that the intestines were stretched with gases; that the liver was in a stage of contraction, called cirrhosis of the liver, which would impair decedent physically and mentally; that the normal amount of bile would not be secreted, and the blood would not be renovated; that his body would become toxic, and his skin become yellow. It was the opinion of the doctor that the failure to eliminate these poisons of the body reduced decedent's vitality, and tended to produce coma; that the failure of the liver and kidneys to eliminate the poisons from the body would impair the brain; that Bright's disease had existed for several years, and was in the acutely aggravated condition; that the elimination process of his kidneys, assisted by his liver, was impaired at that time, about $\frac{2}{3}$ to $\frac{3}{4}$ of normal; that a toxic condition precedes the state of coma; that decedent was "breathing faster than he should; he was toxic; his skin was dry, harsh, and tense:" and the doctor was of the opinion that, had nothing been done to assist in the

elimination of the poisons, decedent would not have lived longer than from 1 to 3 days. He advised the use of hot applications, with turpentine and fluids in the mouth; that he be bathed with hot sponges twice daily, and afterwards rubbed briskly with alcohol; that he be given two teaspoonfuls of digitalis every 2 hours, and Frazer's brandy, 3 ounces every 6 hours; a high rectal enema morning and evening, with Epsom salts and 3 quarts of water; that, when in pain, he be given $\frac{1}{4}$ grain and $\frac{1}{150}$ grain of morphine and atropine, not oftener than once in 8 hours; that he be put on milk, water, soup, and broth, as a diet, and be given "Bulgarian bacillus morning and evening, one tube in one-half glass of water, sweetened, the bacillus being made from buttermilk, and intended to reduce the germs in the intestinal tract." He was then asked, after reciting some of the matters mentioned, "Would or would not there be any improvement in his condition and mental condition, without relief, and without the treatments which you have described, and which you have detailed to the jury?" and, over objection, answered:

"There would be no improvement in his physical condition; he would get worse. Q. How about his mental condition? A. There would be no improvement in his mental condition. Without that treatment his mental condition would get worse. Without that treatment, his physical and mental condition would remain about the same in 1, 2, or 3 hours as when I finished my examination. His mind was impaired, due to his physical trouble."

He was then asked "whether or not, in your opinion, he was, at that time, of sound or unsound mind?" and answered, over objection:

"An unsound mind, due to the toxic condition of his body. Q. State whether or not, in your opinion, he was in such a condition of mind as to intelligently understand the extent and value of his property. A. No. Q. State whether or not, in your opinion, Mr. Henry was in a condition of mind where he could intelligently realize the obligations which he was under to those next of kin to him.

A. No. Q. State whether or not he would be able, within the next 1 or 2 hours [after examination], to intelligently understand the nature and extent of his property, in the absence of treatment which you prescribed. A. No. Q. State whether or not, within a short time after you saw him, in an hour or two, he would, in your opinion, be able to understand intelligently and to realize the obligations which he was under to those next of kin to him, in the absence of the treatment which you prescribed. A. No."

On cross-examination, the doctor was asked as to his testimony on the previous trial, and if, in his opinion, decedent was of unsound mind, or did not appreciate his obligations and realize the extent of his property, if he made certain statements to the scrivener, and swore that he didn't believe "he was conscious of what he was doing when he signed the will;" that he didn't believe "that he was clear-headed as to what he was doing;" that the condition of his mind, within an hour or two after he saw him that morning, would be such that his volition would be impaired; that, on the morning of the 22d of December, when he saw decedent, and for 2 or 3 hours after that, his condition of mind was such that he could respond to suggestions, when aroused.

The evidence was in conflict as to whether this physician advised the decedent to settle his property; and, on further cross-examination, the doctor swore that, if the decedent made the statements with regard to his property and family, as testified to by the scrivener, he would not say that he did not have an intelligent knowledge thereof. Four physicians were called, and each, after qualifying, in response to a hypothetical question, accurately detailing the facts which the evidence tended to show, expressed the opinion that the decedent's condition did not materially change, within the times after Dr. Murphy examined him and when the will was signed; that he did not, at the time, appreciate the extent or value of his property, nor under-

stand the claims of his children to his bounty; and that, in their opinion, he was of unsound mind.

V. On the other hand, Dr. Dvorak, who accompanied Dr. Murphy, testified that he (witness) didn't examine him for arterial sclerosis, but knew he had it, to some extent, and that his temperature might have been two degrees more than normal; denied that his complexion was yellow; swore that Dr. Murphy did not take a sample of his urine, though Mrs. Dolan corroborated the doctor in saying that he did take it, and that the witness made an analysis, and found that it contained bile, but did not examine it for casts; was of opinion that bile in the urine was a sign of Bright's disease; agreed with Dr. Murphy as to the condition of the heart, but did not find any evidence of uremic poisoning; did not find him in a state of stupor, nor delirious. He testified, also, that the patient's liver was not larger than normal; that, when he entered the room on the 22d of December, with Dr. Murphy, the decedent inquired, "What are you two devils here for?" that Dr. Murphy obtained the history of the case from decedent; that they had no difficulty in understanding him; that he discovered nothing that indicated decedent to be of unsound mind; that, when he went out a second time, to take a nurse, he found decedent in the same condition as he had been when examined; that, when he and Dr. Murphy were there, besides talking of his sickness, decedent spoke of the weather, and inquired if it was very cold out; that Dr. Murphy did not take his blood pressure. The witness expressed the opinion that the decedent was of sound mind. The nurse, who arrived at 4 or 5 o'clock in the afternoon of the 22d, remained until the 26th of January following, and was of opinion that decedent's mind was all right. The scrivener, cashier of a local bank, swore that, when he reached decedent's bedside, the latter was not in a stupor; that he had a chat with him about a number of things; that testator told John to bring him his pocketbook, which was done, and, at the direction of his father, John handed the deposit slips and a passbook from it, and called attention to a certificate of deposit in

one bank in Cedar Rapids of \$1,800, and a deposit slip in another bank for that amount, and to the passbook, showing a deposit of \$2,500 in a local bank. There was also a little money in the pocketbook. He further testified that decedent then told him the names of his children and what property he had, and, in response to inquiry, advised him that he wanted John and his boys to have the land as long as they lived, and wanted it fixed so that it could not be mortgaged or sold, and the personal property and money were to be divided among the girls, Nellie's portion to be held in trust, \$500 to be set aside for Willie in trust, and he was to have the use of it only; that Willie had never been at home or helped any there, and that Nellie had no children; that he did not wish Harrington to get any of his money; that he then repeated the arrangement, and asked decedent if it was right, and, upon response in the affirmative, proceeded to draw the will; that he told decedent that he could place Nellie's portion in trust, so that she could have the use of it, and so that it would go to the children after her death, and the same way with Willie's; that he read the will over to decedent, and that he approved it; that he was not sleepy or drowsy, and the witness had no difficulty in understanding him; that his complexion was normal, though he was suffering more or less pain; that witness was there until about 11 o'clock in the forenoon; that decedent referred to his undivided portion of the 160 acres as the south 70 acres of the home farm; that decedent couldn't read or write; that the witness "suggested to Mr. Henry that he put whatever he was going to give Mrs. Horri-gan, in trust;" that he suggested "that he put Willie's share of \$500 in trust;" that testator so did, saying that Nellie and Willie would have something, and the suggestion suited him; that decedent did not say how much corn he had in the elevator, but said he had some notes, but not how many. Several witnesses testified that they had conversations with deceased, at about the time in question, and that, in their opinion, the decedent was of sound mind; and two of them

stated that they had heard decedent say, shortly before, that he wanted John to have all the land.

This is substantially all the evidence adduced. Necessarily, many of the details have been omitted, and possibly some of importance. Enough has been set out, however, to indicate that the cause should have been submitted to the jury. In the first place, the terms of the will were such as to suggest an unbalanced mind as its author. The weight to be accorded to such a circumstance, in passing on the issue, necessarily depends on the variance of the terms of such will from those which might and ordinarily would be expected in the will of an ordinarily just and prudent person in a like situation. There is also evidence from which the jury might have found that decedent had been in failing health for at least two years, and frequently had been drowsy, as would be likely, were he afflicted with the diseases described by Dr. Murphy. So, too, the jury might have concluded that, on December 22, 1919, the decedent was suffering great pain, was afflicted with gas accumulations in the stomach, and possibly further down; that he was in somewhat of a stupor, until he had been relieved by the application of hot water and turpentine in the afternoon, subsequent to the signing of the purported will. Of course, there was evidence to the contrary, but the conflict therein was for the jury to determine. And finally, the expert testimony of Dr. Murphy, in connection with the other evidence, warranted the finding that decedent was not of sound, disposing mind, at the time the so-called will was signed. This physician expressed the opinion that the decedent was of unsound mind when he examined him, and 1 or 2 hours thereafter, and that he did not believe he was capable of making his will, at the time the same was signed. The evidence of four physicians, in answer to hypothetical questions, tended to confirm Dr. Murphy's opinion. True, Dr. Dvorak controverted many of the statements made by Dr. Murphy, and was of different opinion; but the controversy was for the jury, and it was for that body to say whether they would accept the testimony of Dr. Murphy

or of Dr. Dvorak. The appellee contends that there was no evidence of unsoundness of mind at the very time the will in question was made; but, in so doing, they overlooked the opinion of Dr. Murphy that decedent did not have capacity to execute a will within 2 hours after his examination of the witness, and that the will was signed within that time; and also, they seem to have ignored the testimony of Mrs. Horrigan, that her father was in a stupor when she arrived, subsequent to the time when the will was signed. And there was other evidence that his condition was the same up to about 1 o'clock, when he seemed somewhat relieved by the hot applications. In argument, it is assumed that the scrivener's testimony concerning what the decedent said to him about his family and property is to be accepted as true; but whether so, under the circumstances, was a matter on which the jury must have passed. The testimony of the daughters tended to refute the statements of the scrivener as to decedent's condition, and as the scrivener was alone with him, most of the time while there, appellants necessarily relied upon the testimony of the daughters, as well as the opinion of Dr. Murphy, tending to put the scrivener's testimony in issue. See *Womack v. Horsley*, 178 Iowa 1079. Were it to be assumed that the testimony of the scrivener was, in all respects, correct, little would be left to determine. The physicians admitted that, if the decedent's alleged statements to the scrivener concerning his property and family were made, they could not say his mind was unsound. This would not necessarily impair their testimony that, in the absence of such statements, in their opinion his mind was unsound. In other words, the jury was not required to accept what the scrivener said, but might have relied upon the testimony of his daughters as to his condition during the time the scrivener was present and thereafter, and Dr. Murphy's opinion, in substance, that he was without testamentary capacity for at least 2 hours after the doctor's departure. Though the diseases from which decedent was suffering were progressive in their nature, the evidence leaves no doubt that he was possessed

of testamentary capacity up to the time he was taken sick, and that he so far rallied under treatment as to recover from the temporary stupor, if any there was, with which he was afflicted. Appellee contends that the testimony of experts, based on facts occurring at times other than when the will was made, is insufficient to establish the fact of mental unsoundness at the time of making the will. The ruling in *Womack v. Horsley*, 178 Iowa 1079, is to the contrary, and the decisions relied on do not so hold. What is held in *Blake v. Rourke*, 74 Iowa 519, *Speer v. Speer*, 146 Iowa 6, and other decisions, is that a nonexpert may not express an opinion of the condition of the mind of a person under consideration at a time other than when seen. The rule is as laid down in *State v. McGruder*, 125 Iowa 741, that:

4. EVIDENCE:
duration of
condition
of mind.

"A nonexpert may not express an opinion concerning mental condition of the subject of investigation, save at the times of his observation, and the question propounded to McGruder was so limited; but an expert, as Dr. Garton appeared to be, may be permitted to express his opinion, not only of the condition of the mind at the time of the examination, or that fixed by the hypothetical question, but concerning its probable duration, past and future, and whether it existed on a particular day."

A finding that decedent did not have testamentary capacity when the will was signed, might have rested on Dr. Murphy's opinion that he was of unsound mind when he saw him, and that he would not sufficiently recover so to do within a time including that when the will was signed; the testimony that decedent told the scrivener that he did not know how much property he had; that his eyes were closed, at least part of the time the scrivener was there; the testimony of the daughters, that he was not relieved until after 1 o'clock in the afternoon of that day; and Mrs. Horrigan's testimony, that he did not seem to recognize her when she came (after the will was signed), and that he then seemed to be in a stupor. We are of opinion that the

court erred in directing a verdict for proponents.

VI. Mrs. Dolan was asked this question: "Excluding anything that you said to your father that night, or anything he said to you, state whether or not your father was delirious."

5. WITNESSES:
transac-
tions with
deceased.

An objection as incompetent, irrelevant, and immaterial, and calling for a conclusion, and that the witness was incompetent, under Section 4604 of the Code, was sustained. The question did not call for any transaction or communication between the witness and decedent, and, therefore, she was not incompetent to testify. Evidence of his condition the night before the will was prepared and signed surely would have some bearing on the issue as to mental condition in the forenoon following. Whether he was delirious could be determined only from his speech and conduct, and, therefore, was in the nature of a conclusion; but a conclusion of fact, which might not be otherwise proven. The facts indicating that he was delirious could not well be reproduced or described to the jury precisely as they appeared to the witness, and, for this reason, under a well-established rule, the witness should have been permitted to answer the question. See *Vannest v. Murphy*, 135 Iowa 123; *Stewart v. Anderson*, 111 Iowa 329; *Ewing v. Hatcher*, 175 Iowa 443; *Mikesell v. Wabash R. Co.*, 134 Iowa 736; *Kesselring v. Hummer*, 130 Iowa 145.

"It is competent for a witness to testify to his conclusion, when the matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time." *Yahn v. City of Ottumwa*, 60 Iowa 429.

The same witness was asked:

"Now, after midnight, after he quit vomiting, as you stated, just describe his appearance from that time until after your sister Maggie came. A. He talked in an incoherent manner, and was muttering."

This was stricken out, on motion, as not responsive, and as incompetent, under Section 4604 of the Code, and as opinion and conclusion of the witness. Though not respon-

sive, the examining counsel only might complain on that ground. As no communication to or with, nor transaction with, decedent was involved, she was not incompetent, under the section of the Code referred to; and, under the ruling above, the answer was not objectionable as conclusion, and it should not have been excluded.

Other rulings of like nature are disposed of by what has been said. Because of not submitting the issues to the jury, the judgment is—*Reversed*.

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

INDEPENDENT SCHOOL DISTRICT OF MANNING, Appellee, v.
JULIUS J. MILLER, Appellant.

JULIUS J. MILLER, Appellant, v. H. D. HINZ et al.,
Appellees.

ACTIONS: Consolidation by Stipulation. Irrespective of the statute (Sec. 3644, Code, 1897), relative to the consolidation of actions, it is competent for parties, with the approval of the court, to stipulate for consolidation and for the terms thereof.

SCHOOLS AND SCHOOL DISTRICTS: Vacancy in Office of Treasurer. The office of school treasurer is a "civil" office and, notwithstanding the provisions of Art. 9 of the Constitution, relative to the state board of education, becomes vacant whenever the incumbent ceases to be a resident of the district. (Sec. 1266, Code, 1897.)

OFFICERS: Vacancy—Permanent Removal from District. An office becomes vacant whenever the incumbent permanently removes from the district for which he was elected or appointed, even though he has *not* taken up a permanent abode elsewhere.

MANDAMUS: Possession of Funds of Public Office—Mandamus (?) or Quo Warranto (?) Mandamus is the appropriate remedy to

compel the turning over of the funds and papers belonging to a public office, and in such case the court will determine whether plaintiff has prima-facie title to the office, even though quo warranto is the sole remedy for finally testing the *title* to the office.

ACTIONS: Consolidation—Effect of Stipulation. The agreed consolidation of two separate actions, with stipulation for one decree, brings into existence a new action, with the issues of the former two actions; and a stipulation that such consolidation shall be without prejudice to issues raised in the former actions will not reach the point of determining for the court the judgment which shall be entered on the findings made.

Appeal from Carroll District Court.—M. E. HUTCHISON,
Judge.

JUNE 28, 1920.

THE above-entitled causes were consolidated, and, on hearing, the relief sought in the first case was allowed, and in the last, denied. The defendant in the first and plaintiff in the last appeals.—*Affirmed.*

Salinger, Reynolds & Meyers and *F. H. Cooney*, for appellant.

E. A. Wissler, for appellees.

LADD, J.—About the middle of April, 1919, J. J. Miller disposed of his dental practice and office equipment to one McFate, with the understanding that he would quit the practice, June 10th thereafter, and not resume it in Manning while the buyer remained there, without his consent. Miller was serving a two-year term as treasurer of the plaintiff district, beginning July 1, 1918. He appeared at a meeting of the directors in the fore part of June, 1919, saying to the board that he wanted to resign; but acquiesced

in the suggestion that he defer this until July 1st following, when the annual settlement would be had. His annual report was submitted at that time, and, on the day following, the secretary inquired of him by letter concerning his intentions, to which he responded that he had concluded not to file his resignation, adding:

"I had hoped that this matter could have been arranged and a transfer of the office made without a contest for my successor, but, from all appearances, this will be out of the question. I regret exceedingly that this could not be done without any feeling, as the people of Manning have been very kind to me, and I dislike to do anything to create feeling or strife among my friends. Under all of the circumstances, it may be best to permit the people to fill this vacancy at the election in March."

A motion was adopted:

"That, the office of school treasurer being vacated on account of the removal of the treasurer from the county, that the board meet in adjourned meeting on Thursday evening, July 10th, at 8 o'clock, for the purpose of electing his successor, on condition that all members are present."

At the time so fixed, E. D. Sutherland was elected, and thereafter qualified as treasurer. On the next day, the secretary of the board of directors notified Miller that the vacancy caused by his removal to that place (Denison) had been filled by the appointment of Sutherland, and that he had been "instructed to notify you to turn the funds and all other property of the district over to him as soon as possible." This Miller did not do; and, on August 16, 1919, an action in mandamus was brought, in the district court of Crawford County, to compel Miller, who then lived at Denison, to deliver all books, funds, and other property of the district. Miller answered, admitting that he retained the same, but averred that the funds of the district were on deposit with the Iowa State Savings Bank of Manning, and warrants paid upon presentation. In a separate division of the answer, he denied that the remedy by manda-

mus was available. Thereafter, in January, 1920, Miller began suit in Carroll County, alleging in his petition the facts recited above; that the board of directors and the president and secretary of the school board were about to certify to the appointment of Sutherland as treasurer of the district; that the board of directors had wrongfully declared the office of treasurer vacant, and had illegally assumed to elect Sutherland as treasurer to fill the alleged vacancy; that the action referred to had been brought in Crawford County; that, should the moneys be turned over to Sutherland, confusion would be caused: and he prayed that the district directors and officers of the board be temporarily enjoined from certifying the election of Sutherland as treasurer to the county treasurer, and that the latter be so enjoined from paying over any of the moneys of the district to said Sutherland as treasurer. The county treasurer interposed a general denial, and the other defendants averred that the funds had been deposited in the bank without authority, alleged that Miller had ceased to be a resident of the district, and prayed that the temporary injunction be dissolved and the petition dismissed.

I. Miller moved that the case pending in Crawford County be transferred to Carroll County, owing to his alleged residence there, but, as a matter of convenience,

counsel arranged that the cause be tried there, without conceding the matter of residence. Both cases came on for trial December 19, 1919. An attorney for Miller explained to the court that, although the causes of action were pending in different counties, all desired to have both determined by the court then sitting in Carroll County, and suggested that a stipulation might be required in order to try the Crawford County case there; that, "if it were consolidated with the Carroll County case, under an agreement that that should not be any concession * * * that Miller is a resident of Manning, as he claims to be, why couldn't there then be a single decree and a single record?"

1. ACTIONS:
consolidation by stipulation.

An attorney on the other side remarked that the evidence would be practically the same in each case, and that "a mere stipulation that the two cases are to be consolidated, without waiving any of the rights of either party, that this case can be tried as a Carroll County case in the present term of court." Miller's attorney then undertook to state a stipulation:

"Let it be agreed that the Crawford County case * * * shall be and is hereby, by stipulation and order of the court, consolidated with the Carroll County case * * * but that this consolidation shall be without prejudice to the claims of either party as to their rights involved in the litigation, or to the residence of the defendant, Miller, and that it shall be without prejudice to any claim of fact or law made by either party in the pleadings in either case."

This was acquiesced in by counsel for the school district, and attorney for Miller proceeded:

"I am trying to protect my own interest, you see, because I have a plea in there that the action to compel Miller to turn over the stuff is one which the court may not entertain in the form in which it is brought, and, of course, I desire to have it understood that, in arranging for this consolidation as a matter of convenience, that that point is not waived.

"The Court: Well, it will be so regarded and understood."

It was then agreed that there should be but one decree. It is plain from this recital that the parties understood that none of the issues raised in the several pleadings should be lost by the consolidation, and, regardless of what may be the rule where consolidation is ordered, under Section 3644 of the Code it was competent for the parties, with the approval of the court, to stipulate the conditions on which causes of action which might not have been joined shall be tried together, and we shall take up the several issues as seems most convenient.

II. Section 1266 of the Code declares that:

"Every civil office shall become vacant upon the happening of either of the following events * * *.

"3. The incumbent ceasing to be a resident of the state, district, county, township, city, town or ward by or for which he was elected, or appointed, or in which the duties of his office are to be exercised."

2. SCHOOLS
AND SCHOOL
DISTRICTS:
vacancy in
office of
treasurer.

That the office of school treasurer is a civil office is not questioned, but it is contended by counsel for appellant that the statute quoted does not apply to school officers. That section, in so far as it relates to such officers, is like Section 429 of the Code of 1851; and it is argued that, as the board of education was then in control of the school system, and was authorized to legislate with reference thereto, such offices were not contemplated in the last-cited section, or in the like section re-enacted in subsequent Codes. Article 9 of the Constitution of 1857 placed "the educational interests of the state, including common schools and other educational institutions * * * under the management of a board of education" (Section 1); and upon that board (Section 8) was conferred the "power and authority to legislate and make all needful rules and regulations in relation to common schools," the power being reserved in the legislature, however, to alter, amend, or repeal any of the acts, rules, or regulations so adopted. The board, however (Section 10), was denied the power to levy taxes or make appropriations of money. It was required (Section 12) to "provide for the education of all the youths of the state, through a system of common schools, and such schools shall be organized and kept in each school district at least three months in each year." The existing school district was expressly recognized and the laws relating to its organization and officers continued in force by virtue of Section 2 of Article 12, declaring that:

"All laws now in force, and not inconsistent with this Constitution, shall remain in force until they shall expire or be repealed."

There was no inconsistency in Chapters 69 and 70 of the

Code of 1851, providing for the organization of school districts, the election of president, secretary, and treasurer thereof, who constituted the board of directors, and defining their duties, with the provisions of Article 9 of the Constitution; and consequently these must have continued in force, until the board of education was abolished, in 1864. See Chapter 52, Acts of the Tenth General Assembly. We need not inquire whether the board of education had the power to modify or repeal the provisions of Chapters 69 and 70 of the Code of 1851, it being enough to say that it did not undertake to do so. The duties of treasurer were defined in Section 1138 *et seq.* of that Code, substantially as in the Code of 1897. It is argued, however, that, as Section 436 of the Code of 1851 did not provide for filling vacancies in school offices, and no authority existed, it should be held that Section 1266 of the Code should be construed not to include such offices. This assumes too much; for, under Section 1151 of the Code of 1851, it is provided that:

"Should a vacancy occur in the board, they may fill the same by appointment unless it is deemed expedient to call a special meeting of the district for the purpose."

As the treasurer was *ex officio* a director of the board, this included the power to fill the vacancy in the office of treasurer. Section 2771 of the Code, 1897, provides for filling vacancies in school offices, as does the statute quoted; and, as Section 429 of the Code of 1851 was the only statute declaring the event which created a vacancy, as is Section 1266 of the Code of 1897, we are of opinion that these last-named statutes should be construed as including all that their language imports, "every civil office." The history of the legislation on which appellant relies, furnishes no ground on which to base a holding to the contrary. Though Section 1272 of the Code, appearing in the same chapter as Section 1266, provides for filling about every vacancy other than that of school offices, we are of opinion that the latter section should be accorded the meaning its language purports, and that the words "every civil office" should be held to include school offices, and that the office of school treas-

urer becomes vacant whenever that officer ceases to be a resident of the district.

III. Had Miller ceased to be a resident of Manning at the time of the appointment of his successor in office? This issue was raised in the pleadings of each party in the

3. OFFICERS :
vacancy :
permanent
removal from
district.

suit brought in Carroll County, and its decision is essential to determine whether the appointment of Sutherland as treasurer of the district should be certified to the county treasurer, and to which the county treasurer should turn over the moneys collected for the district. As said, Miller went before the board of directors, about the 1st of June, with the purpose of resigning. Concerning this, the president of the board testified that Miller then said:

"We are about to leave Manning; I thought I would come in and see the board in regard to my resignation."

Another member of the board remembered that he said that "we all knew that he was about to leave, or something to that effect;" and still another member, that he "gave as the reason that he was going to leave Manning; said he was going to Denison." This witness also related that Miller had told him that:

"He was going to move to Denison, and that he would see me, and that he would be back to finish my work * * * that he had sold out, and was going to leave Manning."

His brother, by whom he was employed at Denison, swore that he was engaged for no definite time; that his brother had refused to go into partnership with him, because, as he said, he wished to be free to go, just as he liked. When he moved into his father's residence, his goods were stored in the building where he first moved. Dr. Sinn, still another member of the school board, recalled that, when Miller attended the meeting, he had said "he would have to resign, because he was going to move to Denison."

On the other hand, it appears that Miller disposed of his dental practice because of wishing not to be confined in the office; that he voted on the road question in Manning, in the fore part of September, 1919. He was an assistant

cashier of the Iowa State Savings Bank, in Manning, and had given some attention to the work in the bank, of which he was a director. The main reason for being assistant cashier, however, was to enable him to sign papers when the cashier was absent. According to his testimony, the bank had offered him permanent employment there, which he had not accepted. He explained that, though living at Denison, he had arranged with the bank to pay school warrants as they came in, but had never learned that payment might not be made from one fund to satisfy a warrant drawn on another, nor had exacted of the bank a depository bond, as exacted by Section 2768 of the Code Supplement, 1913. He testified further that he had packed his goods at different times, and shipped them to Denison June 4th or 5th; received no definite salary from the bank; purchased some residence lots in Denison as an investment, but had not considered building on them; that his purpose in disposing of his business and residence in Manning was to take a rest; that, in selling, he did not know where he intended to go, nor had he determined to leave Manning; that he collected rent on his house, subsequent to its sale, and the deal was not to be consummated until March 1st following; that his intention in going to Denison was to see if another line of work would agree with him better than dentistry; that he made no arrangement as to how long he would stay there; that he declined to take an interest in his brother's business, because he wanted to be free to go; that he was simply experimenting, to see if he would be satisfied with Denison; that he never entertained the purpose of abandoning his home or residence in Manning; that, in taking a vacation, he concluded not to be bothered with the responsibility of the treasurership, and that explained his purpose to resign; that, when he found the school board would not elect a successor in office who would keep his deposits in the Iowa State Savings Bank, he concluded not to resign; that, when he found that one of those who had promised to vote for his candidate to succeed him did not do so, he concluded not to resign; that "he wasn't certain,

if the purchaser of his house failed to pay for it, and he had to take it back, that he would want to go back to Manning." Such is the evidence on which the trial court based its finding that appellant had changed his residence. That he in fact moved from Manning to Denison about June 1, 1919, is not controverted. If this was a mere temporary absence, it was not sufficient to create a vacancy. *State v. Hemsworth*, 112 Iowa 1. It is sufficient if he remove from the district where the duties of his office are to be exercised, permanently, without the intention of returning. *Curry v. Stewart*, 8 Bush (Ky.) 560; *Inhabitants of Barre v. Inhabitants of Greenwich*, 18 Mass. 129. If he has left such district without intention of returning, and yet not taken up his permanent abode elsewhere, the office will have become vacant; for all that is necessary, in order to render the office vacant, is that the incumbent cease to be a resident of his district. This may happen without his having acquired a domicile elsewhere, as seems to be essential to lose the right to vote. See *State v. Savre*, 129 Iowa 122.

The evidence leaves little or no doubt as to Miller's purpose in leaving. He does not say that he intended to return. He disposed of everything connected with his profession as a dentist, and, by agreement, obviated engaging therein again. He disposed of his residence, and shipped everything he had, save his bank stock, to Denison. He told the members of the school board he intended to leave Manning, and, about the same time, published the following in a local newspaper:

"To My Friends and Patrons: Having sold my dental practice and am moving to Denison, Iowa, I take this means of extending my thanks and appreciation for the business and hearty co-operation that I have received during the sixteen years that I have practiced my profession here in Manning. It is with a feeling of regret that I am to leave the good old home town, not only because it is the town in which I have lived for nearly thirty years, and where I spent my boyhood days, and where I graduated from the high school, but because of the many friendships formed

and the hearty support received while in practice here. Denison is not very many miles away, and I hope to see you all occasionally. Again thanking you one and all for the patronage and business that you have given me, I herewith bid you all farewell, if I do not get to see you personally. With the best of wishes, Dr. J. J. Miller."

Would anyone sound such a farewell who was not intending to sever his relations of neighbor and resident forever? We entertain no doubt that his departure was with the design of leaving permanently, and that, upon his departure, the office of treasurer became vacant. This being so, the petition filed in the district court of Carroll County was rightly dismissed, and the temporary restraining order dissolved.

IV. The suit was brought in Crawford County to require Miller to deliver to his successor in office the books, funds, and other property of the office. One of his de-

fenses was that, as the right to such office was in issue, action in mandamus was not the proper remedy; that title to office may be contested only in quo warranto proceedings. Nothing is better settled than that

title to a public office may not be adjudicated in an application for a writ of mandamus. Equally as well settled, however, is the rule that, in such a proceeding, sufficient investigation may be made to ascertain whether the plaintiff has a prima-facie title to the office, and, if it be so found, then mandamus is the appropriate remedy to obtain possession of the books, funds, property, and insignia of the office which constitutes the subject of inquiry. *Cruse v. State*, 52 Neb. 831 (73 N. W. 212); *Ewing v. Turner*, 2 Okla. 94 (35 Pac. 951); *Cameron v. Parker*, 2 Okla. 277 (38 Pac. 14). The authorities are gathered and reviewed so thoroughly in the last-cited case that further citation is unnecessary. See 26 Cyc. 258. A proceeding in quo warranto is appropriate for testing title to office. *Vette v. Byington*, 132 Iowa 487. See, also, *Nelson v. Consolidated School Dist.*, 181 Iowa 424. Nothing

4. MANDAMUS:
possession of
funds of
public office:
mandamus
(?) or quo
warranto (?)

to the contrary is to be found in *City of Keokuk v. Merriam*, 44 Iowa 432. Indeed, it is recognized there that mandamus is the proper remedy to compel the performance of an official duty, and that it is the duty of an incumbent to turn over the books, funds, property, and insignia of office, upon retirement from office, to his successor. See, also, *Prescott v. Gonser*, 34 Iowa 175, and *Benjamin v. District Township*, 50 Iowa 648. The remedy is summary, and its design, in a situation like that presented, is to avoid confusion and conserve the public good, by putting the claimant having prima-facie title in possession of the office and all property rightly connected therewith. The title thereto, if contested, may not be adjudicated in such proceeding, but can be tried thereafter.

Our only inquiry, then, is whether Sutherland had a prima-facie right to the office. There is no controversy but that Miller, who had been the treasurer, then resided and was employed in Denison, the county seat of an adjoining county, about 22 miles from Manning. Owing to this, Sutherland had been appointed to the office of treasurer in his stead, and had qualified. To authorize this, the board of directors was not required to wait for the adjudication of the existence of a vacancy. The fact of vacancy was enough to warrant the board in taking action; and, had there been no one in possession or claiming the office, the appointee would have been entitled to the books and property incident thereto. The rule is thus laid down in *State ex rel. Leal v. Jones*, 19 Ind. 356:

“Where it appears, *prima facie*, that acts or events have occurred, subjecting an office to a judicial declaration of being vacant, the authority authorized to fill such vacancy, supposing the office to be vacant, may proceed, before procuring a judicial declaration of the vacancy, and appoint or elect, according to the forms of law, a person to fill such office; but if, when such person attempts to take possession of the office, he is resisted by the previous incumbent, he will be compelled to try the right, and oust such incumbent, or fail to oust him, in some

mode prescribed by law. If such elected or appointed person finds the office, in fact, vacant, and can take possession, uncontested by the former incumbent, he may do so, and, so long as he remains in such possession, he will be an officer *de facto*; and, should the former incumbent never appear to contest his right, he will be regarded as having been an officer *de facto* and *de jure*; but, should such former incumbent appear, after possession has been taken against him, the burden of proceeding to oust the then actual incumbent will fall upon him; and if, in such proceeding, it is made to appear that facts had occurred before the appointment or election justifying a judicial declaration of a vacancy, it will be then declared to have existed, and the election or appointment will be held to have been valid."

See, also, *Dew v. Judges of Sweet Springs*, 3 Hen. & M. (Va.) 1 (3 Am. Dec. 639); notes to *State v. Dunn*, (Ala.) 12 Am. Dec. 25; *People v. Olds*, 3 Cal. 167 (58 Am. Dec. 398); *McKannay v. Horton*, (Cal.) 13 L. R. A. (N. S.) 661. We are inclined to entertain the view expressed in *State ex rel. Leal v. Jones*, supra. The right to the office depends, in such a case, on whether there was, in fact, a vacancy, rather than on the appointment by the board of directors to fill the alleged vacancy; for such appointment would be invalid, should it appear that no vacancy, in fact, existed. In determining, then, whether there was a vacancy, the court necessarily passes on the issue as to which of the two persons is entitled to the office, and this may not be determined in an action in mandamus.

V. But the cases were consolidated on conditions heretofore recited. The issues raised in the two cases were to be heard in the consolidated cause. The parties, in so

5. ACTIONS : stipulating, appear to have recognized that
consolidation : effect the suits might not have been joined, and
of stipulation. that, for this reason, consolidation might not
have been effected on motion, under Section
3644 of the Code. The one was a summary proceeding to obtain possession of the books and funds belonging to the

district, while the other sought to enjoin the certification by the several defendants to an appointment, and to enjoin another from the payment of public moneys. Ordinarily, a cause of action in mandamus and a suit to enjoin will not be joined in one action. See *Whigham v. Davis*, 92 Ga. 574 (18 S. E. 548.) In determining whether causes in equity shall be consolidated, identity of subject-matter is largely controlling. *Cox Shoe Co. v. Adams*, 105 Iowa 402. It was ruled in *Browne v. Hickie*, 68 Iowa 330, that:

“When the two causes were consolidated, a new action was formed, which was distinct in its identity from both of them. Neither of the claims alleged by plaintiff remained to be tried, after the consolidation, as a separate issue, but a new issue was presented, which included all of them. When the parties consented to the consolidation, they, in effect, agreed that the two separate actions should be discontinued, and a new and distinct action should be created, in which should be included and litigated all of the questions presented by the pleadings in both of the former actions; and the power and jurisdiction of the courts with reference to this new action were the same as though it had been brought in the manner in which actions are ordinarily instituted.”

The same rule obtains in several states, owing to statutory provisions, in suits of an equitable nature. See *Peterson v. Dillon*, 27 Wash. 78, 85 (67 Pac. 397); *Eastern Wis. R. & L. Co. v. Hackett*, 135 Wis. 464, 472 (115 N. W. 376). In other states, however, where consolidation of causes pending in equity is effected, it amounts practically to no more than a trial of the different suits at the same time, and separate decrees are entered. *Handley v. Sprinkle*, 31 Mont. 57 (77 Pac. 296, 3 A. & E. Ann. Cas. 531); *Holmes v. United States Fire Ins. Co.*, 142 Fed. 863. This result was obviated by the understanding that there should be a single record and a single decree, though the parties specifically agreed that “this consolidation shall be without prejudice to the claims of either party as to their rights involved in the litigation, or to the residence of the defendant

Miller, and that it shall be without prejudice to any claim of fact or law made by either party in the pleadings of either case," Miller's attorney adding, in substance, that he wanted to make sure that, "in arranging for this consolidation as a matter of convenience," he did not waive the point that an action in mandamus may not be maintained for the possession of the books and property of the office. But the parties did not undertake to say, nor might they, what should be the consequence of the conclusions reached by the court on the issues raised in the case as consolidated. The issue as to the residence of Miller was rightly before the court in the consolidated action, brought in with the suit to enjoin, and must have been so regarded; for there was no objection to the introduction of evidence bearing on that issue. The decision thereon in the district court, as in this court, was tantamount to declaring that Sutherland had a prima-facie title, at least, to the office of school treasurer, upon appointment, and, as seen, that is all that is necessary, in order to maintain the action in mandamus. There seems no escape from this conclusion, notwithstanding the stipulation of the parties. Having so decided, the court must have proceeded to the issues involved in the suit in mandamus; and there is also no escape from the conclusion that, the decision having been made that Sutherland was entitled to the office, as against Miller, the former was entitled to the possession of the books and property of the office. This must have been the result, had the hearing of the action in mandamus followed the hearing and determination of the injunction suit, had the decree in the injunction suit been introduced in evidence. In the consolidated action, both issues were heard at the same time, and, the conclusion having been reached in the injunction suit that Sutherland was legally entitled to the office of treasurer of the Independent School District of Manning, it necessarily followed that that adjudication established a prima-facie title to the office of treasurer, at least, and relief as prayed must have been decreed in the suit in mandamus. In other words, the stipulations that consoli-

dation shall be without prejudice to issues raised in the pleadings of the separate actions, did not reach the point of determining for the court the judgment which should be entered on the findings made. The decree entered, dissolving the injunction and ordering the delivery of the books and property pertaining to the treasurer's office, is—*Affirmed.*

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

CLIFFORD A. AUSTIN, Appellant, v. E. A. E. BAXTER,
Appellee.

EASEMENT: Naked Use. *Naked use* of land as a road, with the
1 consent of the owner, howsoever long continued, will not ripen
into an easement.

ADVERSE POSSESSION: Possession in Excess of Calls of Deed.
2 Possession of land called for by a deed furnishes no basis, of
itself, for a claim of adverse possession of land outside the calls
of the deed.

Appeal from Hamilton District Court.—R. M. WRIGHT,
Judge.

FEBRUARY 17, 1920.

REHEARING DENIED JULY 6, 1920.

A DISPUTE over a dividing line between lot owners. Opinion states the facts. Decree for the defendant in the court from which the appeal is taken. Plaintiff appeals.—*Reversed and remanded.*

Wesley Martin, for appellant.

Chase & Chase, for appellee.

GAYNOR, J.—This action involves a dispute as to the boundary line between a lot owned by plaintiff and a lot owned by defendant. Plaintiff's lot is 132 feet east and west, and 132 feet north and south. Defendant's lot joins

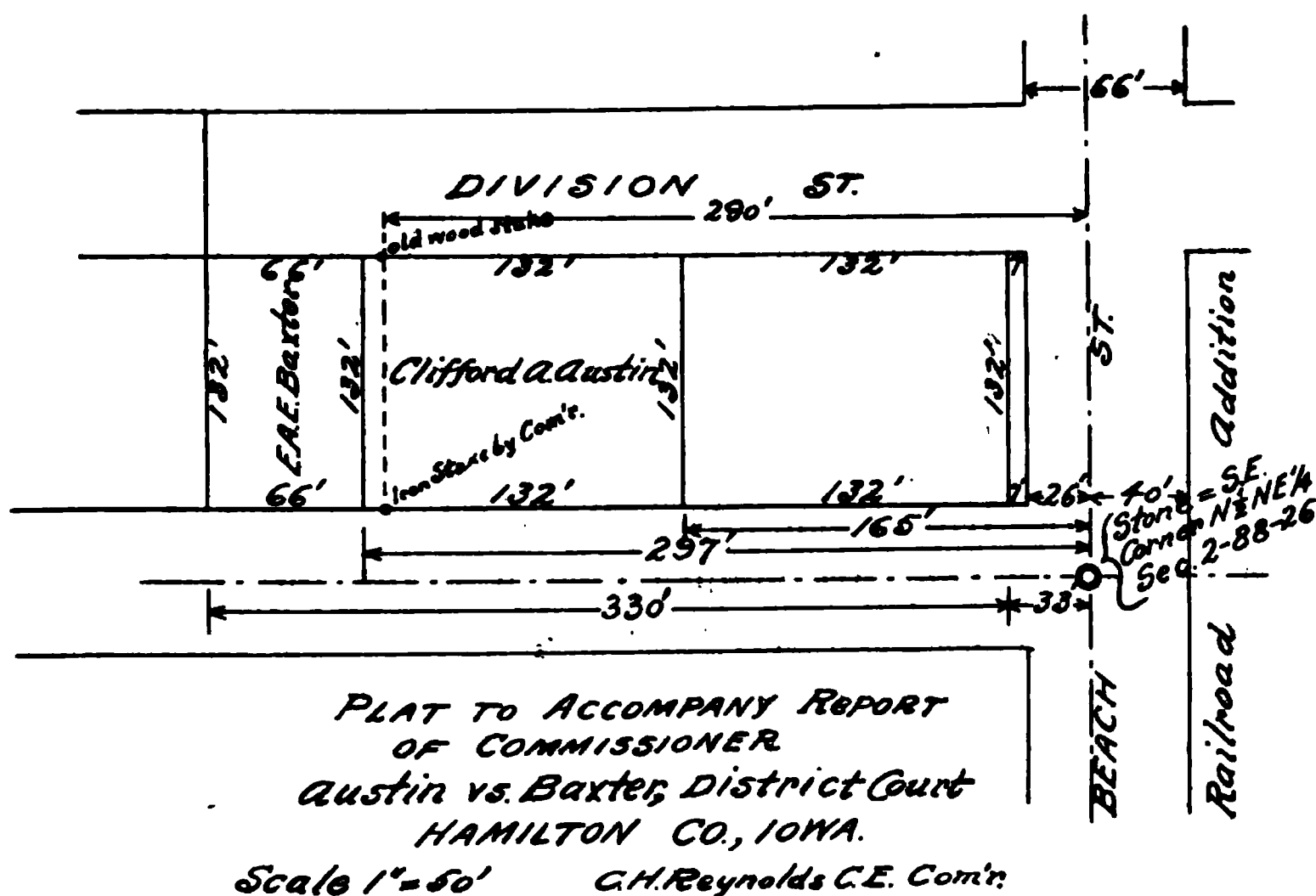
plaintiff's on the west, and is 66 feet east and west, and 132 feet north and south. In plaintiff's deed, his lot is described as follows:

“A parcel of ground located in the southeast corner of the north fractional half of the northeast quarter of Section 2, Township No. 88, Range No. 26, commencing 165 feet west of the southeast corner, thence west 132 feet, north 132 feet, thence east 132 feet, thence south 132 feet to place of beginning.”

Defendant's lot is described:

“Commencing 29 feet north of a point commencing 297 feet west of the southeast corner of the north fractional half of the northeast quarter of Section 2, Township 88, Range 26, West of the 5th P. M. thence running north 132 feet to the south line of Division Street, extending west 66 feet, thence south 132 feet, thence 66 feet to place of beginning.”

For a better understanding of the situation of these properties, and the point from which the measurement is to be made, as indicated in the deeds, we submit herewith a plat.



The controversy is over 7 feet of ground between the plaintiff's and defendant's lots, as shown on the plat. This 7 feet is west of what appears on the plat as the iron stake at the south and the old wood stake on the north. It will be noted that, in the deeds of each, the starting point of measurement in locating the tracts is on the east line of Section 2. On the plat is a round mark, indicating a stone. This marks the southeast corner of the north fractional half of the northeast quarter of Section 2, and is on the east line of said section. South of the tract from which the land in question is taken, is a country road, not marked on the plat. North of the tract from which the land in question is taken, is Division Street, mentioned in defendant's deed; and on the east, Beach Street. Beach Street, as originally laid out, was only 40 feet wide, and was taken off what was then known as Railroad Addition. Later, Beach Street was widened to the west, 26 feet, thus making Beach Street 66 feet wide. The plat shows measurements made by the engineer, appointed by the court as commissioner, to make the survey and ascertain the true boundary line. It will be noticed that plaintiff's land starts at a point 165 feet west of the east line of Section 2, and extends 132 feet west; that defendant's land starts at a point 297 feet west of the east line of Section 2, and extends 66 feet west; that the west line of plaintiff's land is 297 feet west of the east line of Section 2; and that the west line of defendant's land is 363 feet west of the east line of Section 2. Thus, by these measurements, it is made to appear that defendant had 66 feet west of the iron stake, his full quantum, and that, to give the plaintiff his full quantum of land, the west line of his lot must extend 7 feet west of the iron stake. These measurements are shown to be correct. They are made from the point indicated in the deed; so we say that, by actual measurements, made by competent surveyors, it appears that plaintiff's west line is 7 feet west of the iron stake, and defendant's east line is 7 feet west of the iron stake, and that the true line between plaintiff's land and the defendant's land is 7 feet

west of the iron and the wooden stakes indicated on the plat.

Defendant, however, pleads and contends that he has acquired that 7 feet by acquiescence, or by adverse possession. The burden is on him to show this. As the measure-

ments made by the engineer negative defendant's claim that his lot extends east to the iron stake, nothing is left for him except

1. EASEMENT:
naked use. • to say that plaintiff has lost his right to this 7 feet by adverse possession and acquiescence. It is to these contentions that we will address ourselves.

This action was brought by the plaintiff to enjoin the defendant from interfering with him in the use of this 7 feet. He alleged that a dispute exists between him and the defendant as to the true line. A commissioner was appointed to make a survey. He did this, and reported to the court that the true line was 7 feet west of the iron stake, and furnished the court the plat, a copy of which is herein set out. This plat shows, without any question, where the true line is; and the true line must govern, and the rights of the parties must be governed by these measurements, unless it is made affirmatively to appear that the plaintiff has lost some of his rights by reason of acquiescence or adverse possession.

The record shows that plaintiff's lot was unoccupied; that, some time during the years preceding plaintiff's purchase, a fence had been erected between the lands now owned by the plaintiff and the defendant. The house on defendant's lot was located west of what the record shows to be the true line. A narrow walk was built along the east side of defendant's house. Some posts found indicated that, at some time, a fence had existed between these properties, but it was located west of the 7-foot strip in dispute. This 7-foot strip was not enclosed by this fence, either by defendant or his grantor, as a part of defendant's lot. A fence in front of the house was so constructed that it terminated 7 feet west of the iron stake, and did not extend over this 7 feet. The only basis upon which plaintiff can

now rest a claim of adverse possession or acquiescence is that, in entering his lot, he and his grantors drove over this 7-foot strip; that he and his predecessors did this for a great many years. But the record shows that the land east of the plaintiff was unoccupied; that other parties drove over this same way from what is known as the "country road," up to Division Street. All that is shown is that nobody objected to their so doing. There is no showing from which the inference could be drawn that the owners of plaintiff's lot, or the owners of any of the land east of defendant's, acquiesced in their so doing. Mere user is not sufficient to create an easement or a right in the user. Section 3004 of the Code of 1897 provides:

"In all actions hereafter brought, in which title to any easement in real estate shall be claimed by virtue of adverse possession thereof for the period of ten years, the use of the same shall not be admitted as evidence that the party claimed the easement as his right, but the fact of adverse possession shall be established by evidence distinct from and independent of its use, and that the party against whom the claim is made had express notice thereof; and these provisions shall apply to public as well as private claims."

See *State v. Birmingham*, 74 Iowa 407; *Brown v. Peck*, 125 Iowa 624; *Friday v. Henah*, 113 Iowa 425; *McBride v. Bair*, 134 Iowa 661; *O'Malley v. Dillenbeck Lbr. Co.*, 141 Iowa 191. As said in *O'Malley v. Dillenbeck Lbr. Co.*, *supra*:

"The mere use of such way by the public, however long continued, cannot be construed as adverse to the owner of the title. That a highway may be dedicated by parol, without deed or other written evidence thereof, is to be admitted; but it is a cardinal principle of the law on this subject that the intent to dedicate must clearly appear, and the acts and circumstances relied on to prove such intent must be unequivocal and convincing."

That case, of course, dealt with dedication. In *Brown v. Peck*, *supra*, it was said:

"Under the present statute in this state, adverse posses-

sion cannot be predicated upon proof merely of use. It must be established by evidence, independent of the use, that the party claimed the easement as his right. And the party against whom the claim is made must have had express notice thereof."

In *McBride v. Bair*, 134 Iowa 661, it was held that the mere user of a right of way over the land of another will not create a prescriptive right therein, even though with the consent of the owner; that there must also be a claim of right. It was said in that case:

"Undoubtedly, defendant and those under whom he claims knew of the use, but user and knowledge thereof is not enough. There must have been a claim of right, independent of user, of which defendant or those under whom he holds had express notice. * * * Aside from mere user, the record contains no evidence of any claim whatever to this passageway."

It further appears affirmatively that, when the defendant took possession of his lot, he did not claim more than was called for by his deed, and does not now; but insists that

2. ADVERSE
POSSES-
SION: pos-
session in ex-
cess of calls
of deed.

this 7-foot strip is covered by his deed. He claims but 66 feet; and that much he has, outside of the land in dispute. To make his possession adverse, his claim must be as broad as possession. The fact that he used more than he claimed does not make his occupation adverse. See *Grube v. Wells*, 34 Iowa 148; *Mills v. Penny*, 74 Iowa 172; *Fisher v. Muecke*, 82 Iowa 547; *Goldsborough v. Pidduck*, 87 Iowa 599; *Webster v. Shrine Temple Co.*, 141 Iowa 325; *Keller v. Harrison*, 151 Iowa 320; *Griffin v. Brown*, 167 Iowa 599, 608.

There certainly is no evidence of any claim made public, aside from user, that the defendant was claiming any other right than was indicated by the mere use. There is no evidence of any notice to the owner, or knowledge on the part of the owner of the land east, that plaintiff was claiming a right to any portion of the land not covered by his deed. One who takes possession of land is presumed to

take and claim within the limits of the right which the instrument itself creates. If he claims beyond the limits of his deed, there must be something to indicate that claim to those against whom adverse rights are urged; and we have nothing in this record indicating notice of such claim. The deed to the defendant gave him no color of title to any property outside the limits of his deed, and he never did anything that came to the knowledge of anyone adversely interested, showing that he claimed more than was given him by his deed. He could not honestly claim more. A claim of right cannot rest alone on mere possession or secret claims. It must be evidenced by some declaration or act of hostility to the true owner. It is true, that it need not be manifested by words, but there must be some manifestation of an intent to make a hostile claim. The mere use, under the circumstances shown in this case, does not make manifest such an intent. See *Griffin v. Brown*, supra.

On the whole record, we think the court was wrong in holding that there was no equity in plaintiff's contention, and in dismissing plaintiff's bill. The record conclusively shows that the defendant's deed did not cover the land in dispute. The record abundantly shows that the calls in plaintiff's deed did cover the land in dispute; that the true line between plaintiff and defendant is approximately 7 feet west of the iron stake shown in the plat, and there is no sufficient evidence to support adverse possession or acquiescence. The case is reversed and remanded, with direction to enter a decree in accordance with this opinion.—*Reversed and remanded.*

WEAVER, C. J., LADD and STEVENS, JJ., concur.

AUTOMATIC SPRINKLER COMPANY OF AMERICA, Appellee, v.
CENTRAL AMUSEMENT COMPANY et al., Appellants.

FIXTURES: Replevin—Intervening Rights of Lessee. Fixtures in-
1 stalled in a building, under contract with the owner and under
an agreement that title and right to possession shall remain
in the one installing until paid for, may be replevined for de-
fault in payment, even against the tenant who has caused modi-
fications and additions to be made thereto, none of which are
injured or rendered nonusable by removal under the writ.

REPLEVIN: Demand—When Necessary. Replevin for fixtures will
2 lie without demand on the owner, who is *not* in possession,
provided proper demand is made on the tenant, who is in pos-
session.

Appeal from Polk District Court.—LAWRENCE DE GRAFF,
Judge.

MARCH 23, 1920.

REHEARING DENIED JULY 6, 1920.

ACTION in replevin to recover an automatic sprinkler
system, installed on premises at 410–414 Eighth Street, Des
Moines, known as the Empress Theater. Jury waived, and
the cause tried to the court. From judgment entered
against them, defendants appeal.—*Affirmed.*

Read & Read, for appellants.

Arthur G. Rippey, for appellee.

LADD, J.—I. It appears that Mrs. Coffee is the owner
of premises known as 410 to 414 Eighth Street, in the city
of Des Moines, and leased the same to the Central Amuse-

1. FIXTURES :
 replevin :
 intervening
 rights of
 lessee.

ment Company, a corporation subsequently changed in name to Elbert & Getchell, Incorporated, under the terms of which she caused to be erected for their use what is known as the Empress Theater. The cost of this building above a specified amount was to be paid by lessee. P. E. Coffee, in behalf of his wife, contracted with plaintiff for the installation of an automatic sprinkler system, at the agreed price of \$1,575, one third thereof to be paid "when the material is shipped to substantially commence work, one third when the work is substantially completed, and the balance 30 days thereafter, based on the installation of 275 sprinklers." The system was duly installed, and \$525 paid, as required, but no more. The reason for not paying is not made clear by the record, and is not material to this controversy. One of the conditions of the contract is that the Automatic Sprinkler Company "shall retain the title to the materials and equipment until full cash payment shall have been made therefor, and which in the meantime at the option of this company, shall be held in storage as its property, but without any storage charges to it, with the right to this company to enter upon the premises and remove the same in the case of any default." The installation of the sprinkler system occurred shortly after the building was completed and the lessee had taken possession thereof under the lease, and so continued until taken under the writ of

2. REPLEVIN :
 demand :
 when neces-
 sary.

replevin. That such possession was rightful is beyond question, and, as contended by appellants, a demand was essential to the termination of the right thereto. *Stanchfield v. Palmer*, 4 G. Greene 23; *Gilchrist v. Moore*, 7 Iowa 9. The evidence as to whether a demand was made is in conflict, the attorney then acting for plaintiff saying that he did demand the property, and Getchell denying that any demand was made on him. In these circumstances, the finding of the trial court ought not to be disturbed.

II. Appellants argue the cause as though Mrs. Coffee were in possession, and a demand on her were essential. As

she was not in possession, there was no occasion for such demand, and, as against her, plaintiff was entitled "to enter upon the premises and remove" the system first installed, owing to her default in making the payments as agreed.

III. The original contract was for the installation of a wet system. Owing to the danger of the freezing of some of the pipes, Elbert & Getchell, Incorporated, entered into an agreement with plaintiff, under which change to a dry system was effected. The difference between these systems is explained in *Edgerly & Co. v. City of Ottumwa*, 174 Iowa 205. To effect the change, the wet alarm valve was replaced by a dry valve, and an air compressor installed, or, as said by appellee in the agreement:

"We will replace your present wet system with a dry pipe system, furnishing all the necessary material and labor and connect to the air compressor which is used for your heating system and will also replace the water motor alarm system, with an electric alarm system, placing a small electric bell in your boiler room and a buzzer in your box office, for the sum of \$188.00."

Such change was effected, and the price paid by the lessee. Some time later, the latter had plaintiff "furnish and install a belt driven air compressor, 4x5 cylinder capable of pumping 40 to 50 lbs. pressure and delivering 5.4 cubic ft. of free air at 150 R. P. M. (per minute) including belt and pulley, for the sum of \$50.00." These changes or additions were made; but there was no evidence that, in the removal of the original system, any of the materials furnished under these contracts were injured or changed, save that the original system was disconnected therefrom. Nor was there any showing that such materials might not be made use of, were another sprinkling system installed. Appellants contend, however, that, in entering into these contracts, appellee recognized the right of Elbert & Getchell, Incorporated, as lessee, to the use of the sprinkling system, and that the plaintiff is now estopped from asserting any claim to the system inconsistent with the corporation's right to use the same during the term of the lease. As the wet

system was installed before discovery was made that a dry system would be necessary, this must have happened prior to December, 1913, as finally concluded by one of the witnesses; for the contract made with Elbert & Getchell, Incorporated, for the change, was entered into on November 13th of that year, and the second contract, December 16th following. This change was rendered necessary "because of the fact that certain of the pipes were in great danger of freezing," and it involved merely replacing "the wet alarm valve with a dry valve," and putting "in an air compressor," as indicated in the contract. The last contract appears to have called for a particular kind of an air compressor, and was entered into so shortly after the first that it may have been merely a different compressor. The changes arranged were so near the date of the completion of the installation of the system contracted for by the owner that the company must have been familiar with the transaction, possibly knowing the nature of the contract with the owner. Had its managers so desired, they might have ascertained conditions of the contract; and we see no reason for holding that the plaintiff was under any obligation to thrust such knowledge upon them. Surely, the plaintiff is not shown to have said or done anything, through its agents, misleading the corporation in any manner, and we have not been able to discover any basis on which to rest a waiver or plea of estoppel. Any change negotiated by the lessee was at his own risk. In making the changes at the instance of the company, there was no assurance that the system already installed was put in on any conditions other than those of the contract, nor that the plaintiff would not interfere therewith, if necessary to collect the purchase price. Nor was there anything to indicate that the lessee proceeded otherwise than at his own risk. In removing the system under the contract by the owner, no injury appears to have been done to the parts procured at the instance of the lessee, and, as there was no waiver or basis for estoppel, the court rightly denied the defense interposed by Elbert & Getchell, Incorporated.—*Affirmed.*

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

J. S. BAIN et al., Appellants, v. H. E. ULLERICH et al.,
Appellees.

MORTGAGES: Priority Over Attachment Lien. An attaching creditor who seeks to have his attachment lien declared senior to the lien of prior mortgage-secured negotiable notes must show that such notes were without consideration. Especially is this true when the mortgage is prior in record to the attachment lien. In the absence of such evidence, the law will presume a valuable consideration.

VENDOR AND PURCHASER: Waiver of Vendor's Lien. A vendor waives his vendor's lien for unpaid purchase price (1) by levying, two years after the sale, an attachment on the land for damages for fraudulently inducing the conveyance, and (2), with a petition of intervention on file asserting a superior lien, by causing his attachment lien to be judicially confirmed, and (3) by delaying assertion of any right to a vendor's lien until shortly prior to the hearing on the petition of intervention.

Appeal from Linn District Court.—F. F. DAWLEY, Judge.

APRIL 13, 1920.

REHEARING DENIED JULY 6, 1920.

ACTION at law for damages, aided by attachment. R. Lord intervened, alleging in his petition that he was the holder of a prior mortgage upon the attached property, and asked that his rights thereunder be protected. Judgment was entered in the main action as prayed, and the lien of the attachment confirmed. The court also found that the lien of intervener was prior and senior to the attachment lien, and that plaintiffs were not entitled to a vendors' lien, as alleged in their answer to petition of intervention. Plaintiffs appeal.—*Affirmed.*

Treichler & Treichler, for appellants.

Frank C. Byers, for appellees.

STEVENSON, J.—I. We gather from the abstract and argument of counsel that, on or about October 6, 1916, the Cedar Rapids Floral Company, a corporation, conveyed Lots 9 and 10, Block 1, Geo. T. Hedges First Addition to Cedar Rapids, to Chester A. Pelser, and that, on September 5th, Bain Bros. Manufacturing Company, a corporation, conveyed Lot 8 in said addition to said Pelser. The stock of the Cedar Rapids Floral Company was, at the time, owned by J. S. and B. L. Bain, who also owned the stock of the Bain Bros. Manufacturing Company. On the 24th day of October, 1918, plaintiffs filed their petition in the office of the clerk of the district court of Linn County, alleging that the deeds conveying said above-described property to Pelser were obtained by fraud, and demanding judgment against them for \$35,000. The record discloses only the name of J. S. Bain *et al.* as plaintiffs, but we assume that B. L. Bain joined in bringing suit for damages. A writ of attachment was issued therein, and levied upon all of the above-described real estate on the 24th day of October, 1918, and, on March 26, 1919, judgment was entered against Ullerich and Pelser for \$35,000, and the lien of the attachment established and confirmed. On February 7, 1919, R. Lord filed a petition of intervention in said cause, alleging that, on or about November 12, 1917, Pelser conveyed Lots 9 and 10 to him by warranty deed, and, on September 16, Clarence L. Atwood, grantee of Pelser, conveyed Lot 8 by quitclaim deed to him. The consideration expressed in the warranty deed is \$1.00 and other valuable consideration, and in the quitclaim deed, \$250.

On April 30, 1919, intervener, by amendment to his petition of intervention, alleged that the said deeds conveying Lots 8, 9, and 10 to him were, in fact, mortgages, executed to secure the payment of a note of \$5,000, executed by de-

defendants to him on November 16, 1917, payable February 1, 1918. Intervener prayed that his rights be preserved, and that his lien be established as superior to the lien of plaintiff's attachment.

Plaintiffs, for answer to defendant's petition of intervention, denied the execution of the deeds from Pelser and Atwood to intervener, and averred that the deeds conveying the lots to Pelser were procured by fraud; that the deeds to intervener were executed without consideration, with notice of the fraud perpetrated upon plaintiff by defendants in the original transaction; and that the lien of the deeds was junior to vendors' lien. Intervener, for reply, denied the allegations of plaintiffs' answer to the petition of intervention, and pleaded a waiver by plaintiffs of their alleged vendors' lien.

The court found that the deeds to intervener are, in fact, mortgages given to secure the payment of \$5,000 and interest; that same were executed prior to the levy of the attachment; and that the lien thereof is superior and prior to the judgment and attachment liens of plaintiffs; and that they were not entitled to a vendors' lien. As indicated, plaintiffs do not allege or claim fraud in the conveyance of the lots to Lord, but only that same was executed without consideration. No evidence was offered by either party as to the consideration for the \$5,000 note, but intervener testified that the deeds were executed solely for the purpose of securing the payment thereof.

Counsel for appellants contends: (1) That the conveyance of the lots to Pelser was procured by fraud; that the burden rested upon intervener to prove that the note and deeds, which will hereafter be referred to as mortgages, were executed for a valuable consideration, without notice, actual or constructive, of such fraud; (2) that plaintiffs had a vendors' lien on said lots, which was prior and senior to the lien of said mortgages. We will dispose of the foregoing propositions in the order stated. The grounds alleged in plaintiffs' petition for an attachment were nonresidence of defendants, and that the debt sued on is due for property

obtained under false pretenses. In other words, the attachment was procured and issued under Code Section 3878, and not Code Section 3914, relating to vendors. Whether a different situation would be presented if plaintiffs had caused a specific attachment to be levied under Section 3914, we need not determine. Plaintiffs had two remedies for the fraud perpetrated upon them: They could either rescind the contract, and ask a cancellation of the deed to Pelser, or ratify the conveyance, and sue for damages. They elected to pursue the latter. Both conveyances to intervener were executed long prior to the institution of plaintiffs' suit for damages and the levy of the writ of attachment; so that, in point of time, the lien of intervener is prior to plaintiffs' attachment lien. We do not perceive in exactly what manner the fraud practiced upon plaintiffs by Pelser in procuring the deeds from the Floral Company and Bain Bros. Manufacturing Company becomes material in the controversy between plaintiffs and intervener. Plaintiffs' rights under the attachment are the same as those of any other general creditor. It is not alleged or claimed that the deeds or note for \$5,000 were executed for a fraudulent purpose, but only without consideration. None of the authorities cited by counsel sustain their contention that the burden of proving that the mortgages were executed for a valuable consideration, without actual or constructive notice of the fraud inducing the conveyance of the lots to Pelser, rested upon intervener. We will not attempt to distinguish all of the cases cited, but desire to call particular attention to the following:

In *Robertson v. United States Livestock Co.*, 164 Iowa 230, plaintiff, in his petition, prayed the rescission and cancellation of a deed conveying certain lots in DeSoto, Iowa, to defendant, upon the ground that same was procured by fraud. Prior to the commencement of said suit, the defendant executed a note to J. S. Smith and C. M. Thompson, officers and members of said corporation, who transferred the same to the Live Stock National Bank of Omaha, Nebraska, which intervened in said action, alleging that it

acquired said note for a valuable consideration, before maturity, without notice of any infirmities therein. A decree was entered in the court below, canceling the conveyance and dismissing intervenor's petition, and intervenor appealed. This court held that, as Thompson and Smith, the payees named in said note, were officers and members of the corporation, they must have had notice of the fraud, and that, as the mortgage had its inception in fraud, the burden rested upon intervenor to show that it obtained the same in good faith, for a valuable consideration, before maturity, and without notice thereof. As stated, plaintiff in the above case elected to rescind, and have a cancellation of the conveyance, instead of ratifying the same and pursuing a remedy at law for damages.

The decision of the Supreme Court of Nebraska in *Southwick v. Reynolds*, 99 Neb. 393 (156 N. W. 775), does not aid plaintiffs. Plaintiff in that case was the assignee of an unrecorded contract for the purchase of real estate, on which the assignor had, prior to the assignment of said contract, executed a mortgage to the Great Western Commission Company, which mortgage was duly recorded. The defendants, assignors of the contract, defaulted, and judgment was entered against them. The commission company, however, filed a cross-petition, setting up its note and mortgage, and asked that the lien thereof be established as prior and senior to plaintiff's unrecorded lien. The court held that the burden was upon cross-petitioner to prove that its mortgage was executed for a valid consideration, without notice, actual or constructive, of the prior unrecorded contract, and that the usual presumption under the negotiable instrument law that the note was executed for a valuable consideration did not obtain. Apparently, the situation of the parties in the above case and in the case at bar is reversed. The lien of the intervenor herein is admittedly, in point of time, prior to the attachment lien of plaintiffs. In other words, in the cited case, cross-petitioner was seeking to have the lien of a recorded mortgage; whereas, in the case at bar, plaintiffs are asking to have their attach-

ment lien declared senior to the prior recorded lien of intervener. Other cases cited are not more favorable to appellants' contention than the two above referred to. By electing to prosecute a suit for damages, instead of rescinding and asking the cancellation of the deeds to Pelser, plaintiffs ratified the transaction, and confirmed the title in defendants.

The lien of plaintiffs' attachment covered only the interest of Pelser in the property levied upon, and would be subject to a prior unrecorded mortgage. *Hamm Brewing Co. v. Flagstad*, 182 Iowa 826. The mortgages in controversy were, however, executed and recorded prior to the levy of the attachment. Every negotiable instrument is deemed *prima facie* to have been executed for a valuable consideration (Section 3060-a24, Supplement to Code 1913); and the burden clearly rested upon plaintiff, in seeking to have an attachment lien declared senior to the lien of a prior recorded mortgage, to prove that same was obtained without consideration. We find nothing in the record tending in any way to indicate that the \$5,000 note and the instruments executed to secure the same were without consideration; indeed, no evidence was offered upon this point.

II. The only reference in any of the pleadings filed on behalf of plaintiffs to a vendors' lien is in their answer to the petition of intervention, and is as follows:

1. INTERVENOR	"And the intervener, if he has any claim,
2. VENDOR AND PURCHASER: waiver of vendor's lien.	the same is junior and inferior to plaintiffs' lien as vendor. Wherefore, plaintiffs ask, in addition to the prayer in their original petition, that plaintiffs' lien as vendor be established in and to said described lots, and that, whatever interest the intervener may have therein, that the same be held junior and inferior to plaintiffs' lien thereon."

The pleading from which the above extract is taken was filed March 15, 1919, 11 days before judgment was entered in the main case. No claim to a vendors' lien was asserted in plaintiffs' original petition against the defendants, and,

so far as appears in the record, none has been asserted thereto, except as stated above.

Intervener, in his reply to plaintiffs' answer to the petition of intervention, alleged that they have waived their right, if any they ever had, to a vendors' lien, and contends in argument that they have blended the purchase price of the land in the main action with other considerations, so that the precise amount thereof cannot be ascertained, and that they are not, therefore, entitled to a vendors' lien. Section 2924 of the Code, providing for a vendors' lien, is as follows:

"No vendor's lien for unpaid purchase money shall be enforced in any court of this state after a conveyance by the vendee, unless such lien is reserved by conveyance, mortgage or other instrument duly acknowledged and recorded, or unless such conveyance by the vendee is made after suit by the vendor, his executor or assigns to enforce such lien. But nothing herein shall be construed to deprive a vendor of any remedy now existing against conveyance procured through the fraud or collusion of the vendees therein, or persons purchasing of such vendees with notice of such fraud or lien."

As early as *Allen v. Loring*, 34 Iowa 499, this court held that a vendor's lien is not based upon contract, is not an equitable mortgage or resulting trust, but a mere equity. In that case, the court said:

"We need not discuss the question whether the assignees of an obligation given for real estate have the same right to enforce a vendor's lien as the payee and vendor himself has; because, in our view of the case, if Clemens, himself, was seeking to enforce his vendor's lien, as against an attaching creditor without notice of it, his right must be denied. And this, upon the doctrine as stated by this court in the case of *Porter v. City of Dubuque*, 20 Iowa 440. It is there said that the lien of a vendor is not based upon contract; nor is it an equitable mortgage or resulting trust, but a mere equity. It is but a naked equity, raised and administered by courts, and which will be enforced or denied,

even between the parties, where no counter equity arises, as the particular case may seem to demand. But it is never allowed to override or take priority of equities or rights of third persons, which have attached in ignorance of such vendor's equity. It is not, in this respect, like a mortgage, or any other lien created by express contract, or even by statute."

Substantially the same language was used by the court in *Spindler v. Iowa & O. S. L. R. Co.*, 173 Iowa 348. In the last-cited case, the court held that:

"A waiver of a vendor's lien may be found from any conduct on the part of the vendor which shows that he did not rely upon the lien, or has abandoned it; and this may result from a failure to assert the same within a reasonable time."

The mere commencement of an action for damages, aided by attachment, would not, however, operate as a waiver of the right to enforce a vendor's lien. *Patterson v. Linder*, 14 Iowa 414; *Stein v. McAuley*, 147 Iowa 630. As already stated, the lots in question were conveyed to the defendant Pelser by the Cedar Rapids Floral Company and Bain Bros. Manufacturing Company, and not by the plaintiffs herein. Whether this fact alone, as plaintiffs were the owners of all the stock of the said corporations, would prevent them from asserting a vendor's lien, we need not determine; but it is significant that plaintiffs permitted judgment to be entered in the main action with knowledge of plaintiffs' claim, without asserting therein, as against the defendants, some claim to a vendor's lien, or taking some steps to establish and enforce the same.

It is alleged in plaintiffs' petition that the lots in question were worth in the neighborhood of \$18,000, and that the judgment against defendants is in amount almost double the value of the lots. Plaintiffs brought their suit for damages, aided by attachment, about two years after the transactions complained of were consummated. Judgment was not entered for several months thereafter, and yet plaintiffs have taken no steps to enforce a vendor's lien

against the lots, except as above stated; and we think they should, upon the record before us, be held to have abandoned and waived any right they may have had to vendor's lien, as against the rights of intervener. See, also, *Todd v. Davey*, 60 Iowa 532; *Owen v. Higgins*, 113 Iowa 735; *Kretzinger v. Emering*, 169 Iowa 59. Assuming, further, without deciding, that plaintiffs might, under the issues and the prior holdings of this court, in the absence of waiver, be entitled to a vendor's lien upon the lots, it would be impossible for the court, upon the record, to determine the precise amount for which a lien should be established, and for this reason, the right thereto must be denied. *Erickson v. Smith*, 79 Iowa 374; *Smith v. Dayton*, 94 Iowa 102.

Other questions discussed by counsel bear, either directly or indirectly, upon the propositions already considered, and do not merit separate consideration. It follows that the judgment of the court below is right, and must be—*Affirmed*.

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

STINA ANDERSON BLACKMORE, Guardian, Appellee, v. CITY OF COUNCIL BLUFFS, Appellant.

LIMITATION OF ACTIONS: Roads and Streets—Dual Notices.

- 1 The written notice necessary to avoid the three months' limitation of actions for injury on account of defective streets, may be given to the city or to a committee thereof having the matter in charge, by a *series* of notices which, together, set forth the "time, place, and circumstances" of the injury.

TRIAL: Correct But Inexplicit Instructions. Correct but inex-

- 2 plicit instructions are sufficient, in the absence of a request for the more explicit one. So held where instructions correctly stating the city's duty to maintain its streets did not draw any distinction between the duty to maintain *sidewalks* and *crosswalks*.

TRIAL: Instructions—Insufficient Exception. An exception to the
 3 effect that a series of instructions *as a whole* did not completely
 instruct as to the respective duties of the city and pedestrians
 on cross streets, is not sufficient to present the point that dif-
 ferent standards of care rest upon the city as regards sidewalks
 and crosswalks.

MUNICIPAL CORPORATIONS: Sidewalks and Crosswalks—Stand-
 4 **ard of Care.** "Reasonable care" in the maintenance of streets
 is a standard applicable to both sidewalks and crosswalks.

MUNICIPAL CORPORATIONS: Defects From Snow and Ice—
 5 **Notice.** Record held to present a jury question on the issue of
 notice to the city of the rough and uneven condition of snow
 and ice on the public street.

Appeal from Pottawattamie District Court.—J. B. ROCKA-
FELLOW, Judge.

FEBRUARY 23, 1920.

REHEARING DENIED JULY 6, 1920.

ACTION to recover for injuries received by a fall upon one
 of defendant's sidewalks. The opinion states the facts.
 Verdict and judgment for plaintiff. Defendant appeals.—
Affirmed.

Henry Peterson, for appellant.

Mayne & Green, for appellee.

GAYNOR, J.—This action was begun June 21, 1915, and
 was brought for and in behalf of Anna Anderson, a minor,
 to recover for injuries alleged to have been sustained by
 her through a fall on an icy street crossing
 1. **LIMITATION** near the corner of Broadway and Second
OF ACTIONS: roads and
 streets:
 dual notices. Street in defendant city. The injury oc-
 curred on the 11th day of March, 1915. The
 action is brought by her guardian.

The usual issues were tendered, together with a claim

that the action is barred by reason of a failure to serve the defendant with written notice of the injury, as required by Section 3447 of the Code of 1897. The cause was tried to a jury, and a verdict returned for the plaintiff. Judgment being entered on the verdict, defendant appeals.

It is contended that the plaintiff cannot maintain the action; that it is barred by the provisions of Section 3447 of the Code of 1897, which provides:

"Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:

"1. Those founded on injury to the person on account of defective roads, bridges, streets or sidewalks, *within three months, unless written notice* specifying the time, place and circumstances of the injury shall have been served upon the county or municipal corporation to be charged within sixty days from the happening of the injury."

The contention that the action is barred is bottomed on the thought that it was not brought within 90 days from the happening of the injury, and that notice of the injury is insufficient to avoid the bar, because it did not state the time when the injury occurred.

On the 17th day of March, 1915, notice of the injury was served on the defendant city in the following words:

"You are hereby notified that the undersigned Anna Anderson, while walking along the north side of Broadway near the corner of Second Street, fell on the ice which had been allowed to accumulate at said point and was seriously and permanently injured, said fall breaking and splintering the bones of her leg and knee to such an extent that she will be permanently crippled. That said city had permitted a large amount of snow and rough ice to remain in the regular pathway of travel at said point and that the fall and injury were due to the negligence of the city in that respect, and that the undersigned has been damaged thereby in the sum of five thousand dollars.

"You are further notified that unless adjustment is

made of said claim, suit will be commenced for said injury."

It will be observed that this notice does not state the time of the injury. The petition was dismissed on that ground. Thereafter, the petition was amended, and, as amended, stated that, on the 22d day of March, the city council held its first meeting after receiving the above notice. The matter of plaintiff's claim was called to the consideration of the city council, and the minutes of the meeting show the following:

"A communication from Anna Anderson by Mayne & Green, her attorneys, notifying the city of injuries received while walking along the north side of Broadway near the corner of Second Street, by falling upon ice which had been allowed to accumulate at this point, stating that she was seriously and permanently injured and had been damaged in the sum of \$5,000, was presented to the council, read, and on motion of same was referred to the judiciary committee and the city solicitor."

Immediately after the reference of said claim to the judiciary committee and said attorney, as above set out, a further and additional notice was served upon the defendant, by serving it on one of the members of said judiciary committee, to which said claim was referred. This notice was in words and figures as follows, to wit:

"To Whom This May Concern:

"This is to certify that Annie Anderson received a fracture of the inner condyle of the left femur on March 11, 1915, by falling on the sidewalk. Since she has been in Mercy Hospital, Council Bluffs, Iowa, being treated for same.

"Fracture was verified by X-Ray.

"(Signed) A. V. Hennessy, M. D."

A demurrer was filed to the petition as amended, challenging the sufficiency of the notices to take the case out of the operation of the bar of the statute. This demurrer was overruled. This is assigned as a reversible error.

The object of the notice is to inform the city of the time.

place, and circumstances of the injury. This, for the purpose of enabling the city to make full and thorough investigation of the injuries and the accident complained of, within 60 days, and for the further purpose of enabling the city to investigate and determine for itself whether there was a defect at the time and at the place when the injured party claims to have received injury. In *Howe v. Sioux County*, 180 Iowa 585, a case involving the construction of this particular statute, this court held that the purpose of the notice is to enable the officers of the county sought to be charged, to make investigation, and that the notice must specifically state the time of the injury, the place where the same happened, and the circumstances surrounding the transactions. With this information, the board of supervisors or other officers of the county (or municipality) are enabled to investigate and determine whether the county (or municipality) is liable, and, if so, what course to pursue with reference to the matter of making settlement, or preparing to make defense to any suit that may be brought against it. In *Neeley v. Incorporated Town of Mapleton*, 139 Iowa 582, it was held that the tendency of courts is to construe the limitations of the statute liberally, provided it is made to appear that the notice already given has accomplished the purpose for which it is required, and that the purpose of the notice is to convey to the town council, within the time limit, information as to the time, place, and circumstances of the injury, so that an investigation may be had while the facts are fresh. While the statute should be liberally construed, no construction should be indulged in that emasculates it, or deprives the city of the notice which it is the intent of the statute that it should have, to wit, notice of the time, place, and circumstances of the injury. This notice, the statute provides, shall be in writing. It does not designate the particular officer of the city on whom service shall be made. The notice is, therefore, sufficient if it conforms to the statute as to time, place, and circumstances, and is in writ-

ing, and is served on any officer of the city whose relation to the city is such that notice to him of matters affecting the interest of the city is notice to the city. It follows, therefore, that notice to one charged with a duty to the city, with respect to the matters concerning which the notice is given, is notice to the city. The city acts through its officers. All the information that comes to it must come through officers charged with the duty of acting for and in behalf of the city. It will be noted that the second notice was in writing, and served on the members of the city council appointed by the council to act for the city as a judiciary committee in the investigation of this particular matter. While acting for the city and charged with the duty of investigating this matter, these officers of the city received this additional notice in writing, in which is given the time when and the place where the injury occurred. Though the second notice was not signed by the injured party, it was served by one authorized to act for her. In *Neeley v. Incorporated Town of Mapleton*, 139 Iowa 582, there was no signature to the notice at all, and yet the notice was held good. See, also, *Pardey v. Town of Mechanicsville*, 112 Iowa 68. If the notice is in writing, and contains information as to the time and place and circumstances of the injury, or is sufficiently specific to enable the officers of the city to know the time, and to locate the place where the injury occurred, within the time limit fixed by the statute, it is sufficient. The fact that it is not addressed to the city does not vitiate it. See *Klingman v. Madison County*, 161 Iowa 422.

In order to prevent the running of the statute against plaintiff's claim, all that is necessary, under the statute, is that there be served upon the municipality notice in writing, stating the time, place, and circumstances of the injury, sufficiently clear and specific to enable the city to investigate and determine for itself whether or not the claim is well founded. It is necessary that the information be given within 60 days, but it is not required that all the information be given in one paper, or at one time. The

information must be in writing, and served on the city within the 60 days. When this is done, the bar that would otherwise prevent recovery upon the claim is avoided. The whole theory of the statute is that one injured shall not be barred of a right to recover if his suit is not brought within 3 months from the time of the injury, if, within 60 days of the injury, he give the city notice in writing of the time, place, and circumstances of the injury. If the information which the city is entitled to is conveyed to it in writing within 30 days, it cannot possibly be prejudicial because the information was conveyed in two writings, rather than in one. If, within the time given it to investigate, it receives all the information it is entitled to, and in the way the statute provides, it has no ground for complaint. In this case, it received all the information it was entitled to within the 60 days. We think the court did not err in holding that the two notices, taken together, fulfilled the purposes of the statute, and that plaintiff's action was not barred because not brought within 90 days from the time of the injury. Actions for personal injury may be brought at any time within 2 years. When the notice contemplated by the statute is served within the 60 days, the plaintiff has 2 years in which to prosecute the action.

It is next contended that the court failed to instruct the jury that the city did not owe as high a duty to a pedestrian to keep *crosswalks* free from snow and ice as owed in keeping its *sidewalks* free from snow and ice.

The court instructed the jury that the fact that ice and snow had accumulated on the walk or pathway, and had been permitted to remain there for a considerable length of time, even though it caused the walk to

2. TRIAL: correct but implicit instructions.

become dangerous and unsafe, would not, of itself, constitute a defect for which the city would be responsible in case of injury

resulting therefrom; that it is only where snow and ice are allowed to remain upon the walk until, by travel thereon, or from other causes, the surface of the snow or ice becomes rough, ridged, or rounded, in such manner that a person,

in the exercise of ordinary care, could not pass over it without danger of falling, that liability attaches.

The court instructed the jury that the city was not an insurer of the safety of those who used its walks or crosswalks; that the only duty it owed to pedestrians was to exercise reasonable care to see to it that its walks and crosswalks were kept in a reasonably safe condition for travel; that all that was required of the city in respect to walks or crosswalks was to exercise reasonable care to see to it that they were kept in a reasonably safe condition for travel. This clearly states the duty of the city with respect to its walks. If the defendant had desired a more specific statement of duty touching crosswalks, or if it had desired the court to caution the jury touching the difficulties which attend the keeping of crosswalks, over which teams may pass, in a reasonably safe condition for travel by pedestrians, it should have specifically asked the court to amplify

3. TRIAL: In-
structions:
insufficient
exception.

fy its instructions by calling this fact to the attention of the jury. This was not done. It is true that, before the instructions were read, counsel did object to the instructions

as a whole, and based his objection on the ground that, as a whole, they did not completely instruct as to the respective duties of the city and pedestrians on the matter of street crossings. This was not specific enough to advise the court that the defendant was contending that there is a difference in the duty of municipalities regarding the care it owed to travelers on crosswalks, or places where people cross over streets which are used in winter by teams attached to sleighs. We are not prepared, however, to subscribe to the doctrine found in many cases cited, to wit, in *Dupont v. Village of Port Chester*, 204 N. Y. 351, 354 (97 N. E. 735), and other cases like that, in which it is said:

“Even if the entire removal of snow from a crosswalk is desirable for its use by pedestrians, the ordinary travel upon a street necessarily carries more or less snow upon the crosswalk, and, when it thaws or freezes with the varying temperature, it would be quite impossible, except by

continuous effort, to keep crosswalks or crossings wholly free from snow and ice. We repeat that the obligation resting upon a municipality to keep its sidewalks free from snow and ice does not, in the absence of express provisions of statute, apply to the same extent to a crosswalk or crossing on a public street."

When the city opens and invites the traveling public to use its crosswalks, it assumes the duty to the pedestrians to see that reasonable care is exercised in keeping these cross-

4. MUNICIPAL CORPORATIONS: sidewalks and crosswalks: standard of care. walks in a reasonably safe condition for travel. If it fails in this, it fails in the discharge of its duty to the pedestrian. What is reasonable care depends upon many circumstances and conditions. What might be rea-

sonable care in respect to one matter might not be reasonable care with respect to another. But, in either case, the exercise of reasonable care is required, to see that the walk on which pedestrians are invited to travel is reasonably safe for their use. More than reasonable care is not required in respect to any walk, and less than reasonable care will not satisfy the requirements of the law in respect to crosswalks. But what is reasonable care must be measured by the exigencies of the particular case. We think the court's instructions were sufficiently specific on this point, in the absence of any request for further elaboration. It is true that crosswalks are not only used by pedestrians, but also by vehicles of various kinds, and that vehicles have a right to use them. It does not follow necessarily that the use of these streets by vehicles renders a crosswalk essentially more dangerous. It may do so, but that is a question of fact. If this crosswalk was rendered more dangerous at this particular time and place, by reason of its use by vehicles, reasonable care for the safety of travelers required more diligence on the part of defendant.

We find no reversible error here.

5. MUNICIPAL CORPORATIONS: defects from snow and ice: notice. It is next contended that there was no actual notice to the city of the conditions which caused the injury, and it is further claimed that the conditions had not existed

for such a length of time before the injury that the city, by the exercise of reasonable care, might have discovered the condition and removed the danger.

This is a fact question, and was resolved by the jury against defendant. The court instructed the jury on this point, in substance, that the city would not be liable for the injury unless it had actual notice of the defects complained of, or that they had existed for such a length of time that the city, by the exercise of ordinary care and prudence, should have known of the condition in time to have remedied the same, and thereby prevented the injury, and said that there is no duty on the city to remove snow and ice from the sidewalk so long as the snow and ice remain on the walk in its natural condition; that the city only became liable when the snow and ice becomes ridged, rounded, and uneven, and is made to assume some other form or present some other danger than it would have presented solely from natural causes; that, to entitle plaintiff to recover, it must appear that the snow or ice had become and was, through artificial cause, rounded and uneven, and in a condition to make the walk unsafe; that this condition had existed for such length of time that the city, in the exercise of ordinary care, should have known of the rough, uneven, and dangerous condition at the point of injury, in time to have remedied the same, by the exercise of reasonable care, before the injury happened.

We are satisfied that, as to the knowledge of the city of the defect, a fair question was presented in the record for the jury. We think there was a fair question for the jury, both as to the negligence of the city and as to the contributory negligence of the plaintiff.

This covers the fifth, sixth, seventh, and eighth propositions submitted.

It is next contended that the record shows that the plaintiff, prior to this time, had suffered a fracture of the leg injured in the fall, and that, by reason thereof, the leg now injured was an inch shorter than normal, and that the court should have called the jury's attention to this fact,

when it came to consider both the care exercised by the plaintiff and the amount of plaintiff's recovery. The court did touch upon this question, and did call the attention of the jury to the fact that the plaintiff had been injured in this leg prior to the injury complained of, and said:

"In determining the degree of care which should have been exercised by the plaintiff's ward, * * * you may consider, in connection with all other facts and circumstances throwing light thereon, whether or not the plaintiff's ward, as a result of some prior injury, had experienced any loss of the use of her left limb, so as to require, by reason thereof, greater care in walking. Whether or not the plaintiff's ward was guilty of negligence which contributed to her injury, is a question of fact for your determination from all the facts and circumstances in evidence throwing light thereon. * * * The plaintiff cannot recover in this action unless she shows, by a preponderance of the evidence, that she was guilty of no negligent act which contributed to her injury. She was required to exercise that degree of care which an ordinary prudent person of her age and sex would have exercised under like circumstances, and if she did exercise such care, then she was not guilty of negligence. If she failed to exercise such care, then she would be guilty of negligence defeating her recovery."

It is next contended that the verdict is excessive. We have examined the record, and do not find the verdict so excessive as to justify our interference.

Upon the whole record, we find no reversible error, and the cause is—*Affirmed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

FREDERICK LEROY BURGESS et al., Appellees, v. BREMER
COUNTY, Appellant.

EMINENT DOMAIN: Answer on Appeal. No answer is necessary
1 on appeal from an award of damages in eminent domain pro-
ceedings.

DAMAGES: Unquestioned Trial Theory. A trial theory of dam-
2 ages to which no objections were in any wise interposed in the
trial court will not be reviewed on appeal.

WITNESSES: Competency—Review on Appeal. Record held in-
3 sufficient to justify a reversal because of the rejection of testi-
mony bearing on damages, on the ground that the witness
was not competent.

Appeal from Butler District Court.—M. F. EDWARDS, Judge.

JULY 6, 1920.

DEFENDANT appeals from a judgment for damages for
the relocation of a public highway.—*Affirmed.*

W. H. Wehrmacher, County Attorney, and *E. A. Dawson*, for appellant.

Hurd, Lenehan, Smith & O'Connor and *C. G. Burling*,
for appellees.

STEVENS, J.—Appellant's record in this case comes to us
in almost total disregard of the rules. We have, with diffi-
culty, sorted out what appear to be the principal rulings of
the court complained of. Other matters discussed are not so
presented as to permit consideration thereof. The proceed-
ings for the relocation of the highway were instituted upon
the recommendation of the county engineer, under Sections

1527-r1 *et seq.*, Supplemental Supplement to the Code, 1915. The highway, as originally established, ran on the west side of and parallel with the right of way of the Illinois Central Railway Company, and the relocation, which was for the purpose of getting it away from the encroachment of a stream, transferred it to the opposite side of said right of way. Damages were claimed for both the vacation and the relocation of the highway. Upon this question see *Yonota v. Modrachek*, 189 Iowa 538.

I. After the trial had begun, defendant
1. EMINENT DOMAIN:
answer on appeal.
filed an answer, for the apparent purpose of presenting counsel's theory of the measure of damages. This answer was, upon motion, stricken by the court. While it contained some irrelevant and immaterial matter in no wise prejudicial to plaintiff, it might well have been permitted to stand. No pleading was necessary, however, and certainly appellant was not prejudiced by the ruling of the court. *Mason v. Iowa Cent. R. Co.*, 131 Iowa 468; *Simons v. Mason City & F. D. R. Co.*, 128 Iowa 139. The only question involved upon an appeal from the action of the board of supervisors is the amount of damages, if any, to which the claimant is entitled. *Pol-lard v. Dickinson County*, 71 Iowa 438; *Dugan v. Dugan*, 129 Iowa 241.

II. The court instructed the jury that,
2. DAMAGES:
unques-tioned trial theory.
in estimating damages, benefits accruing to plaintiff, by reason of the relocation of the highway, could not be considered, and also that, in weighing the testimony upon the question of value, the jurors might use and be guided by their own judgment, and that the verdict must be based upon the evidence and in accordance with the instructions. Instructions similar in form and of identical import were sustained by this court in *Neddermeyer v. Crawford County*, 190 Iowa —. The instruction defining the measure of damages was not, apparently, drawn with special reference to Section 1527-r3 of the Supplemental Supplement, 1915, which provides:

“That if by the change of any road herein contemplated,

any part of the highway abandoned reverts to the owner of the land condemned, then and in that case the owner, by reason of the relocation of such highway, shall be entitled to such damages for the locating of such new highway which exceeds the damages sustained by reason of the old highway, taking into consideration the value of the premises immediately before and after such old road is abandoned and the new road established."

What the court, in fact, told the jury was that plaintiff was entitled to recover the difference, if any, between the fair market value of the whole farm immediately before and its fair market value immediately after the change, without taking into consideration any benefits or advantages to plaintiff, either by reason of the vacation of the old or the relocation of the new highway. No attempt was made by either party to bring the testimony as to damages within the apparent rule of the statute. This was doubtless due, upon the part of counsel for defendant, to a misinterpretation of the effect of the ruling of the court upon the motion to strike its answer and upon the admission of evidence. The measure of damages fixed by Section 1527-r3 of the Supplemental Supplement does not go to the question of benefits accruing to the owner of the land by reason of the changed location of a highway upon his land, as that term is applied in the decisions of this court in condemnation proceedings. No motion was made on behalf of defendant for a directed verdict upon the ground that no proper measure of damages was shown, nor was the question raised by a request for an instruction presenting appellant's theory of the statute. Furthermore, the point is not preserved by proper exception in the court below, nor is it presented in substantial compliance with the rules governing procedure in this court.

III. The court permitted one Cunningham, a witness for defendant, to testify as to the market value of plaintiff's land before and after the establishment of the highway, without taking into consideration any advantages

3. WITNESSES : competency : review on appeal.

that may have accrued on account of the change in the highway, which it later struck from the record, on motion of counsel, upon the ground that the competency of the witness had not been shown. The witness was apparently familiar with the land in question, and competent to give an opinion on the subject; but his answers to the preliminary questions tended to disqualify, rather than to qualify him as such witness. Other testimony was offered upon this point, and, while the court, in the exercise of its discretion, might properly have permitted the testimony to remain in the record, we do not think its exclusion calls for a reversal of the judgment below.

IV. Some contention is made by counsel for appellant that the verdict is excessive; but it is not claimed that it is the result of passion or prejudice on the part of the jury, and the amount arrived at is well within the limits fixed by the plaintiff's witnesses. Furthermore, the question is not properly presented in this court. As we find no reversible error in the record, the judgment of the court below is—*Affirmed*.

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

NELLIE R. CAVANAGH, Guardian, et al., Appellees, v. FRANK A. O'CONNOR et al., Appellants.

TRUSTS: *Action to Enforce—Law (?) or Equity (?)*. A trustee who has breached his agreement to furnish the trustor with the necessities of life may be sued *at law* by the trustor's guardian to recover a sum sufficient to discharge obligations incurred by the guardian in furnishing such necessities to his ward.

Appeal from Chickasaw District Court.—W. J. SPRINGER, Judge.

MARCH 23, 1920.

REHEARING DENIED JULY 6, 1920.

ACTION to recover for board and lodging furnished one Runion, a man of unsound mind. The opinion states the facts out of which the controversy arises. A motion was made to transfer to equity, and overruled. From this ruling the defendants appeal.—*Affirmed*.

Hurd, Lenehan, Smith & O'Connor, for appellants.

R. Feyerabend, for appellees.

GAYNOR, J.—This is an appeal from the action of the court in refusing to sustain a motion to transfer the cause to the equity side of the calendar for trial.

For a better understanding of the immediate facts out of which this controversy arises, it is necessary that we go back to a time when no relationship existed between these parties at all, and neither owed the other obligation or duty, and then to a time when the obligations and duties involved in this suit arose, and the circumstances out of which the new relationship arose. In 1915, Runion lived in the town of New Hampton. He was then about 93 years of age, and feeble in health. He was possessed of considerable property, both real and personal. The defendant O'Connor was an attorney, residing in the city of New Hampton, and Kennedy, a banker. About this time, the Servant Sisters of the Holy Ghost, a foreign corporation, contemplated the erection of a hospital in that city. In this enterprise, Runion seems to have become interested, and out of this came a desire to contribute something of his substance to the enterprise. Runion and the defendants were all members of the Catholic Church, in good standing. O'Connor and Kennedy were also deeply interested in the furtherance of the purpose of the Servant Sisters of the Holy Ghost, and they, too, desired to see the enterprise succeed. Runion was approached by these defendants, we presume as others were approached, and solicited to do

something, in a charitable way, for the benefit of this enterprise. Without entering into a discussion of the influences that were brought to bear upon Runion to induce him to contribute to the enterprise, it appears that warranty deeds, in the usual form, were executed by him, conveying to these defendants all his real estate, consisting of 480 acres in Texas and a residence in New Hampton. He also transferred to them all personal property then owned by him. As part of the same transaction, and evidently for the purpose of evidencing the thought of the parties touching the enterprise contemplated by the Servant Sisters of the Holy Ghost, a trust agreement was entered into between him and these defendants, in which they were designated as trustees, to manage and dispose of all the property thus transferred to them by Runion. This trust agreement, in its preamble, recites that:

"Whereas, a movement is on foot in New Hampton, Iowa, for the erection of a hospital in said city by the Servant Sisters of the Holy Ghost, * * * and whereas, Runion is desirous of providing for his own care and comfort and necessities so long as he shall live and at the same time assisting in said enterprise; it is therefore hereby agreed, by and between Runion, party of the first part, and W. J. Kennedy and F. A. O'Connor, parties of the second part, that said second parties are hereby appointed and constituted trustees of the property of the party of the first part to handle, manage and dispose of the same, under the conditions and terms herein provided."

Then, after reciting the conveyance of the property to said O'Connor and Kennedy, it recites as follows:

"It is further agreed that second parties shall hold the legal title to the land above described, free from any trust limitations, with authority to sell and convert the same into cash as soon as they shall deem it expedient to do so, the intention being to authorize and direct such sale and conversion at the earliest moment consistent with good business judgment; and second parties are hereby authorized and empowered to convey said property to any purchaser or pur-

chasers thereof free from the terms and limitations of this trust, and without any appraisement, order of court or other restrictions of any kind.

"It is further agreed that second parties, as trustees, shall out of the funds or proceeds arising from the sale of said property, pay over to first party the sum of \$1,000 for such special purposes and use as first party may desire to make of same, and shall pay all indebtedness owing by first party at this time, including any mortgages against any of said property; that said second parties as trustees, shall hold the remainder of said funds in their hands, of such time and purposes as are herein provided; and so long as said property or the funds derived from the sale thereof remain in the hands of second parties under this agreement, second parties agree to hold same in trust, and from said property or funds or from the income therefrom, to provide first party with all necessary board, lodging, clothing, washing and laundry, nursing, medical attendance, and a nominal amount for pocket money from time to time, so long as he shall live, and to furnish him a proper and respectable burial in case of his death; all the remainder of said property or the funds derived from the sale thereof shall be devoted to hospital purposes as hereinafter provided.

"Second parties are hereby authorized to apply proceeds from the sale of said property in whole or in part, or the property itself, (so far as same may remain unsold) to aid the said Servant Sisters of the Holy Ghost in the erection of a hospital in New Hampton, Iowa, and in the purchase of a proper site therefor; provided, however, (if first party be living at said time) that before any of said property or funds shall be used for hospital purposes as above provided, said Servant Sisters of the Holy Ghost shall first legally obligate themselves by written contract to continue to furnish first party all necessary board, lodging, clothing, washing and laundry, nursing, medical attendance, and a nominal amount for pocket money from time to time so long as he shall live, and to furnish him respectable and proper

burial in case of his death and said contract shall provide that first party shall be assigned a suitable and comfortable room in said hospital."

It will be noted that, in this agreement, there is no time specified in which this hospital shall be erected. There is no time provided in which the Servant Sisters of the Holy Ghost shall obligate themselves to perform any of the conditions of this agreement. The obligation to furnish to Runion the things which the contract calls for, and to which he is entitled because of the agreement, was assumed by these defendants, O'Connor and Kennedy, and that duty rests upon them until such time as they may be relieved by a transfer of the property to the Servant Sisters of the Holy Ghost. It does not appear that the Servant Sisters of the Holy Ghost have assumed any of the obligations that this contract calls for. It does not appear that the hospital has been erected, or any provision made for his entertainment at a hospital. No obligation, therefore, rests upon the Servant Sisters of the Holy Ghost now, and none can arise until the property is transferred to them, and they have assumed the obligations. We have to deal, therefore, only with the obligation assumed by the defendants O'Connor and Kennedy. It will be further noted that the primary purpose in the transfer of the property to O'Connor and Kennedy, and in the agreement supplemental thereto, was to secure to Runion the necessities of life, so long as he should live. His agreement to assist in the enterprise was, therefore, subordinated to this principal purpose, and was acquiesced in by the parties to the agreement. The obligation assumed was in consideration of the conveyance to them of this property, and the execution of this agreement. They obligated themselves, first, to pay over to Runion the sum of \$1,000; second, to pay all his indebtedness, including any mortgages against the property; and third, to provide him with all necessary board, lodging, clothing, washing and laundry, nursing, medical attendance, and a nominal amount of pocket money, from time to time, so long as he should live, and to furnish him a proper and

respectable burial at his death. It will be noted that it is only the remainder of the property, or the fund derived from the sale, that is to be devoted to hospital purposes. It will be noted that it is further provided that, before any of the property or funds shall be used for hospital purposes, the Servant Sisters of the Holy Ghost shall first legally obligate themselves, by written contract, to continue to furnish the first party the things agreed to be furnished by O'Connor and Kennedy.

The petition recites that, after the contract was executed, and on or about the 1st of November, the defendants O'Connor and Kennedy agreed with Runion that he might select a place in which to live, where he could receive the care and comforts which they had contracted to give to him; that he selected a home in a private family, and in this home received the comforts and the necessities contemplated by the contract. It recites further that he has been in this home for a considerable length of time, and has been receiving there the things which the defendants contracted to give him; that the defendants have performed no part of the conditions of the contract on their part to be performed, and have given to Runion none of the things which the contract calls upon them to furnish, though demand has been made therefor.

The action is brought to recover from these defendants a sum of money sufficient to liquidate the obligations which the defendants assumed to discharge in his care and keeping since the execution of the agreement. So far as this record is concerned, the only question to be determined is the amount which these defendants should be called upon to pay. The action is brought by the guardian of his property, and it is brought to enforce a contract of obligation—an obligation to provide Runion with all necessary board, lodging, clothing, washing, etc. We take it that this necessary board, lodging, etc., were furnished Runion at the instance of his guardian. Runion is now of unsound mind, and under guardianship. The agreement to furnish him these things was an agreement with Runion. His guardian

stands in his place, and seeks to enforce this agreement. It involves no equitable features. It involves simply the enforcement of a contractual obligation, of which the law takes cognizance. There is clearly a privity contract between these trustees and Runion. The Servant Sisters of the Holy Ghost can have no interest in the fund until such time as the contractual obligations now existing between Runion and the defendants have been fully discharged. There is no need of any accounting. All the rights of the Servant Sisters of the Holy Ghost in this contract are subordinate to the rights of Runion, which are now sought to be enforced. While a court of equity might have taken cognizance of this controversy, and, by decree, enforced the rights of this plaintiff against these defendants, yet its jurisdiction is not exclusive. Plaintiff, having invoked the aid of a court of law, is entitled to have his rights adjudged and adjusted in a court of law. The action is, in its nature, an action for money had and received for the use and benefit of this defendant, and such actions are not solely cognizable in a court of equity. It is the general holding that, where money is received for the use and benefit of another, and an express promise is made to pay it, an action at law may be maintained for its recovery. Of course, it is true, ordinarily, that an action at law for money had and received will not lie against the trustees while the trust is still open, but, where the instrument creating the trust contains an express promise to pay to the creator of the trust for his use and benefit, a law court will enforce the promise, and clearly so when the amount which the contract calls for is easily and definitely ascertainable. Thus it has been held that, where there is an express promise by the trustee to pay the beneficiary a certain part of the income, assumpsit will lie upon the promise. See *Weston v. Barker*, 12 Johns. (N. Y.) *276; *Dias v. Brunell's Exr.*, 24 Wend. (N. Y.) 9; *Roper v. Holland*, 3 Adolphus & Ellis 99. Of course, these authorities are not strictly in point, but are suggestive on the point here under consideration.

There is no reason suggested in this record, either legal

or equitable, why this promise to the old man has not been performed. We take it the property has been converted into money, and is now in the hands of the trustees. If the only objection to the payment is that the amount demanded is excessive, that matter can be determined in a court of law, as well as in a court of equity. We see no reason for interfering with the action of the court in overruling the motion. Its action is, therefore,—*Affirmed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

BERTHA COLLINS, Appellee, et al., Appellants, v. G. R.
AHRENS, Administrator, et al., Appellees.

WILLS: Action to Construe—Creditors. Creditors of one who
1 might inherit if a will be construed in a given way may not maintain an action to construe such will.

APPEAL AND ERROR: Points Noticed by Court Sua Sponte. The
2 appellate court will note, on its own motion, that a creditor of a possible legatee under a will may not maintain an action to construe the will, and therefore has no right to maintain appeal from a decision adverse to such possible legatee, even though such point was not raised in the trial court.

Appeal from Benton District Court.—JAMES W. WILLETT,
Judge.

APRIL 6, 1920.

REHEARING DENIED JULY 6, 1920.

THE trial court dismissed a petition of said Collins to construe a will. Said interveners Hartman Company appeal.—*Affirmed*.

C. W. E. Snyder, for appellant.

Tobin & Tobin and R. S. Milner, for appellees.

SALINGER, J.—I. Bertha Collins, an heir of Catherine Turnbull, deceased, instituted an action to have that will construed. She asserted that there was intestacy as to certain 10 shares of bank stock, to the half of which she was entitled by inheritance. If there was intestacy, one D. A. Turnbull was, by inheritance, entitled to the other 5 shares. A creditor of said D. A. Turnbull's had, by garnishment and levy, brought proceedings to subject said 5 shares to his debt. He then intervened, and asked the court to construe the will in such manner as that the debtor would inherit said 5 shares. The trial court dismissed the petition, and thus held that the will took said shares from both Collins and Turnbull. The intervener only appeals.

At the outset, appellee urges upon us that the appellant has no right to maintain an action to construe said will. Assuming, for the purposes of present discussion, that appellees have not waived the right to make this objection, we think that the objection is valid. It was squarely held, in *Higgins v. Downs*, 101 App. Div. 119 (91 N. Y. Supp. 937), that a judgment creditor of a beneficiary cannot sue to determine the estate of the beneficiary. Speaking to the giving construction to a doubtful or disputed clause in a will, Mr. Pomeroy, in the third volume of his work on Equity Jurisprudence (3d Ed.), says (page 2301):

"In accordance with this doctrine, which regards a trust, express or implied, as essential to the jurisdiction, it necessarily follows that the suit can only be maintained by some party *directly* interested in the trust under the will; that is, by an executor or a trustee, or by a *cestui que trust*, or a legatee; it cannot be maintained by an heir at law, or a devisee of a mere legal title, and much less by a creditor."

For this text, a very large number of cases are cited by the author. It was ruled, in *Clark v. Carter*, 200 Mo. 515 (98 S. W. 594), that a purchaser of land from an executrix cannot proceed to have a will construed. We held, in *Do*

1. WILLS: ac-
tion to con-
strue: cred-
itors.

Rousse v. Williams, 181 Iowa 379, at 387, that a debtor who has no more than a right to assert an interest in property under a will is not obliged to assert such right to benefit his creditors, and that he is at liberty to make an election not to acquire property. An heir might, by successfully contesting a will, obtain means out of which payment of his debts could be made. The same result might follow from his succeeding in having the testament given a certain construction. But no one will claim that his creditor can contest the will and thus ultimately obtain satisfaction of his debt. We can see no reason why one who would have no standing to contest a will has standing to have it construed.

II. The only response of appellant is that no objection was made below to the intervention, and that, therefore, none may be made now. There was no occasion for those

2. APPEAL AND
ERROR:
points no-
ticed by court
sua sponte.

opposed to the intervention to concern themselves much about it, and the record shows that little attention was paid to it. It was of no importance, because the result to the intervenor would be precisely the same, whether it appeared in the case or not. The proceeding to construe the will is one *in rem*. Its object was to fix the status of the title to property. It was being brought by an heir who had the right to bring it. If the court held the will did not dispose of the stock shares, then Turnbull was the owner of half of these shares, and, necessarily, the attachment of the intervenor would, in that event, hold the property for the creditor. Being *in rem*, so fixing the status would fix it for this creditor, whether a party or not. If, on the other hand, at the suit of Collins the court found that there was no intestacy, and that, therefore, Collins owned none of the shares, that finding would govern the title of Turnbull, and intervenor would have nothing to seize, whether it appeared in the suit or did not. Its presence in the case became material for the first time when Collins submitted to her defeat, and intervenor alone appealed. It follows the objection raised by appellees must be sustained.

In view of what has been said, it may, perhaps, be unnecessary to add that this objection is one we should have raised on our own motion. The fair effect of the law on the subject is that equity has no jurisdiction to construe a will at the insistence of a mere creditor of one who might inherit if the will be construed a given way. If that is so, we could not reverse at the instance of such creditor, and would have to raise for ourselves the point that he had no standing to maintain his appeal.—*Affirmed*.

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

MILDRED CONKLIN, Appellant, v. CITY OF DES MOINES,
Appellee.

APPEAL AND ERROR: Law of Case. The law as declared on appeal must necessarily govern the retrial on the same pleadings and facts.

NUISANCE: Abated Permanent Nuisance—Measure of Damages.
2 The measure of damages for a nuisance, permanent in its nature but fully abated prior to the bringing of action, is the depreciation in rental value for the time between the creation of the nuisance and its abatement.

Appeal from Polk District Court.—LAWRENCE DEGRAFF,
Judge.

JULY 6, 1920.

ACTION to recover damages for diverting water on plaintiff's land, through a ditch constructed by the defendant. At the conclusion of all the evidence, the court directed a verdict for the defendant. Plaintiff appeals. For a full statement of the facts, see opinion of this court on former appeal, reported in 184 Iowa 384.—*Affirmed*.

S. B. Allen, for appellant.

H. W. Byers, Reson S. Jones, C. A. Weaver, and Paul Hewitt, for appellee.

GAYNOR, J.—Plaintiff is the owner of a certain tract of land in the city of Des Moines, and claims that the defendant wrongfully constructed a ditch, in such a manner and way as to divert the water, both surface and flood water, from its natural channels, and cast it upon plaintiff's land. Her claim, briefly stated, is that the ditch was constructed by the defendant; that it was so constructed that water coming from the ditch flowed over her premises; that the water so coming would not, in the natural course of drainage, pass onto her land; that no provision was made for its escape as it accumulated in the ditch, except over plaintiff's premises; that, during the years 1903 to 1909, inclusive, defendant, through the channel so created, caused the water above plaintiff's land to be carried through said ditch onto plaintiff's land; that the effect of this was to prevent plaintiff from raising any crop upon the portion of the land each successive year between said dates.

She divides her petition into two counts. In the first count, she seeks to recover damages for the injury to the land occasioned by the act of the defendant aforesaid. In the second count, she alleges that, by reason of the act aforesaid, waters that did not come upon her land were wrongfully cast upon the land through said ditch, and remained there to her great damage; that, subsequently, the board of supervisors of Polk County, observing the condition, established a drainage district, in which this land of plaintiff's was included; that, through this drainage district so created, they properly established a ditch to carry off the waters, and the evidence shows it did this; that, subsequently, plaintiff's land was assessed for its proportion of the cost of draining the entire district, on the theory that she was benefited to that extent; and that her equitable apportionment of the cost was \$1,000. She alleges that, besides this, the drainage district appropriated certain of her lands, the use of which has been entirely lost to her through

the action of the board. She claims that it would not have been necessary to have established this ditch, if it had not been for the act of the defendant aforesaid. In this second count, she claims a right to recover for the value of the land taken by the drainage district, together with the amount which she was required to pay as special benefits accruing to her by reason of the establishment of the district and the putting in of the ditch.

The defendant filed a general denial, practically.

Upon the issues, the cause was tried to a jury. At the conclusion of all the testimony, the court directed a verdict for the defendant, and from the action of the court the plaintiff appeals, and assigns error. Not all the errors assigned need be discussed in the disposition of this case.

This case was here before on appeal. The opinion of the court is found in 184 Iowa 384.

As we have said, we need not discuss all the questions that are urged here. Many of these questions were settled on the former appeal, and the holding of this court on the former appeal is the law of this case. On the former trial, it was urged that plaintiff was entitled to recover the amount assessed against her as benefits in the establishment of the drainage district, and recovery was sought upon the same theory that is urged here, to wit: that it represents the cost of abating the nuisance created by the act of the defendant complained of. The record on this point is the same now as it was then. We then said:

“It would, therefore, be manifestly impossible for a jury to determine the cost to plaintiff of the abatement of the nuisance by a public drainage improvement. To permit the jury to do so would open up a field of speculation only.”

This holding was based upon the thought that the evidence relied upon, to wit, the amount assessed against plaintiff's land for the improvement, did not measure the cost to the plaintiff of abating the nuisance. The plaintiff did not abate the nuisance. The nuisance was abated through the action of the board of supervisors in establish-

1. APPEAL AND
ERROR: law
of case.

ing the drainage district, and the construction of the ditch through the drainage district so established. It is conceded that this abated the nuisance, and relieved plaintiff of all the water which she says was wrongfully carried upon her land by the action of this defendant. The nuisance is abated. It no longer exists. The cost of abating a nuisance is properly chargeable to the one who causes the existence of the nuisance; but the amount recovered must be measured by the cost to the party, reasonably incurred in the act of abating. The amount assessed for special benefits in a drainage district is not measured by its relief from any particular waters that flow upon it. Plaintiff's land was all low, and much of it subject to overflow, before the act of the defendant was committed of which complaint is made. By the act of the board of supervisors in establishing the drainage district and the ditch, it is now relieved from the burden of all the waters that interfered with the land for agricultural purposes. The amount assessed does not measure, therefore, the cost of repairing the wrong which the defendant did, but tends rather to measure the whole benefits which came to the plaintiff by reason of the establishment of the drainage district and the removal of the waters within the district which served, more or less, as a menace to plaintiff's land. However that may be, this matter is settled by the previous decision of this court. So it is apparent that, on the second count of plaintiff's petition, her attitude not having been changed nor the proof altered, her claim stands condemned by this court.

The first count of her petition is bottomed on the theory of a permanent nuisance, and she introduced evidence of damage on that theory, and followed the rule which is ordinarily adopted when a nuisance is permanent, to wit, the difference between the value of the land immediately before and the value of the land immediately after the establishment of the nuisance. The record discloses in this case that, after the establishment of the drainage district and the putting in of the ditch by the district, plaintiff's land

2. NUISANCE:
abated per-
manent nul-
sance;
measure of
damages.

has been relieved of all the evil consequences which she claimed flowed from the action of the defendant. The nuisance is, therefore, abated, and was abated before this action was commenced. It would be manifestly inequitable now to allow her to recover on the theory of a permanent nuisance. She was not denied the right, however, if she had chosen to follow the suggestions made in our former opinion, to introduce proof of such loss as accrued to her while the nuisance continued. This would be measured by the loss of the use of the land during the existence of the nuisance. Whatever plaintiff's reason may have been for failing to follow the suggestion of this court in the former opinion, she has seen fit to rely and submit her case on the theory of a permanent nuisance, and offered no evidence tending to show the loss, if any, to her in the use of the land during the continuance of the nuisance. We are rather inclined to think that this was not done for the reason that the plaintiff has received her rental, the same after as before the nuisance was created. The loss, if any, must have fallen on her tenant, who is not a party to the suit. This was the theory upon which the court instructed the jury to return a verdict for the defendant.

We will not reconsider the propositions involved beyond this holding. She introduced no evidence tending to show the depreciation of the rental value of the premises, or that she lost anything by any act of the defendant in depreciation of rental value. In our former opinion, we said:

"The court should have permitted plaintiff to show the fair and reasonable rental value of the premises before the ditch was constructed, and its rental value as affected thereby."

This, under the record, was the proper measure of plaintiff's damage, if any she sustained. No evidence being offered by the plaintiff on this point on this trial, she has furnished no basis on which damages could be awarded her, and the court was right in so holding. Its judgment is, therefore,—*Affirmed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

E. G. COTTER, Appellant, v. FRED KADERA, Appellee.

BOUNDARIES: Suddenly Formed River Channel as Boundary. A suddenly formed river channel will not, by any length of time, become a boundary line by acquiescence, in the absence of a showing that one landowner claimed ownership to such new channel, and that the other landowner expressly or impliedly consented to such claim. Especially was this true when the land of the owner asserting such boundary line was separated from the land in controversy by the old channel, title to which was in the state.

Appeal from Johnson District Court.—R. G. POPHAM,
Judge.

JULY 6, 1920.

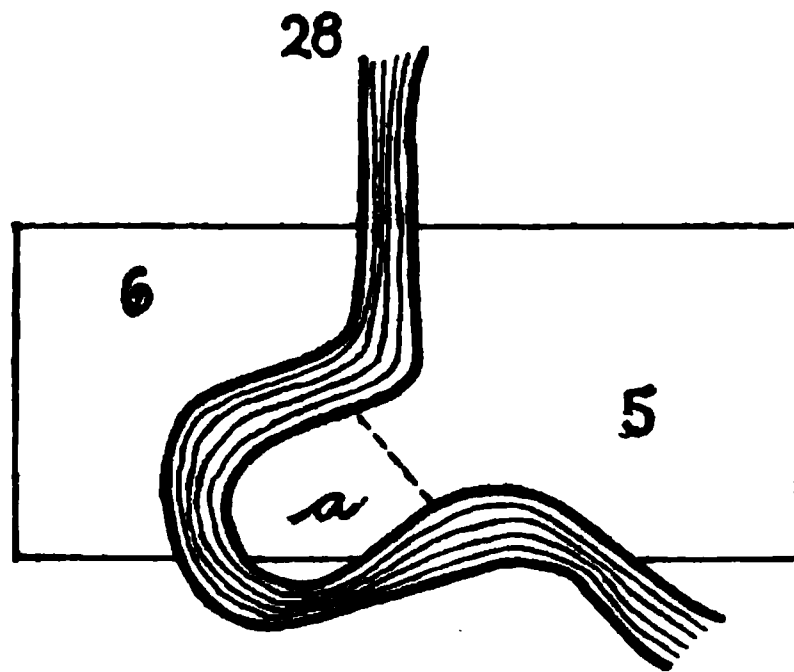
Suit in equity to quiet title to a body of land comprising 7 or 8 acres. The defendant denied the material allegations of the petition, and presented a cross-bill, asking to quiet title in himself to the same body of land. A trial being had, there was a decree for the defendant. The plaintiff appeals.—*Affirmed.*

Havner, Messer, Clearman & Olsen, for appellant.

Hart & Hart for appellee.

EVANS, J.—Though the plaintiff first pleaded a paper and record title, he afterwards amended, and set up a claim of title by adverse possession and prescription, and by acquiescence in a partition line. The real controversy between the parties rests upon the allegations of this pleading, and turns wholly upon a question of fact. That question is whether the evidence discloses adverse possession

by the plaintiff and his grantors for the statutory period of limitation; or does it disclose acquiescence in a partition line between the respective landowners for the statutory period? The body of land in controversy abuts upon the Iowa River, in Section 28-81-8, in Johnson County. At the time of the government survey of this section, the south quarter of such section was intersected by the Iowa River, running south and southwesterly. Near the south line of the section, the course of the river turned, and formed a bend known in the record as "Horseshoe Bend." The following rough diagram is sufficiently illustrative:



The river was meandered, as navigable. The land abutting thereon on each side was platted into numbered lots by the government survey. Lot No. 5 abutted on the east, and Lot No. 6 abutted on the west. The land within the "horseshoe bend" was a part of Lot 5. Its location is indicated in the above diagram by "a." Sometime subsequent to the government survey, and more than 30 years prior to the trial, the flow of the river cut across the heel of the horseshoe, and established a new channel, which has continued ever since. The quantity of land thus cut off from Lot 5 was somewhat less than 8 acres. It is referred to in the record as the "island," and appears to have been so known locally for some period of time at least. The old channel and the new combined had the effect to completely surround it. It was covered with grass and brush, and

perhaps timber. None of it was tillable. Neither was it valuable, as compared with tillable lands. The title to Lot 5 was conveyed, in 1863, to the Amana Society, and was held by such grantee until February, 1912, when it was conveyed to this defendant.

Plaintiff acquired the title to Lot 6 in 1903 from Jiras, who acquired the same in 1900 from Wolf. Wolf had held the title and occupancy for more than 20 years. Up to this point, the evidence is without substantial dispute. The evidence on behalf of plaintiff in support of adverse possession is so slight and inconclusive that we would not be justified in a discussion of its details. The real emphasis of appellant's argument is upon the claim of acquiescence in a boundary line. The title of the Amana Society to Lot 5 was not affected by the new channel of the river. The new channel, however, did affect the convenience of the society in the use and enjoyment of its property. The tract in controversy was physically segregated. It was only a small part of Lot 5. Its character and value were, perhaps, such as not to justify any considerable expense in establishing connections across the river. It remained unused. Some emphasis is laid upon this fact by appellant, as tending to show acquiescence in the new channel as a partition line. It is urged that it was wholly inaccessible to the society or to the defendant, except by crossing the river, or passing over the plaintiff's land. We think such circumstance does not aid the plaintiff's contention. It is not only consistent with nonacquiescence in a change of line, but is explanatory of nonuser by the society of this tract of land, to which it had a perfect title. Moreover, the tract was, in a legal sense, inaccessible to the owner of Lot 6 also, in that it was surrounded by the old river bed, title to which was in the state.

In order to show acquiescence in a boundary line, it was incumbent upon the plaintiff, not only to show that the owners of Lot 6 conceived a purpose to claim to the new channel of the river, but to prove also that the owner of Lot 5 acquiesced in such claim, either in terms or by con-

duct inconsistent with a contrary claim. There is no evidence of such acquiescence, by language or conduct. The only circumstance tending in that direction is that the new channel was there, and that it in fact severed Lot 5. It was not put there as a boundary. At the time that the avulsion occurred, the owner of Lot 6 could not have claimed, in good faith, that it enlarged his rights. The subsequent use of the tract by the plaintiff was of such a nature as to afford but slight evidence of any claim of right on his part. That part of his farm contiguous to the river was used by him as his pasture land. His tillable land and his improvements were further west. His pasture land thus used by him abutted upon the old river channel. His stock encountered no obstacle to the run of the river channel and to the tract enclosed thereby. No fence was maintained along the east boundary of Lot 6. Within 3 or 4 years prior to the beginning of this suit, there was an attempt by plaintiff or his tenant to maintain a fence along the river bank, but it was washed away by the first high water. It appears, also, that, within the same period of time, the plaintiff rented some of his pasture land to the brother of the defendant, and that, in charging rent therefor, he included this tract in his acreage. This evidence would tend to show a claim of right on the part of the plaintiff at that time.

As already indicated, we find the evidence quite insufficient to prove any acquiescence by either owner of Lot 5 in any adverse claim, if any, on the part of the plaintiff, or to prove that either owner knew or had reason to know that the plaintiff was making adverse claim to such tract. The decree below was properly entered for the defendant, and it is—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

THOS. CUSACK COMPANY, Appellee, v. J. R. MYERS, Appellant, et al.

EASEMENTS: Naked License and Contract Therefor Distinguished.

- 1 A naked license, without consideration therefor, is revocable at pleasure. A contract for an easement on a consideration paid in advance is not so revocable.

INJUNCTION: Restraint of Continuing Trespass. An injunction

- 2 will lie to restrain defendant from painting signs on walls for the use of which for like purposes plaintiff has paid a valuable consideration in advance.

INJUNCTION: Motion to Dissolve as Involving the Merits. A

- 3 motion to dissolve an injunction does not necessarily raise an issue which goes to the merits.

Appeal from Webster District Court.—R. M. WRIGHT, Judge.

JULY 6, 1920.

DEFENDANT appeals from an order refusing to dissolve a temporary writ of injunction.—*Affirmed.*

Kenyon, Kelleher & Hanson, for appellant.

Price & Burnquist, for appellee.

STEVENS, J.—I. The defendant J. R. Myers appeals from the order of the court overruling a motion to dissolve a temporary writ of injunction. Upon the petition of plaintiff, a corporation engaged in the business of sign painting and advertising for others, for an injunction to restrain the defendant Myers, who is engaged in a like business, from painting signs upon the walls of various buildings in

1. **EASEMENTS:**
naked license
and contract
therefor dis-
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the city of Fort Dodge, upon which signs painted by plaintiff were displayed, a temporary writ was ordered by the judge in vacation, without notice to the defendant. The defendant Myers alone appeared, shortly after the writ was issued and served, and filed an answer, admitting that he had entered into contracts in writing with the owners or tenants of the respective buildings referred to in plaintiff's petition, granting him the privilege of placing advertising upon the wall space occupied by the signs placed thereon by plaintiff, and that he claimed the right, under said contracts, to use said wall space; and also filed a motion to dissolve the temporary writ.

Evidence was offered orally upon the hearing of the motion to dissolve, from which it appears that a contract in writing was entered into between plaintiff and each of the following named persons, who are joined as defendants herein, for the right to paint signs upon the walls of certain buildings owned or occupied by them, to wit: With Colby Bros., dated August 12, 1917; with Julius & Awe, dated August 1, 1917; with J. A. McIntyre, dated August 15, 1917, each for one year; with Hoffman & Piesinger, T. F. Taff, Sackett & Hajre Drug Company, Smith Bros., and Wafful & Welty, dated June 1, 1917, and expiring June 1, 1918. The contracts were identical in form, and contained a provision granting plaintiff the privilege of occupying the premises on like terms from year to year, for a period of not to exceed five years. Each contract also recited and acknowledged the receipt of a consideration of from \$5.00 to \$10. Written contracts dated after June 1, 1918, reciting a consideration of from \$5.00 to \$25, and granting defendant the privilege of using the wall space in question, duly signed by the owner or occupant of said buildings, were entered into with the defendant Myers. These contracts contain a provision for the annual renewal and extension thereof.

It further appears from the evidence that a representative of plaintiff came to Fort Dodge on or about June 18, 1918, for the purpose of renewing the several contracts

above referred to, when he found the advertisements placed on the walls of the buildings painted out, and a sign of the Pillsbury Milling Company placed thereon. Near the bottom of the signs displayed by plaintiff were written the words, "Thos. Cusack Co.," for the purpose of indicating the advertising agency using the space. It is also claimed, and this the evidence tends to show, that the agent of defendant, who was a foreman, and in charge of a force of painters, knew of the contracts between plaintiff and his codefendants, and that, as he had formerly been employed by plaintiff in the same capacity, he was familiar with the form of contract used.

The grounds of defendants' motion to dissolve the injunction are, in substance, that the contracts in question were naked licenses, revocable at the pleasure of the grantors; that several of them had expired before contracts were made with defendant, and that no right of renewal, therefore, existed; that the allegations of plaintiff's petition clearly show that it has an adequate remedy at law for damages, and no grounds of equitable cognizance are alleged therein. The motion asks the dissolution of the writ generally, and does not ask for a modification thereof; so that the only question presented for our decision is whether the court abused its discretion in refusing to dissolve the injunction. *Brody v. Chittenden*, 106 Iowa 340.

As already stated, each contract referred to was for one year, for a fixed consideration, paid in advance; and it would seem to be immaterial whether it be treated as a lease, a license, or a simple contract to use the wall space for advertising purposes for a definite period. The right of the grantor to revoke a mere naked license may be conceded, so far as the merits of this appeal are involved. The owner of a building who makes a contract, for a valid consideration, to permit another to display advertising thereon, is as much bound by the terms thereof as he would be by any other contract. The authority, or right, to use the walls in question is not merely permissive, but amounts at least to the grant of a right in the nature of an ease-

ment. *Levy v. Louisville Gunning System*, 121 Ky. 510 (1 L. R. A. [N. S.] 359); *Willoughby v. Lawrence*, 116 Ill. 11; *Borough Bill Posting Co. v. Levy*, 70 Misc. Rep. 608 (129 N. Y. Supp. 181); *Cusack v. Gunning System*, 109 Ill. App. 588. The exact question under consideration was only indirectly involved in several of the cases cited by counsel for appellant, and none of them appears to sustain their claim that the grantor could revoke the contracts in question at will. Several of the cases cited are in the New York Supplement reports. In *Borough Bill Posting Co. v. Levy*, supra, the court held that specific performance of a license or contract to use real estate for advertising purposes, given for a definite period and for a valuable consideration, might be granted in a proper case. It is our conclusion that, as the contracts were based upon a consideration, and fully performed by plaintiff, they were not revocable at the will of the grantor, but that he was bound by the terms thereof.

II. The signs painted by plaintiff advertised the products of various concerns by which it was employed as an advertising agency, the terms of which are not shown. The

2. INJUNCTION:
restraint of
continuing
trespass.

effect, however, of the action of defendant complained of was to exclude plaintiff from the use of at least three of the spaces provided for in its contracts for several months, and it is in the nature of a continuing trespass. Whether an adequate measure of damages is provided in the action by plaintiff against the party violating his contract, we are, upon the record before us, unable to say; but we have no doubt that the court might very properly enjoin the defendant from excluding the plaintiff from exercising its rights under the contracts shown, or from interfering therewith during the pendency of the case for trial on the merits. *Tantlinger v. Sullivan*, 80 Iowa 218; *Halpin & Co. v. McCune*, 107 Iowa 494; *City of Council Bluffs v. Stewart*, 51 Iowa 385; *Chamberlain v. Brown*, 144 Iowa 601. The defendant, in his answer, insists upon the right to destroy the advertising of plaintiff, and to deprive it of the benefits of its contract.

3. INJUNCTION:
motion to
dissolve as
involving the
merits.

Whether the plaintiff had the right, under its several contracts, to renew and extend the same, without electing to do so, by tendering the consideration agreed upon before the expiration of the period of one year, or whether a right superior to that of defendant was acquired by plaintiff by the renewal and extension of certain of the contracts, goes to the merits of the controversy, and is not raised by a motion to dissolve the injunction generally. *Brody v. Chittenden*, supra; *Wingert v. City of Tipton*, 134 Iowa 97; *Swan v. City of Indianola*, 142 Iowa 731.

We need not, in view of this fact, consider the contention of counsel for appellant that the renewal provision of the several contracts is unenforceable for want of mutuality. It is our conclusion that the record fails to disclose that the court abused its discretion in refusing to dissolve the temporary writ, and, therefore, its finding and order thereon is—*Affirmed*.

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

PERRY M. DIVINES, Appellee, v. JACOB M. DICKINSON,
Receiver, et al., Appellants.

LANDLORD AND TENANT: Premises—Possession, Enjoyment,
1 **and Use—Repairs.** In the absence of a covenant or agreement by the landlord to make repairs, or to maintain the leased premises in a safe and suitable condition for the occupancy and use of the tenant, he is not bound to do so.

LANDLORD AND TENANT: Premises—Possession, Enjoyment,
2 **and Use—Duty of Landlord.** While a tenant could not require the landlord to repair a defect existing at the time of the lease, or occurring thereafter from causes other than the landlord's acts, nevertheless the landlord was under an implied obligation not to disturb or otherwise interfere with the leased premises.

LANDLORD AND TENANT: Premises—Possession, Enjoyment,
3 **and Use—Duty of Landlord.** It was the duty of the landlord,

after removal of the building adjoining the one leased, to take such steps as were reasonably necessary to maintain the leased building in the condition in which it was at the time the lease was entered into, except as to defects or injuries other than from his acts.

LANDLORD AND TENANT: Premises—Possession, Enjoyment, and Use—Negligence of Landlord. Evidence reviewed, in an action against a landlord by a tenant for injuries to property from the collapse of a wall on leased premises, and held sufficient to go to the jury on the question whether the landlord was negligent, and had caused an adjoining building to be removed, without making reasonable provision for protecting the leased premises from becoming untenable or dangerous, because of the weakening or exposure of the wall and foundation to the action of the elements.

RECEIVERS: Negligence—Duty to Tenant on Company's Property. Evidence reviewed, in an action against a receiver of a railway for injuries to property by the removal of adjoining wall of leased premises, where there was nothing to indicate that the receivership was not for the general purpose of defending and protecting the property of the railway company, and held sufficient to go to the jury upon the question whether the receiver, who had been appointed after the removal of the wall, was negligent in failing to brace the tenant's wall, after notice that the foundation was giving away.

Appeal from Des Moines District Court.—OSCAR HALE, Judge.

SEPTEMBER 26, 1919.

REHEARING DENIED JULY 6, 1920.

ACTION by a tenant against his landlord for damages resulting from his alleged negligence in removing buildings adjoining the demised premises. There was a judgment upon the verdict of the jury in favor of plaintiff. Defendant appeals.—*Affirmed.*

F. W. Sargent, Tracy & Tracy, and J. H. Johnson, for appellants.

Power & Power and Hirsch & Riepe, for appellee.

STEVENS, J.—I. The defendant railway company in 1912 became the owner of three buildings in the city of Burlington, known as Nos. 106, 108, and 110, Jefferson Street. Defendant thereafter orally leased No. 110 to plaintiff, who had for some time been in possession thereof as a tenant. Plaintiff paid his rent monthly, and occupied the first floor for business purposes, and the second as a residence. The building at 106 was partially destroyed by fire, and, in 1914, defendant entered into a contract with one Gilbert to wreck this building; but, after a portion of the building had been removed, the contractor discovered that it could not be completed without wrecking the building at No. 108, whereupon defendant contracted with Gilbert to wreck both buildings. The buildings were wrecked without other compensation than the salvage received therefrom. The building in question was a very old three-story brick, resting upon an independent stone foundation, and was erected long prior to the adjoining buildings. The joist in building No. 108 was inserted in openings made for that purpose in the east wall of the leased building, but the lower joist rested upon the stone foundation. There was a cellar under the building at Nos. 108 and 110, the latter being about 18 inches deeper than the former.

→ Plaintiff was engaged in the bird and goldfish business, and kept a small stock of glassware. On April 13, 1916, a portion of the foundation of the east wall of the building in question gave way, and on the following day collapsed, resulting in serious loss to plaintiff's stock of birds, fish, and glassware.

The negligence charged in plaintiff's petition is, in substance, as follows: That, in removing said adjoining buildings, the east wall of the leased building was greatly weakened, and the support received from the adjoining buildings removed; that the work of removing said buildings was carelessly and negligently done, and the building occupied by plaintiff rendered dangerous and unsafe; that the said

railway company neglected and failed properly to support the east wall of the building, after the supports from the adjoining building had been removed.

Counsel for appellants rest their contention upon two propositions: (a) That the oral lease under which plaintiff held possession of the building did not require defendant to repair the building or maintain it in a safe or suitable condition for occupancy; and (b) that Gilbert was an independent contractor, for whose negligence, if any is shown in the removal of the adjoining buildings, resulting in injury to the building occupied by plaintiff, defendant would not be liable.

The law is well settled that, in the absence of a covenant or agreement by the landlord to make repairs or maintain the leased premises in a safe and suitable condition for the occupancy and use of the tenant, he is not bound to do so. *Flaherty v. Nieman*, 125 Iowa 546; *Wood v. Carson*, 257 Pa. 522 (101 Atl. 811); *Beaulac v. Robie*, (Vt.) 102 Atl. 88; *Brown v. Dwight Mfg. Co.*, (Ala.) 76 So. 292; *Samuels v. A. M. Realty Co.*, 165 N. Y. Supp. 979.

The right of defendant to remove the building adjoining the leased premises must also be conceded, as well as the general rule urged by counsel for appellant that the employer is not liable for injuries resulting from the negligence of an independent contractor. The difficulty is not with the rules of law above stated, but with the application sought to be made thereof. Plaintiff does not seek to recover upon the theory that defendant was liable for the negligence of Gilbert, who, it is conceded, was an independent contractor, nor upon the ground that defendant owed the plaintiff the duty to make repairs upon the leased building, except such as were made necessary by the negligent, wrongful act of the defendant in removing the adjoining building, with-

1. LANDLORD
AND TENANT:
premises:
possession,
enjoyment,
and use:
repairs.

2. LANDLORD
AND
TENANT:
premises:
possession,
enjoyment,
and use: duty
of landlord.

out purposely protecting the leased premises. While plaintiff could not require the defendant to repair the defects existing therein at the time he leased the same, or occurring thereafter from any other cause than the acts of defendant, nevertheless the defendant was under the implied obligation not to disturb, or in any way interfere with, the leased premises, or plaintiff's use and occupancy thereof. It may be that some of the brick were loosened in the wall, when the joist inserted therein was removed by the independent contractor; but there is little, if any, evidence tending to show that the work of wrecking the old building was negligently done. The effect of it, however, was to leave a brick wall, three stories high, resting upon a foundation built out of small stone and mortar, with the openings left by the removal of the joists exposed to the elements, and the foundation, to the action of water accumulating in the basement under the former adjoining building. No immediate serious consequences to plaintiff followed. The wall remained standing for more than eighteen months before it collapsed. At the time the oral lease was entered into, the wall had the support and protection of the adjoining building, and its foundation does not appear to have been endangered by water.

Under the rules stated, it was the duty of defendant, after the removal of the adjoining building, to take such steps as were reasonably necessary to maintain the leased building in the condition in which it was at the time the oral lease was entered into, except as to defects or injuries resulting thereto, independent and apart from the negligence or other acts of the defendant.

The tenancy, which began under an oral lease, continued at will, and it was the duty of defendant not to interfere with or do any act which would necessarily injure or impair the safety of the building, or from which such consequences might reasonably

3. LANDLORD
AND TENANT:
premises:
possession,
enjoyment,
and use:
duty of
landlord.

4. LANDLORD
AND TENANT:
premises:
possession,
enjoyment,
and use:
negligence of
landlord.

be anticipated. It was a question of fact for the jury to determine whether the defendant was negligent in causing the building to be removed without making reasonable provision for protecting the leased premises from becoming untenable or dangerous, because of the weakening or exposure of the wall and foundation to the action of the elements. Numerous cases are cited by counsel for appellant to sustain their contention that defendant had an absolute right to remove the buildings, and, in the absence of an agreement to repair the same, cannot be held liable, even though the effect of such removal was to expose the tenant to hazards not previously existing.

The court in *McMillin v. Staples*, 36 Iowa 532, held that the owner of a lot adjoining the leased premises had a right to excavate the same for the purpose of erecting another building, and was not liable to the tenant for the loss of potatoes in the basement of the leased building by freezing, due to the exposure thereof to cold on account of the excavation; but the court specifically held:

"If such damages resulted from the negligent manner of doing the excavation or building, which ordinary care would have avoided, then the liability would arise."

Ward v. Fagin, 101 Mo. 669 (10 L. R. A. 147); *Doupe v. Genin*, 45 N. Y. 119; *Sherwood v. Seaman*, 2 Bosworth (N. Y.) 127; *Brewster v. DeFremery*, 33 Cal. 341, cited by counsel for appellant, were all decided upon the proposition that the landlord had not covenanted to repair or maintain the building in a suitable condition for use. No negligence against the landlord was charged. The holding of the court of Common Pleas in *Rotter v. Goerlitz*, 16 Daly (N. Y.) 484, is opposed to the conclusion announced herein; but none of the other cases cited by counsel are inconsistent therewith.

The court instructed the jury that, if it found from the evidence that the collapse of the wall was not caused by the removal of the adjoining buildings, or if same was caused by the action of the elements alone, unaffected and not contributed to by the removal of the adjacent building,

defendant would not be liable. The theory upon which the case was submitted to the jury by the court was that, to charge the defendant with liability, negligence in exercising its right to remove the adjoining building must be shown: that is, if the removal of the adjacent building, in the exercise of due care, would of itself have been a menace or danger to the leased building, and the injury complained of resulted therefrom, then defendant would be liable for such damages as were directly occasioned thereby. The case was properly submitted.

guil

5. RECEIVERS:
negligence:
duty to ten-
ant on com-
pany's prop-
erty.

II. Jacob M. Dickinson was appointed receiver of the defendant railroad on April 20, 1915, several months after the buildings were removed, but before the wall of the leased building collapsed. At the close of the evidence, the receiver moved the court for a directed verdict in his favor; but the motion was overruled. Judgment was entered on the verdict and against both defendants. It is now the contention of the receiver that a motion for a directed verdict, made at the close of the evidence, should have been sustained, upon the ground that whatever negligence is shown, occurred before the receiver was appointed, and that no negligence is shown upon his part. Whatever merit there may be in appellant's contention that, if the injuries in fact were received before the appointment of the receiver, he would not be liable, it does not follow therefrom that the judgment against him should not be permitted to stand. Evidence was offered by plaintiff, tending to show that defendant could, by the exercise of reasonable care, have prevented the collapse of the wall, after actual notice that the foundation was giving way had been served upon its agent. A witness, called in plaintiff's behalf, testified that, by proper bracing after the foundation began to give way, the wall could have been prevented from falling. Upon this question, the court, in substance, instructed the jury that, if bracing would have been effectual to prevent or lessen the damage, and it found from the evidence that the weakened condition of the building was due to the defend-

ant's negligence, then it was the defendant's duty to use reasonable care to prevent damages by bracing the wall.

The receivership is admitted, but the purpose thereof is not shown; and there is nothing in the joint answer of defendants, or in the evidence offered, to indicate that it was not for the general purpose of managing and controlling the property of the defendant railroad company, and of operating its lines of railway. One of the agents employed in the railroad office signed a written notice that was served upon plaintiff on April 13th, saying that the building was unsafe, and warning him to immediately remove therefrom.

The jury may have found from the evidence that the defendant receiver was negligent in failing to brace the wall after notice that the foundation was giving way.

Other matters argued by counsel do not present cause for reversal, and need not be discussed. Since we find no reversible error in the record, the judgment of the court below is—*Affirmed*.

WEAVER, GAYNOR, and PRESTON, JJ., concur.

EUGENE T. FRITH, Appellee, v. ROSE FRITH, Appellant.

DIVORCE: Dissipated Habits Contributed to by Plaintiff. Dissipated habits of a wife, with consequent demoralization of the domestic relation, will not be denominated cruel and inhuman treatment, when it appears that the husband's conduct and method of living have distinctly contributed thereto.

Appeal from Dubuque District Court.—D. E. MAGUIRE, Judge.

JANUARY 20, 1920.

REHEARING DENIED JULY 6, 1920.

ACTION in equity for divorce. Decree for plaintiff, and defendant appeals.—*Reversed*.

Lyon & Willging, for appellant.

M. H. Czizek, for appellee.

WEAVER, C. J.—The parties were married June 22, 1909, and lived together until a short time before this action was begun. One child, a daughter, has been born of the marriage, and, at the time of the trial below, was about 7 years old.

This action was begun by the husband on April 25, 1918. The original petition is stated in two counts. In the first count, plaintiff charges defendant with cruel and inhuman treatment, endangering his life, and with neglect of her husband and family, and other misconduct causing him much mental distress and impairment of health. In the second count of the petition, defendant is further charged with "adultery" on various occasions, but naming no co-respondents. The prayer of the petition is for an absolute divorce, and the custody of the child.

By an amendment, later filed, plaintiff alleges somewhat more specifically defendant's neglect of her household and family duties, and with being intoxicated on three or four specifically named dates. He also alleges that defendant "associated with and sought the company of one Scherrer, one Goetz, and one Zatin," and finally makes the specific charges of adultery with the men above named and names the places where such adulterous acts are said to have occurred.

To this action, defendant appeared, and by answer denied the allegations of the petition. She also, by cross-petition, asked a divorce from the plaintiff, on the ground of cruel and inhuman treatment.

On trial of these issues, the court held that plaintiff's charges of adultery had not been proven, but did find him entitled to a divorce on the ground of cruel and inhuman treatment, and decree was entered accordingly.

We shall not extend this opinion for a statement of the evidence, except in mere outline. The parties had been

married and maintained family relations nearly nine years, and plaintiff's chief complaint of misconduct relates almost entirely to alleged conditions developed in the last two or three months of that period. He concedes that, up to this period, defendant had charge of their home, performed the duties of housewife acceptably, without aid of a servant, and was a good housekeeper and mother. He claims, however, and as a witness testifies, that she developed a habit or practice of using intoxicants to excess, and on frequent occasions failed to give proper attention to her duties, and to her husband and child, and frequently came home more or less intoxicated, much to his distress. He further swears and offers evidence to the effect that his wife sought the society of one or more of the men named by him in his petition, and associated with them or some of them in various places and under circumstances of a compromising character. Some of this testimony, if credible, would justly expose the defendant to severe criticism, but we agree with the trial court in the conclusion that it does not justify a finding that she was guilty of adultery.

So far as actual unchastity is concerned, no witness testifies to it as a fact, or gives evidence which is necessarily inconsistent with the woman's innocence. It should be said, also, that, as witness on the trial, the defendant and each of the men named as co-respondents deny the charge unequivocally. Having disposed of this issue, the facts explanatory of the disruption of this family are not far to seek. The parties were married when still quite young. The husband was then and continued to be addicted to the habitual use of intoxicants, though, in the usual sense of the word, he was probably not a habitual drunkard. He kept liquors in his home, and liquors were served at his table. He was one of a set of young men and women frequently meeting in parties or social gatherings where drink was a common feature of the entertainment. It was not an unusual thing for these men and women to drive out at night, and make the rounds of drinking places in Dubuque, and to extend such rambles across the river into

East Dubuque, visiting the roadhouses and drinking resorts along the way. Up to the time of her marriage to the plaintiff, the defendant says she had never indulged in liquor drinking; and in this her story is not denied. Into the sort of life above mentioned, plaintiff introduced his young wife; and it is fairly evident that, in time, she learned to adapt herself to her environments, and became one of the gay world in which her husband found his chief pleasure. On his cross-examination as a witness, he says:

"Always kept liquor in the house. Always had a case of beer or so. Drank it at home. * * * We went around with different people, going to dances and little social sessions around at different houses. On practically all these occasions when they were at my house or I was at their houses, the men and women all had something to drink. Nothing was ever thought about that. On one of these occasions, my wife drank to excess. It was at Schmid's hall in 1917. I was there. I drank with her. We used to make automobile trips, too, and go around the loop, as they call it. We used to stop at the various drinking emporiums along the road. Men and women also would drink. I never found fault when my wife used to stop at any saloon. Used to stop at East Dubuque; at the two-mile house and at the three-mile house, Sandy Hook. Twice came over by way of Eagle Point, and stopped at O'Meara's place. Stopped at O'Hearn's place."

It is unnecessary to pursue this sorry revelation further. The evidence all tends to show that life for these people and those in whose society they found chief pleasure was a continuing round of dissipation. That this should have resulted in some material degree of demoralization in both of them was inevitable, and the only wonder is that they succeeded in maintaining so long a considerable degree of harmony. With reference to the time and circumstances of their final break and separation, each charges the other with being intoxicated, and with unprovoked physical violence; and it would be no great strain upon the probabilities to assume that both tell the truth. That defendant

had been, to say the least, imprudent in her association with men other than her husband, and given him apparent grounds for his jealousy, and did neglect her family and household duties to some extent, may be conceded; but, the court having found the charge of adultery not sufficiently proven,—a finding with which we agree,—we are wholly unable to frame any plausible theory of the facts on which to grant plaintiff a divorce on the ground of cruel and inhuman treatment endangering his life. By recitations embodied in the decree, the trial court bridges over the difficulty with the finding that, although the charge of adultery was not proven, yet defendant's conduct was of such character as to justly arouse her husband's suspicion of her infidelity, and cause him great mental anxiety and suffering, and that "a continuance of such conduct by her could not help but destroy the mental poise of the plaintiff to such degree as to endanger his life." We are not at all convinced of the soundness of this conclusion. It is true, plaintiff swears his wife's conduct "has almost made a nervous wreck" of him, and caused him worry and sleeplessness and loss of memory and flesh; but we are persuaded that a man whose theory and philosophy of life find illustration in the record he makes for himself in this case, is hardly possessed of such delicate sensibilities that an experience of this sort is likely to prove fatal. That his wife is not faultless may be admitted; but, in so far as her faults are shown in the testimony, she is the work of his hand, and his marital unhappiness is the harvest of his own sowing.

In this connection, it should be said that, while a considerable portion of the record is given to the alleged drinking habits of the defendant, the prayer for divorce is not based upon any allegation of habitual drunkenness on her part, and the trial court avoids any reference to that subject in its decree. That she did use liquor is conceded, and that whatever of demoralization appears in her habits and conduct has its spring and origin in that fact is hardly questionable; but, for reasons already suggested, it affords

1914, he conveyed to the four youngest children of Jacob and Amanda Ruggles 100 acres of land, without consideration. It is contended that the property thus conveyed was of the value of \$70,000, and that the conveyance thereof was improvident on Gilbert's part, and the result of mental incapacity and undue influence.

At the time of the divorce, Gilbert conveyed to his wife \$50,000 worth of property, including the home farm of 240 acres. The divorced wife died in 1906, intestate, and her children took her estate. Upon their application, the father was appointed administrator, and as such administered and distributed the estate among the children. He died April 6, 1918, leaving an estate of about \$150,000. No other improvident act is charged against him, either in pleading or evidence, than the two conveyances already referred to.

The two conveyances complained of were not contemporaneous. It is necessary, therefore, to consider them separately.

I. We turn first to a consideration of the conveyance to Jacob and Amanda Ruggles of April 8, 1910. The question of Gilbert's mental condition will be considered in the next paragraph, in connection with the conveyance of 1914. We shall not dwell upon it at this point, further than to say that our finding on this question, as of this date, is adverse to the plaintiffs. The immediate facts attending the making of the conveyance of 1910 are of such a nature as to fully refute the complaint of plaintiffs in relation thereto.

It is made to appear that, in May, 1914, Mrs. Anderson, one of the daughters of Gilbert, and now one of the plaintiffs, began a proceeding in the district court of Jasper County for the appointment of a guardian for her father, on the ground of mental incapacity and that he was squandering his property. These grounds were predicated upon the two conveyances now under attack. A temporary guardian was appointed *ex parte*, which appointment was afterwards set aside, upon motion. While this proceeding was

pending, and in February and March, 1915, the deposition of Gilbert was taken. He was at that time suffering from an affection of his throat; and testified under some physical disability on account thereof. But an exhaustive examination was had, consisting of more than 300 interrogatories. The facts pertaining to this conveyance and the reasons therefor were fully gone into and stated by the witness. Such deposition was introduced in evidence herein by the defendants. From such deposition it appeared that the 100 acres conveyed to Jacob and Amanda Ruggles constituted one half of a 200-acre farm, purchased jointly by Gilbert and Jacob Ruggles in October, 1909, from W. E. Kingdom. The farm was purchased for \$124 an acre, and settlement therefor was to be made on March 1st. The settlement was made on March 1st by Gilbert, and a deed taken from Kingdom to him. Shortly thereafter, Ruggles settled with him for his share of the purchase, and Gilbert made the conveyance, pursuant to the original purchase. That the original purchase was a joint one is undisputed in the evidence. The statement of Gilbert to that effect is also corroborated by the testimony of other witnesses who had to do with the transaction, and by newspaper publication of the fact at the time. Indeed, this fact does not appear to be controverted in the argument of appellants in this court. But it is contended that no consideration was, in fact, ever paid by Jacob or Amanda Ruggles for the one half thus conveyed to them. This contention is qualified with the further contention that not more than \$2,000 of the consideration was paid. The deed recited a consideration paid of \$12,400. This was exactly one half of the purchase price of the whole farm. If the amount thus stated was not actually paid, Gilbert had, nevertheless, a good cause of action therefor. The agreement to pay was itself sufficient consideration to support the deed as such. The remedy in such case was to enforce the payment. In an equitable sense the title of Ruggles had its origin, not in the deed of April 8, 1910, but in the contract of purchase from Kingdom, in October, 1909. If it be true, therefore, that the

grantees paid only a part of the purchase price due from them, it furnishes no basis for an action to set aside the deed. We have no occasion, therefore, to consider the question of undue influence in this connection. The only result of undue influence, if any, was to induce Gilbert to join in this contract of purchase of the farm. The contract of purchase was an advantageous one, and he was not hurt by it. The conveyance afterwards made by him was one which he was under legal duty to make, and no influence could make such duty either less or more.

The large valuation of \$70,000 which plaintiffs fix upon this farm is predicated upon present values, and not upon its value in 1910. The price actually paid for it at that time was \$24,800. Gilbert exacted from the grantees neither more nor less than one half of such purchase price. We find, therefore, that, so far as obtaining the title from Gilbert for one half of such farm is concerned, there was no room for the operation of undue influence.

II. The conveyance of April 11, 1914, purports to have been made for the consideration of \$1.00 and love and affection. The grantees were the four youngest children of Jacob and Amanda Ruggles, ranging in age from one year up. They were all minors. The conveyance reserved to the grantor a life estate. The 100 acres conveyed thereby was the other one half of the Kingdom farm. After the conveyance of April, 1910, the Ruggles moved upon this farm, and Gilbert made his home there with them. The effect of the conveyance was ultimately to convey the entire farm to the Ruggles family.

In the deposition of Gilbert hereinbefore referred to, he was fully interrogated concerning this transaction. He emphatically re-affirmed it as a gift, and stated: "I put it just where I wanted to." There is no question of the character of this conveyance as being one of gift. The question of mental incapacity or undue influence has controlling importance. So far as the question of mental incapacity goes, the principal evidence is directed to the period of Gilbert's last illness, which covered about six

months previous to his death. At the time the deposition of Gilbert was taken, in 1915, he was suffering from an affection of the throat, which was more or less paralyzed, and this required that his nourishment be taken through a tube. He was attending to his own business affairs, and continued to so attend to them until a few months before his death. His deposition discloses complete familiarity with all his business affairs. He contested the guardianship proceeding successfully, in that, upon the eve of trial, it was dismissed by the plaintiffs.

There was evidence on the part of plaintiffs which fairly established the fact that the underlying cause of the defendant's throat trouble and of his fatal illness was syphilitic. The contention of mental incapacity is founded largely upon this fact. It is indeed an important fact, but does not dispense with the necessity of proving mental incapacity in fact on the part of the patient. The evidence is very slight indeed of any abnormal mental condition on the part of Gilbert, prior to April 11, 1914. The parties in interest, as witnesses, testified to circumstances in April, 1914, which might be regarded as tending to prove such fact. If such evidence were to be deemed literally true, we could not deem it sufficient, as proof of mental incapacity. Making due allowance for the interest of the witnesses, and for the inaccuracy of the memory as to details, we are very clear that little weight can be given to it. Many disinterested witnesses were examined on both sides. Among these we find none who transacted any business with Gilbert up to the time of his last illness who discovered any lack of normal mentality.

Upon the whole record, we are clear that the plaintiffs have failed upon the issue of mental incapacity

Was the conveyance obtained by undue influence? It is not claimed that the infant grantees exercised such influence. The charge of undue influence is predicated upon alleged adulterous relations between Gilbert and Mrs. Ruggles. Such is the skeleton in this closet. The only direct evidence of that fact is by one of the sons, who testified to

2. DEEDS: un-
due influ-
ence: gift
to illegiti-
mate child.

his personal observations of such relations on an occasion more than 20 years prior to Gilbert's death, and prior in time to the divorce. Other evidence in support of this charge is circumstantial, and is given in the main by the parties interested. Proof of reputation also was resorted to. Such proof by plaintiffs assailed the general moral character of Mrs. Ruggles. It also dealt with the reputed paternity of her younger children, who are the grantees in the conveyance under consideration. Such proofs were not left uncontradicted by the defendants. Gilbert was 73 years of age at the time of his death. Mrs Ruggles was nearly 25 years younger. She was the mother of 8 or 9 children, all born in lawful wedlock. So far as appears, she lived happily with her husband at all times. If the evidence relied on in support of the charge be deemed true, the husband could not have been ignorant of the illicit relation. Needless to say that the facts thus stated tend, of themselves, to rebut strongly such charge, and that they are not to be lightly brushed away. Needless to say, also, that the fact of guilt should not be found, except upon most convincing evidence. The evidence of the son is indeed direct, but, in the light of the whole record, it is not convincing. We are sure that, upon this record, we should not be justified in finding that illicit relations existed between these parties.

3. BASTARDS:
child born
in lawful
wedlock.

Needless, too, to say that the proof of reputed paternity of these children was worthless, as evidence of the fact. The child born in lawful wedlock is protected by the conclusive presumption of the law as to his paternity. To defeat these grantees upon the ground of the criminality of their paternity would be to deprive them of such legal presumption. Moreover, if there were no presumption, and if the bastardy of these children were fully proved, what then? Accepting the fact as explanatory of the gift, yet the gift itself might be deemed only a moderate discharge of a legal obligation, and a recognition of a moral responsibility which could never be fully met or expiated.

The sum of the whole case is that this decedent presented 100 acres of land to the children of the family in which he had lived for 14 years. He had 360 acres more for his own children, and other property of large value, as already indicated. Was the fact that he made such gift evidence of improvidence on his part, and did it indicate failing mental powers? We cannot say so. We reach the conclusion, therefore, that the case was rightly decided in the trial court, and the decree entered there is—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

MARY GRACE, Appellant, v. MICHAEL CALLAHAN, Appellee.

FRAUD: Fiduciary Relations. A showing of long-continued intimate relations between a nonassertive sister of but little education and experience, and a domineering brother of good education and wide business experience, may be sufficient to cast upon the brother the burden of proof to show freedom from fraud of a conveyance executed by the sister to the brother without consideration.

TRUSTS: Parol Evidence. While parol evidence is inadmissible to establish an express trust in real estate, yet one who is admittedly the owner of real estate may, in explanation of his title, orally testify that his grantor never was the owner of the property, was simply a trustee for the one so testifying, and that the grantor's deed was simply in execution of the trust.

PRESTON, SALINGER, and STEVENS, JJ., dissent on the question of fact.

Appeal from Dubuque District Court.—J. W. KINTZINGER, Judge.

JULY 6, 1920.

ACTION in equity to cancel a deed. The facts are stated in the opinion. Decree for defendant. Plaintiff appeals.—*Reversed*.

Hurd, Lenehan, Smith & O'Connor, for appellant.

Frantzen & Bonson, for appellee.

STEVENS, J.—Plaintiff and defendant are sister and brother, and the daughter and son of Dennis Callahan, who died in March, 1916, 78 years of age, and without property.

Cornelius Callahan, whose relation to the matters involved will appear presently, and who died in December, 1895, was the unmarried brother of Dennis. On December 2, 1895, and about 10 days prior to his death, which followed an illness from which he was then suffering, Cornelius Callahan conveyed a tract of 400 acres, situated in Dubuque County, to Dennis Callahan, for a consideration of \$6,000 and a further alternative agreement, recited in the deed and covered by an independent contract, to support the grantor so long as he should live, or pay him \$600 annually for that purpose. On January 30, 1904, Dennis Callahan conveyed all of said tract to the defendant herein, for a consideration of \$1.00 and love and affection. At the time of making the last conveyance, Dennis Callahan owned an additional 280 acres, in the vicinity of and adjoining some part of the 400-acre tract. On October 15, 1912, he conveyed 240 acres thereof to the plaintiff, for a consideration of \$1.00, care, and support during his life, together with the payment by her of all of his debts and funeral expenses. The remaining 40 acres he had previously sold and conveyed to defendant, for a consideration of \$1,200. On May 9, 1913, the plaintiff conveyed 80 acres of the 240-acre tract to defendant. The consideration recited in the deed is \$1.00 and "other valuable consideration." On May 21, 1913, Mary Callahan married Thomas Grace. On September 24, 1913, plaintiff instituted this action, for the purpose of obtaining a cancellation of the deed from her to the defendant of the 80-acre tract. The grounds upon which she bases her prayer for equitable relief are: (a) That the said conveyance was without consideration; (b) that it was procured by duress

1. FRAUD:
fiduciary re-
lations.

and undue influence; and (c) that she was induced to execute the deed because of the confidential and fiduciary relations existing between her and defendant. Defendant denies that he obtained said conveyance by inequitable means, and avers that, prior to the conveyance of the 240-acre tract to plaintiff by her father, which conveyance was negotiated and consummated by the efforts of the defendant, it was agreed that they would subsequently make a just and equitable settlement between them of the property. Referring to the conveyance of the 400-acre tract to the defendant, he alleges in his answer that Cornelius Callahan conveyed the same to his father, in trust for him, and that the deed was executed to carry out the trust.

It is not claimed that the alleged trust was created in writing, or that it was enforceable under the statute. Defendant married in 1899, at the age of 23 years, and moved upon the 400-acre tract, where he has since continuously resided. Plaintiff's mother died when she was a small child, and she resided at home with her father and brother on the 240-acre farm until the marriage of the latter, and thereafter with her father, until after her marriage, in 1913. At the time of the trial, she was 44, and defendant 42 years of age. The farm is located near the parish church attended by both of them. The testimony is peculiarly lacking in detail, and the transaction complained of is quite out of the ordinary. The difference in the situation of the respective parties at the time the conveyance was made is significant. Defendant owned the 400-acre farm, worth in the neighborhood of \$70,000, and plaintiff the 240-acre tract of approximately proportional value. Since old enough, plaintiff had performed the duties of housekeeper for her father, who did not marry after the death of plaintiff's mother, and had looked after and cared for him up to the time he went to live with the defendant, in 1913, which, she claims, was against her will. Defendant is vice president of a bank in Bernard, and, we gather from the record, a prosperous farmer. Plaintiff does not appear, however, to have been able to add substantially to the property received from her father.

She testified that she did not attend school after she was 11 years of age; that she has had little business experience; and that, up to the time of the trial, she had never been outside of Dubuque County, although she had made occasional, and perhaps frequent, trips to Dubuque and Bernard, for the purpose of visiting the stores and purchasing family necessities. She appears to be a woman of ordinary intelligence and ability, for one of her opportunity and experience. She further testified that she and her brother had always been on friendly terms, except that, upon two occasions, after they grew up, but years before the transaction in question, he struck her, but not violently, and in a fit of anger. The day before the deed was executed, she went to her brother's home, for the purpose of requesting him to take her to Bernard. He was absent; but, on the following morning, they went to town together. She testified that, while they were on the road to Bernard, she informed him of her approaching marriage; and that he then said to her that he thought they had better settle up, and that she should convey to him some of the land. Continuing her testimony, she said:

“My brother took me to Bernard: I went down to his house, a few days before that. I had some potatoes for him, and I wanted to go to Bernard. We had made a couple of trips to Bernard before that time. I wanted to get some household goods; but he didn't happen to be home that day, so I told his wife that I wanted to go to Bernard, and he came up the next day to take me to Bernard to get the things for the house, and on the way to Bernard, I told him I was to be married. So he asked me to settle up; he said I owed him some property. I don't know just what he did say, but I asked him how much it was, and how much he wanted; I think that was the way of it. He said he wanted about 80 acres. Of course, I was surprised. I did not answer him as to the 80 acres,—I was so surprised it was quite a shock to me, like.”

She further testified that, when they arrived at Bernard, she ordered some groceries, and then went with defendant

to the bank to have some checks cashed; and that, while there, he took her into a room and introduced her to the cashier of the bank, of which he was vice president, who made out a couple of papers, which she signed,—one a quit-claim deed to the 400-acre tract; the other, of the 80-acre tract in controversy. She further testified that neither of the instruments was read to her, and that she did not know which 80 she was conveying to her brother. Defendant's version of the conversation on the way to town is as follows:

"I had a talk with my sister, before the deed was executed to me, in regard to these 80 acres of land. When we were going down to Bernard, I told her I heard she was going to be married. She said 'Yes,' and I said: 'Before you do, however, you had better make a little settlement with me, in order to have things in good shape.' She said, 'All right, what do you want?' I said, 'I would like to have that 80 acres adjoining mine.' She said, 'All right.' I said, 'You are satisfied now, are you, with that?' She said, 'Yes; I want you to be satisfied, too.'"

The above is the substance of their testimony, which is not materially varied or enlarged by cross-examination or by the further details. The defendant also testified that he induced the father to convey the 240 acres to plaintiff, in pursuance of an understanding between them that they could better care for him and handle the property in this way, and that they would later make a proper division or settlement between them. There is no evidence that the father was not willing to deed the farm to her, or that it was not done voluntarily, and in accordance with a desire to give it all to her. Upon this point, defendant testified:

"I remember the occasion of my father making a deed of all of this 240 acres to my sister. That was in October, 1912, I think. I had a talk with my sister, previous to the making of this conveyance, in regard to the property at her father's place. At that time, I lived about a mile from my father's. I brought the notary from Bernard. I had a few conversations with my sister in regard to my father's con-

dition, but I could not say how many,—in the neighborhood of five or six. Q. What were the nature of these conversations? A. In regard to his feeble condition. Q. At the time when the title to this property was placed in your sister, given by your father, state whether or not your sister knew of the circumstances under which it was placed in her. A. It was explained to her; she knew. Q. Where was this deed drawn up? A. At my father's house, my sister's home now. Joe Garrig and I were present. My sister wasn't present; she was outside. Besides this property, there was personal property conveyed at that time. * * * Q. In this conversation with your sister, prior to this deed and about the time this deed was made to her, was there any understanding between you and your sister in regard to the transaction of this property? * * * A. Yes. On account of my father's condition it had become time, we thought, to make some arrangements for his comfort, he not being able to work, and not being able to turn back to any business; and thought it better to have him sign it over to her, in order that she would be able to take better care of him, and it would make it easier for both of us to have the property in her name. We thought it was a good, safe way to do. * * * Q. And was there any understanding between you and she as to the settlement between you and her after your father's death, at that time? * * * A. Yes. Q. What was there as to that settlement? When did it take place? * * * A. When it would be most convenient for both of us, or when circumstances would permit, later on."

Plaintiff testified that her brother suggested to her that it was the thing to do for her to get the property in her name, but that she did not want to have it done. She denied specifically that there was any agreement or arrangement of any kind between them as to a future settlement or division of the property. Referring later to the transaction at Bernard, the defendant testified:

"This was while we were driving toward Bernard. I told her that, as I only had a quitclaim deed to my farm from

father, it would be nice if she would give me a quitclaim deed, too, she having a warranty deed for her property. And she said we could make the conveyance that day for all the deeds. Then we went down town. She went into the store, and bought household goods and groceries, etc. When she got through at the store, we went over to the bank, and I introduced her to Mr. Clark, and told him the nature of our business, and he wrote out the deeds according to the instructions, and we all talked it over, just the same as anybody else would be conveying property on good, agreeable terms, and we had the quitclaim deed to the 440 and the warranty deed for the 80 acres, and she signed them, without showing any disposition of not being inclined to do it in any way. If she did, I wouldn't insist on her doing it."

In so far as this testimony is inconsistent with the testimony of the plaintiff quoted above, it was contradicted by her. Defendant's testimony as to what occurred at the bank is corroborated in all material respects by that of the scrivener, who was not, at the time of the trial, employed by the bank, and who resided at Traer. Defendant, as indicated, does not claim that he purchased the land from plaintiff, or that she was paid anything more than a technical consideration therefor. The case is, therefore, unlike most of the cases cited by counsel, in which the plaintiff sought to set aside a conveyance upon the ground of inadequacy of consideration. The parties were competent to contract, and plaintiff, if she desired to do so, had a right to convey the land to her brother; and, after she has done so, it cannot be set aside solely upon the ground that she has repented of her act. Nor does defendant take the position that the conveyance was intended as a gift. His contention is that the deed was executed in pursuance of the alleged mutual arrangement and understanding arrived at between the parties before the land was conveyed to her.

It is conceded by the plaintiff that she took no part in the negotiations with her father resulting in the conveyance

of the land to her, nor did she take any part in the transaction at the time the deed was executed, except to pay him \$1.00. On the same day the deed was executed, her father turned over to plaintiff some cows, horses, grain, sheep, machinery, and about \$2,000 in cash.

Concerning her business experience and the relations between herself and defendant, plaintiff testified that, while her brother was at home, he sold the products of the farm and did the business generally; that she was not allowed to take part therein; that defendant was domineering, and insisted on having things done as he directed; that she did what he said, whether she wanted to or not; that he was quick-tempered; that he interfered with her upon two occasions, and objected to her marriage; that he suggested and induced her father to convey the farm to her; that the deed to the 80 was drawn up by the scrivener, and signed by her in ignorance of its contents; that she did not know what 80 was described therein; that it was not read over to or acknowledged by her; that he went with her to deposit the money in the bank at Dubuque; and that he looked after and advised her in business matters. Defendant admits that he assisted his sister when necessary, and when requested by her, but denies that he sought at any time to exercise any undue influence, or take advantage of her or the relations between them, and says that she signed the deed voluntarily, as requested by him. The cross-examination of several of defendant's witnesses developed that he is a man of strong, positive, and determined convictions, and likely to insist upon having his own way.

Shortly after plaintiff was married, the defendant requested that she deed him another 40, in consideration of his assuming the burden of caring for and supporting the father. This she refused to do. After this suit was begun, the parish priest requested plaintiff to come to the meeting; as, according to his testimony, he did the defendant, also. At this conference, attended by the parties and by the two priests, plaintiff admits that she agreed to dismiss the suit;

says she was afraid of the priests. Concerning the meeting, the defendant testified:

"It was in October, 1912, that Mary and I were before these two priests at the monastery. That was after the deed was made. Father Placid requested me if I would talk with Mary and explain our case, and see if we could come to a settlement outside of court. It was already in the court at that time. I never talked with him about this suit until he asked me about it. That was before she and I were there with this missionary and Father Placid. It was arranged that this meeting should be at the monastery, if she was satisfied. I suspected what it was for, but I didn't know what it was for. Nobody went into details about it. I knew they were going to have a talk, and I thought I would see what they had to say. I was strictly cautious not to use any influence. I knew before I went there that the purpose of this meeting was to discuss with her the claim she had against me in this suit. I don't remember whether she or I was there first. I don't remember that, when she came in, the door was locked. Her husband wasn't there. I don't remember whether he was invited or not. I know he wasn't present during any of the time they asked her to drop it. I don't know whether they urged her to drop it. I don't know whether I urged her to drop it or not."

Both parties also testified that the details of the controversy were not gone into. Defendant denied that the meeting was requested by him. Some time after this occurrence, plaintiff wrote her brother a letter, complaining of his conduct and charging that he had designs on her property, and asking him not to plow up the 80-acre tract. In this letter she said:

"I know how you made me say before two priests to give it up for peace sake; but I went right again my conscience and my husband, who is trying so hard to see that I am justified. Why don't you come with your papers and witnesses and prove that you are entitled to one half of this property, and if your 400-acre farm was not papa's property,

why, then, did you take me before the Bernard banker and make me sign off?"

While mere inadequacy of consideration is never a ground for the cancellation of a conveyance, it has been held, in some cases, to constitute satisfactory evidence of fraud. *Herron v. Herron*, 71 Iowa 428; *Rarick v. Womer*, 184 Iowa 1016; *Derby v. Donahoe*, 208 Mo. 684 (106 S. W. 632); *Barker v. Wiseman*, 51 Okla. 645 (151 Pac. 1047); *Dotson v. Norman*, 159 Ky. 786 (169 S. W. 527); *Schwarz v. Reznick*, 257 Ill. 479 (100 N. E. 900).

Where confidential or fiduciary relations between the parties are shown, the burden of showing the good faith of the transaction is upon the grantee. *Reeves v. Howard*, 118 Iowa 121; *Jordan v. Cathcart*, 126 Iowa 600; *Detrick v. Patterson*, 159 Iowa 460; *Steen v. Steen*, 169 Iowa 264; *Herron v. Herron*, supra; *Earhart v. Holmes*, 97 Iowa 649; *Nesmith v. Platt*, 137 Iowa 292; *Schneider v. Schneider*, 125 Iowa 1.

Fraud is often difficult to prove, and is seldom established by the admissions of the party or by positive testimony alone. It may be, and usually is to be, found in the circumstances and the results of the transaction. As was said by Mr. Justice Weaver, in *Johnson v. Carter*, 143 Iowa 95:

"The trail of fraud is not always easily followed; and, while the law charitably prefers to sustain all business transactions which are reasonably explainable on the theory of fairness and honesty of all the parties concerned, yet courts are not at liberty to ignore clear and convincing indicia of bad faith, or refuse to draw inferences of fraud from circumstances which irresistibly point to that result."

It was also said by the Supreme Court of Illinois, in *Schwarz v. Reznick*, supra, that "whatever circumstances, when proven, convince the mind that the fraud charged has been perpetrated, is all that is required."

Transactions between parties of ordinarily equal opportunity and ability do not often result in one's securing an unconscionable advantage over the other. It is obvious that

plaintiff and defendant either dealt upon the basis of a prior mutual agreement and understanding, or that the former was the victim of gross imposition and fraud at the hands of the latter. It cannot be explained upon the ground that plaintiff desired or intended to bestow a gift upon her brother. He does not claim that. No claim is made by appellant that any false representations were made, or that defendant, by any immediate act or outward manifestation, exercised duress or undue influence in any form, to procure the execution of the deed.

As stated, plaintiff denies absolutely that she at any time agreed, before the deed was executed by her father, to convey any part of the land to defendant, or that the matter was discussed between them. If the 400-acre tract, in fact, was the property of Dennis Callahan, and not held by him in trust for the defendant, by the conveyance thereof to him he obtained a decided advantage in the distribution of his father's estate.

Counsel for appellant insist that the evidence offered upon the subject of the alleged parol trust was inadmissible. This evidence, upon the theory of counsel for appellee, was

2. TRUSTS:
parol evi-
dence.

not offered for the purpose of establishing an enforceable trust in real estate, but only to explain the source of his title. In so far as such testimony might tend to throw light

upon the disposition, division, or distribution of the property of Dennis Callahan between his children, or to show the relative situation of the parties, this evidence was admissible. Defendant could not be charged with inequitable conduct, if he were, in fact, the beneficiary of his uncle to the extent indicated, because he insisted upon a share of the property conveyed by his father at an advanced age in life, and shortly before his death. The testimony of the defendant relative to the alleged trust is not denied by witnesses, but there is much in the transaction and circumstances revealed, to cast doubt upon its reality. In the first place, Dennis Callahan, by the terms of the deed, agreed to

pay a consideration of \$6,000, which he subsequently approximately paid in satisfaction of a mortgage upon the land at the time of conveyance. He assumed and agreed to support and maintain his brother, or to pay him annually \$600 for that purpose. The market or actual value of the land, at the time it was conveyed, is not shown, but it is possible that Dennis Callahan contemplated that the profits and income he would derive from the land would more than offset the burden assumed by him; but the fact that the father paid \$6,000 to discharge the mortgage, and obligated himself to pay \$600 per year to his brother so long as he lived, for a conveyance of land in trust only, is not without significance. The recitals in the deed were supplemented by an independent contract, which was not introduced in evidence, nor its whereabouts satisfactorily accounted for. These papers were apparently prepared by a competent person, and it is strange, indeed, that they contained no reference to the alleged trust. Defendant testified to none of the details of his negotiations with Dennis Callahan, resulting in the execution of the deed of the 240 acres to plaintiff. So far as appears by the record, this conveyance may have been in pursuance of a settled plan on the part of the father, in making a division of his property between his children. However, he does not appear to have ever expressed such a purpose or desire to plaintiff.

In our opinion, the long-continued intimate relations between the parties, the difference in their opportunities and experience in business, the positive and determined character of defendant, as shown by the evidence, his disposition to control, and the fact that the conveyance was without a monetary consideration, afford sufficient evidence of fraud and undue influence to cast upon the defendant the burden of showing good faith in the transaction. *Forrestel v. Forrestel*, 110 Iowa 614; *Reeves v. Howard*, supra; *Jordan v. Cathcart*, supra; *Detrick v. Patterson*, supra; *Herron v. Herron*, supra; *Schwarz v. Reznick*, supra. As stated by the Supreme Court of Alabama, in *Cannon v. Gilmer*, 135 Ala. 302 (33 So. 659):

"It is well settled that courts of equity, in dealing with transactions between persons occupying fiduciary relations toward each other, are not confined to cases in which there is any formal or technical relations of that character, such as guardian and ward, parent and child, attorney and client, etc., but they apply the principles to all cases in which confidence is reposed by one party in another, and the trust or confidence is accepted under circumstances which show that it was founded on intimate personal and business relations existing between the parties, which gave the one advantage or superiority over the other, and that the burden of proving that the transaction was fair and righteous is on the one receiving or acquiring the benefit."

It is said by the New York Court of Appeals, in *Sears v. Shafer*, 6 N. Y. 268:

"A court of equity interposes its benign jurisdiction to set aside instruments executed between persons standing in the relations of parent and child, guardian and ward, physician and patient, solicitor and client, and in various other relations in which one party is so situated as to exercise a controlling influence over the will and conduct and interests of another. In some cases, undue influence will be inferred from the nature of the transaction alone; in others, from the nature of the transaction and the exercise of occasional or habitual influence."

In our opinion, the defendant has not met the burden cast upon him. It is quite true that fiduciary relationship cannot be predicated upon family ties alone, but there is much evidence in this case that plaintiff had all her life relied upon the defendant to aid and advise her, and she doubtless had come to depend upon his counsel and to repose confidence in his honesty and judgment; that he had, by his strong character and will, obtained such a mastery over her that she was unwilling or unable to resist his request to convey the land to him without substantial consideration. The judgment and decree of the court below must, therefore, be reversed.

What is said above is intended to express the views of the majority, as understood by the writer, who does not concur in the conclusion reached. In his opinion, the evidence of fraud, duress, and undue influence is too meager to justify the court in setting aside the deed. The writer is unable to perceive what evil motive could have actuated the defendant to procure the deed and personal property of the father to be delivered to plaintiff. His explanation that, at the time of this transaction, there was an understanding between him and plaintiff that they would, after the death of the father, make a satisfactory division, is the most rational, although perhaps not wholly satisfactory, explanation offered of the transaction. Defendant is doubtless a man of considerable business ability, and it is difficult to conceive that he would ask his sister to convey to him 80 acres of land without consideration, or that she would respond thereto without objection or protest of any kind. Much is made in evidence of plaintiff's lack of education and experience; but she was neither an imbecile nor so entirely without business experience or knowledge of the value of land in that county as to deed the 80 to her brother, merely because he requested it. In the opinion of the writer, the decree of the court below should be affirmed; but, as a majority think otherwise, it is—*Reversed*.

WEAVER, C. J., LADD, EVANS, and GAYNOR, JJ., concur.

PRESTON, SALINGER, and STEVENS, JJ., dissent.

W. R. GRAVES, Administrator, Appellee, v. INTERSTATE
POWER COMPANY, Appellant.

ELECTRICITY: *Insulation of Wires at Dangerous Places.* An electric power transmission company is under a duty to properly insulate its wires at all points where it may reasonably anticipate the lawful presence of people, e. g., along and near the trees of another, close to which trees the lines run.

TRIAL: *Cross-Examination.* Whether a witness "had warned his deceased son of the danger of electrical wires" is not cross-examination of testimony "relative to the location of the lines and the phenomena attending them when coming in contact with other objects."

EVIDENCE: *Testimony Inconsistent with Statutory Requirements.* Testimony tending to demonstrate the impracticability of insulating high-tension electrical wires by wrapping or covering them, and the customary method of constructing such lines by first-class systems, is wholly irrelevant in view of the statutory requirement that such lines shall be "properly insulated." (Sec. 1527-c, Code Supp., 1913.)

TRIAL: *Instructions Construed as a Whole.* An instruction that electrical wires must be so constructed and maintained "as to prevent injury and death," is not subject to the vice of imposing a liability upon "insurers," when the instructions as a whole clearly demonstrate that the court meant nothing of the kind, and that the jury could not have so understood.

Appeal from Allamakee District Court.—W. J. SPRINGER,
Judge.

JULY 6, 1920.

DEFENDANT appeals from a judgment upon the verdict of a jury. The material facts are fully stated in the opinion.
—*Affirmed.*

Dawley, Jordan & Dawley, D. J. Murphy, and J. H. Trewin, for appellant.

Wm. S. Hart and H. E. Taylor, for appellee.

STEVENS, J.—The Upper Iowa Power Company was granted permission by the board of supervisors of Allamakee County, in 1911, to erect and maintain poles and wires in the public highway, for the purpose of conducting electricity for heat, light, and power purposes from Waukon to Lansing; and, in 1913, the defendant company succeeded to the ownership thereof, together with the equipment, franchises, etc., of said company.

1. **ELECTRICITY:**
Insulation of
wires at
dangerous
places.

The said transmission line was constructed in front of the residence of George Gramlich. At this point, the highway curves slightly away from said residence, in front of which, on the inside and near the fence, are two cottonwood trees. Defendant's poles, which are 110 feet apart, are set so that at least one wire extends a few inches over the fence and across the Gramlich premises. The power line consists of three No. 6 copper wires, two of which are attached to a wooden crossbeam in the usual manner, about 28 inches in length, fastened securely to a cedar pole. The top of the pole extends above the crossbeam, and two of the wires are strung about 14 inches from the pole on either side. The third wire is strung about 24 inches above, near the top of the pole, and directly between the two lower wires. The wires were not covered with any insulating substance whatever, and carried a current of 13,200 volts.

On or about the 17th day of October, 1913, a son of George Gramlich's, a few months past 15 years of age, climbed one of the trees through which the high tension wires passed, and in some way came in contact therewith, and was killed. The tree was on the Gramlich premises, about 18 inches from the fence and about 16 feet from the corner of the porch, and was about 12 inches in diameter at the stump. The distance from the ground to the first

limb of the tree was 10 feet and 3 inches, and to the second limb, 12 feet and 1 inch. The distance from the surface of the ground to the lower wires was 19 feet and 10 inches. 17 feet and 6 inches from the ground, the tree forked, one limb originally extending over the fence into the highway; the other in the opposite direction. Some time after the transmission line was erected, one of the wires coming in contact with the limb extending toward the highway finally burned it off, and, later, one of the employees of defendant sawed off the stump about $3\frac{1}{2}$ or 4 feet from the crotch of the tree. One wire, at the time of the accident, was about a foot above the stump, and $2\frac{1}{2}$ or 3 inches nearer the pole. The crotch in the tree was $3\frac{1}{2}$ to 4 feet below what we will call the inside wire, the one nearest to the tree.

Just how the accident, which occurred between 1 and 2 o'clock in the afternoon, happened, is not known. The mother testified that her son told her he was going up in the tree to get a squirrel; that she later saw him in the tree, and, a few minutes thereafter, her attention was attracted by an unusual noise; that she went to the door, and saw the boy lying in the crotch of the tree, with one foot over the wire, his hands and the other foot hanging down. She further testified that she saw a squirrel about the premises that morning, and that the children chased it, before going to school, and that she saw one on the windmill which stood near; that she had seen and knew of but one squirrel on the premises. Other witnesses testified to the removal of the body, and the condition of his hands and feet. Both of the latter were very severely burned. The burn on one hand was somewhat more extensive than that on the other. He was evidently instantly killed. The day was warm and cloudy. The tree was probably damp, as there had been a heavy fog that morning. The jury returned a verdict of \$9,500. This was reduced by the court, with the acquiescence of plaintiff, to \$8,000, for which sum judgment was entered.

I. The court overruled a motion by counsel for defend-

ant, based upon several grounds, at the close of the evidence, for a directed verdict. It is now urged by them that this ruling was erroneous, for two reasons: (a) That no negligence upon the part of defendant was shown; and (b) that it appeared affirmatively from the evidence that the injury was the result of the contributory negligence of deceased. The court instructed the jury that it was the duty of the defendant, in the construction and maintenance of its transmission lines, to use such care as would be reasonably commensurate with the danger involved, and that, to charge it with negligence in maintaining its wires in the condition and position shown where the accident happened, the jury must find that the defendant was bound to anticipate that boys of the age of deceased were likely to climb into said tree and, without negligence on their part, come in contact with said wires. The court further instructed the jury that deceased had a right, at any time he saw fit, to climb the tree in question, and that he could not be charged with contributory negligence, so as to defeat plaintiff's right of recovery, by the mere fact that he climbed the tree; and that it was for the jury to say whether or not, at the time he was injured, he was in the exercise of due care, and free from contributory negligence. Several instructions were requested by counsel for defendant, but no complaint is made in this court because of the refusal of the court to give same.

Section 1527-c of the 1913 Supplement to the Code requires that electric light companies shall use for transmission lines "only strong and proper wires, properly insulated, attached to strong and sufficient supports and insulated at all points of attachment. * * * Where such wires are carried across or under wires used for other service, there shall be suspended under or over said power, heat or light service lines, properly constructed and insulated guard nets, or shall be protected by such other equally efficient devices as will prevent contact with such other service lines, in case of sagging or breaking of such wires. * * * The grantees shall be responsible for all

damages that may arise from such construction and operation under this grant or from a failure to comply with said provisions."

No claim is made by counsel for appellant that the wires in question were insulated, or that other protection was provided against injury to a person coming in contact therewith at the point where the boy was killed. On the contrary, we are confronted with the argument that insulation of the wires by wrapping or covering so as to prevent injury is entirely impracticable and impossible. We have not had occasion to define the words "properly insulated," as employed in Section 1527-c, Supplement to the Code; but it makes no difference, under the facts in this case, whether the requirement thereof is that all high-tension wires be covered or wrapped with an insulating substance, or that insulation or protection be provided only at points where those engaged in the construction, maintenance, and operation of electric lines conveying a deadly current of electricity, should, as reasonably prudent and cautious persons, know or anticipate that others, in the exercise of their lawful rights, are or may be likely to come in contact therewith, and be injured.

The tree in question was standing upon the premises of deceased's father, the wire with which he came in contact extending over and across said premises. It is not claimed that defendant had a right, under its grant, to place the wire upon or across said premises, or that it was placed there with the consent of the owner. To this extent, defendant was a trespasser. It is not uncommon for the owner of shade trees situated as is the one in question to climb into the upper branches, to remove broken branches or trim the tree; and it appears that deceased and his two younger brothers, both of whom testified that they had not been warned that the wires were dangerous, and that they did not know that fact, climbed into the tree, at various times, for purposes not unusual to children playing in the vicinity of trees. It is true that the lower limbs of the tree were rather high, but there was a board fence within a

few inches of the tree, which was only about a foot in diameter.

Many cases cited by counsel for appellant are generally in harmony with our holding in *Davis v. Malvern L. & P. Co.*, 186 Iowa 884; but we need not discuss or review these cases. It was the duty of the defendant to properly insulate its wires at all points where it might reasonably be anticipated that a person lawfully engaged was likely to be. We so held in *Knowlton v. Des Moines Ed. Light Co.*, 117 Iowa 451, which was decided prior to the enactment of the present statute. Courts have generally held that it is the duty of those engaged in erecting and maintaining wires conveying a deadly current of electricity to properly insulate the same, where they pass through shade trees, which, it should reasonably be anticipated, might be climbed by children of immature years, and without knowledge of the danger involved. *Temple v. McComb City Elec. L. & P. Co.*, 89 Miss. 1 (42 So. 874); *Mullen v. Wilkes-Barre G. & E. Co.*, 229 Pa. St. 54; *Brubaker v. Kansas City Elec. Light Co.*, 130 Mo. App. 439; *Chickering v. Lincoln County Power Co.*, (Me.) 108 Atl. 460; *Williams v. Springfield G. & E. Co.*, (Mo.) 187 S. W. 556; Curtis on Electricity, Section 512.

• Mr. Justice Dunn, in *Chickering v. Lincoln County Power Co.*, supra, obviously indulging somewhat reminiscently in a touch of sentiment, but soundly, said:

“Trees growing about a family home are not primarily for boys to play in. But by climbing a tree a boy would not altogether remove himself from the pale of the protection of the law. In constructing and maintaining a line for transmitting the subtle agency of electricity, no one may with impunity totally disregard the natural habits and the childish inclinations of boys at play to climb the doorway shade trees. Human life is short enough, and its burdens and responsibilities come soon enough, at best. To take from boyhood the legitimate pleasures and adventures of tree climbing would unduly restrict the confines

of that memory-cherished domain, and lessen life's joys both there and thereafter."

The Supreme Court of California, in *Minter v. San Diego Consol. G. & E. Co.*, (Cal.) 182 Pac. 749, recognized the duty of electric companies to be substantially as stated, and refused to apply the rule to the facts of that case. The only case coming to our attention which holds to a contrary doctrine is *Brown v. Panola L. & P. Co.*, 137 Ga. 352 (73 S. E. 580).

The correctness of the instructions referred to above is not challenged by counsel for appellant, nor is the theory upon which the case was submitted to the jury. They must be treated as the law of the case. We cannot say that the evidence of negligence and proximate cause was insufficient to justify the submission of the case to the jury.

II. The father and mother of deceased were called as witnesses, and asked to describe the premises, and the location of the trees, fence, wires, etc., and were interrogated

2. TRIAL: cross-examination. at some length as to certain phenomena manifested by the wire nearest the tree, when coming in contact with the branch that was finally burned off; and they also testified that the father's hand was burned by a piece of iron which fell from the pole. Counsel for defendant sought, by cross-examination, to elicit from these witnesses that deceased had been warned by them of the dangerous character of the wires, and not to climb the tree. Objection to these questions, upon the ground that same were not cross-examination, was sustained. A careful examination of the record reveals that nothing was brought out in their examination in chief upon that point. Cross-examination must be confined to facts connected with the direct examination (*Kirby v. Chicago, R. I. & P. R. Co.*, 173 Iowa 144); and, while the permissible range of the cross-examination of the witnesses is, to some extent, within the discretion of the trial court (*In re Will of Eveleth*, 177 Iowa 716), it must be confined, as stated, to matters covered by the examination in chief. The examination of these and other witnesses

elicited that, when the high-tension wire came in contact with the limb, a light was observed, which the witnesses describe as of the size of a teacup. Deceased doubtless observed this phenomenon, but whether he knew that the wire contained a current of electricity of sufficient potentiality to be dangerous, is not shown.

Plaintiff offered no evidence upon this point, and the only evidence elicited by defendant in this connection was by the cross-examination of the two younger brothers of deceased. They both testified that they had no knowledge of the dangerous character of the wires; that they had climbed the tree, but not to a sufficient height to come in contact with the wires; that they had not been warned by their parents that the wires were dangerous; and that they had never heard their deceased brother mention the matter. The objection was properly sustained, upon the ground that the examination was not proper cross-examination.

3. EVIDENCE:
testimony in-
consistent
with statu-
tory require-
ments.

III. An expert witness was interrogated at length by counsel for defendant as to the practicability of insulating high-tension wires by wrapping or covering the same with an insulating substance. Objections to several of these questions, upon the ground that it was not cross-examination, and that same was incompetent, irrelevant, immaterial, and sought to invade the province of the jury, were sustained. Counsel also was prevented, by the ruling of the court upon objections to the testimony, from showing the customary method of constructing high-tension wires by first-class electric systems, and other matters of a similar nature. The witness, however, was permitted to testify to the effect and probable efficiency of insulation by wrapping, of wires carrying 13,200 volts.

It appears further that answers were permitted to other questions which, to a considerable extent at least, covered the information sought by the questions to which objection was sustained. The statute requires wires of the character shown to be "properly insulated," and, if one method of

insulation was impracticable or impossible, some other means of providing the required protection must be devised. The court, in *Toney v. Interstate Power Co.*, 180 Iowa 1362, said:

"We are of the opinion that the statute is by its terms applicable to the situation as shown by the undisputed evidence, and that failure to comply with its requirements was negligence. Such failure is made none the less vital by showing that the requirement is, in the opinion of experts, unwise, or that the prescribed protection would be lacking in efficiency. To hold otherwise would be to substitute the opinion of the witnesses for the legislative judgment, and make obedience to the statute optional with the companies for whose regulation it was enacted."

So far as the evidence sought to be introduced was material or relevant, we think the court permitted the same to be introduced; and defendant was not, therefore, prejudiced by the ruling of the court, if erroneous.

IV. Complaint is also lodged against the fifteenth paragraph of the court's charge to the jury. The court, in this instruction, said:

4. TRIAL: In-
structions
construed
as a whole.

"The defendant was rightfully upon the highway in front of the Gramlich premises, and had a right to construct its transmission line, together with the wires thereof, upon and over the highway in front of the same; but, in so doing, defendant was required by the laws of this state to so construct and maintain the same as to prevent injury and death to any person who had a right to be at any place where they might come in contact with said wires, and where defendant could reasonably anticipate a person might be,
* * * ."

The particular portion of the instruction complained of is the words, "so construct and maintain the same as to prevent injury and death."

The theory of counsel is that the court, by this instruction, imposed upon the defendant the liability of insurers. It is very doubtful whether defendant is entitled to be

heard in this court upon this question, but we are entirely satisfied that no prejudice resulted to it on account of the portion of the instruction quoted, if erroneous. The jury could not have misunderstood the charge in this respect as a whole. The court defined the duty of defendant at considerable length, and there is nothing in the charge, when considered as a whole, from which the jury could possibly infer that the liability of defendant was that of an insurer. The purpose of requiring high-tension wires to be properly insulated, is to provide safety and prevent injury. The objection to the instruction is without substantial merit. We find no reversible error in the record, and the judgment of the court below is—*Affirmed*.

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

JUDSON HALL, Appellee, v. E. E. YOUNG, Appellant, et al.,
Appellee (and one other case).

PARTNERSHIP: Evidence. Evidence reviewed, and held to pre-
1 sent jury question on the issue of the existence of a partnership in operating a garage.

EVIDENCE: Owner Presumed to Control His Property. An owner
2 of property is presumed to be in control of his own property; therefore, a showing of ownership casts upon the owner the duty to show that the use of his property, on the occasion in question, was *without his consent*. So held in the operation of an automobile.

NEGLIGENCE: Imputed Negligence—Act of Unauthorized Person.
3 The owner of an automobile is not liable for the negligent acts of another in operating the car without the owner's knowledge or consent.

PARTNERSHIP: Negligent Acts Outside Scope of Partnership. A
4 partner in the ownership and operation of an automobile is not liable for the negligence of another partner in using the car for a purpose wholly outside the scope of the partnership.

Appeal from Linn District Court.—F. O. ELLISON, Judge.

MAY 22, 1920.

REHEARING DENIED JULY 6, 1920.

ACTION by the plaintiff in each suit against defendants for damages. The causes were tried together, and resulted in separate verdicts, and judgment in favor of each of the plaintiffs. The defendants appeal.—*Reversed.*

E. A. Fordyce and H. S. Johnson, for appellants.

Hughes, Sutherland & O'Brien and C. L. Taylor, for appellees.

LADD, J.—At about 30 minutes after noon of September 12, 1914, Judson Hall, 11 years old, and his brother, 5 years of age, with their little wagon, loaded with groceries, were waiting between the curb and street car track for the car to pass. As it swung around a curve to Third Avenue, a two-seated automobile, moving at a high rate of speed, struck them, throwing one against and the other under the car. Each was seriously injured, and, by his next friend, brought action against defendant Thomas Young, who was operating the automobile, and E. E. Young, who was not present. In an amendment to his answer, Thomas Young admitted that he was operating the automobile; that negligence in so doing caused the injuries; and that he alone is liable therefor. His father, E. E. Young, interposed a general denial, and he only appeals. The two actions were tried together, and separate verdicts returned. Our inquiry is limited to ascertaining whether error was committed against E. E. Young. To sustain the finding of the jury, the evidence must have been such as to have warranted the conclusion that the father was legally re-

1. PARTNER-
SHIP: evi-
dence.

sponsible for what his son did. *Wagner v. Kloster*, 188 Iowa 174. That body was told, in the fifth instruction, that:

“Before he can be held liable to plaintiffs for any damage caused through the negligence of Thomas Young in operating the automobile in question, the plaintiff must prove, by a preponderance of the evidence,—that is, by the greater weight or value of the evidence,—that, at the time the plaintiffs were injured, Thomas Young was the agent, servant, or employee of E. E. Young, and was employed in or about the business of E. E. Young, and in the operation and management of said automobile, or that both of the defendants owned the automobile in question together, and both were interested as partners, or were otherwise engaged in a joint enterprise or common purpose, and were using the automobile in connection therewith when the plaintiffs were injured. If the plaintiffs have so established either of said propositions, then both defendants would be liable for the damages caused by the negligent operation of the said car, and you should so find. But if neither of said propositions has been established, then the defendant E. E. Young would not be liable in this action.”

The exceptions to this instruction, interposed by appellant, were that the evidence was not sufficient to carry the issues to the jury, because it is therein assumed against this defendant that damages were caused by the negligent operation of the car, and that it tended to lead the jury to think Thomas' admission of negligence was binding on his codefendant. The last exceptions are without foundation; for, in the previous paragraph of the charge, the jury was fully and correctly instructed on this subject. Appellant argues that the instruction is erroneous in permitting recovery upon the finding of agency or partnership, without exacting a further finding that Thomas was engaged within the scope of the agency or partnership. This point was not raised by the exception to the instruction, and may not be considered. *Anthony v. O'Brien*, 188 Iowa 802. There was evidence tending to show partnership, or, at least, that

father and son were together interested in the automobile business. One Newman testified to being proprietor of a garage; that, at the instance of the police, he took the automobile to his garage; that a demonstration number in the name "E. E. Young & Son" was attached thereto; that E. E. Young called, a few days later, and, in the course of a conversation, remarked that he did not understand why they arrested Thomas, as he never had a cent, and they could not get anything out of him; that to this the witness responded that he had an automobile, and appellant said, "No," the automobile belonged to him; that appellant paid the charges on the car, and, upon the suggestion that the witness repair the car, declared that he and his son operated a garage at Palo, and that he would repair it in his own garage. The witness swore that they conducted business under the name of Young & Son. Lightner, a justice of the peace, related that appellant left a memorandum at his office that they were conducting a garage at Palo; that Thomas was not worth anything, but had a large family; that, if he didn't get to work at some trade, he would put him on a farm. On the other hand, appellant swore that, in 1914, he was selling the King car in his garage at Palo; that Thomas lived in a rented house in Palo that year; that he told Thomas he could go in and have full access to the blacksmith shop in the garage and make what he could; that "that was his own business, he [Thomas] was not having anything to do with the garage at all;" that they were not interested in the business of each other; that the witness had two cars; that he was not engaged in trading cars, but Thomas traded and sold cars when he wanted to; that the automobile in question was an "E. M. F.," which Thomas had obtained from one Stark, by paying \$37.50 difference between that and another car, and that the witness had no interest in it; that each carried a key to the garage; that Thomas had not driven either of the witness' automobiles during the year; that the demonstration number was taken out in December preceding the accident, but he did not know it was in the name of E. E. Young

& Son, and such a firm did not use it; that it was so taken out so that either one might use it; that, when having nothing to do, Thomas assisted about the office, but was not concerned with the sale of the King cars, which witness handled; that, since the middle of August preceding the accident, Thomas had been working on a 5-acre tract, being a part of witness' farm of 240 acres, four miles out of Palo: that he had built a kitchen to a small house there, moved an old shop over there, and fitted it up for a blacksmith shop, and trimmed the trees; that Thomas bought and paid for the lumber which went into the kitchen, and paid the cost of moving the shop; that all this happened before the accident; that witness sold the automobile Thomas had driven, reimbursed himself for what he had paid in fines and costs for his son out of the proceeds, and gave the balance to his son, in pursuance of an agreement so to do, had between them. Thomas' testimony was, in substance, like that of his father, and he adduced checks tending to confirm that he had purchased the automobile traded for the "E.M.F.," and had paid the difference between these, when obtaining the latter; that he got the car for his own use and that of the family; that he went to Cedar Rapids to get a personal check cashed; that his father did not know he was going; that the moving of the shop was then done; that he went to get a valve for the pump, but could get none, and then got the beer to treat the men who had done the moving; then got dinner, and started for home; that he leased the land from his father at \$25 per year, and owned the improvements he put on the place. A brother of the last witness swore that appellant was not present when Thomas traded for the "E.M.F.," and Hepker, that appellant had nothing to do with moving the old shop, and that witness had charge thereof, and Thomas paid him therefor. Iser testified to doing the carpenter work on the kitchen, and that Thomas paid him therefor after the accident; that appellant gave no attention to what was being done. Hayes swore that the lumber for the kitchen was bought August

18, 1914, and that Thomas gave his note therefor, and afterwards paid it.

2. EVIDENCE:
owner pre-
sumed to
control his
property.

Such was the evidence, and we are of opinion that it was enough to carry the issue as to whether the father and son were in partnership or carrying on the business of operating the garage together, to the jury. They made use of a demonstration number under the name of E. E. Young & Son, precisely as though a partnership. Both worked in the same shop, in a manner likely, if partners. The father took charge of the car as his own, shortly after the accident, and declared, as was testified, that it belonged to him, and that they were conducting a garage together. Of course, all this was put in issue. The only benefit appellant derived from the improvements put on the five acres was that they might revert to him when Thomas gave up the lease. The latter was not restricted or controlled in the improvements made, save that he was required to pay all the expenses thereon. If, as appears, Thomas was to pay the rent, "part in work and part in cash," such part was not in improving the leased premises in any way. That Thomas, long after the accident, worked some for the appellant, does not warrant the conclusion that he was operating the car for appellant at the time in question, or that appellant had anything to do therewith. But the jury might have believed Newman and others, and rejected the testimony of defendant relating to these matters, and have concluded that they were partners, or, at least, that they were carrying on the business of the garage together. So, too, as against defendant, the jury might have found that he was owner of the car. If they so concluded, then the prima-facie case was made out that he was in control thereof, and that Thomas was operating the car for him. *Landry v. Overscn*, 187 Iowa 284. This, as was said in that case, is a mere inference that an owner probably is in control of his own property, and is to be given no greater weight than required to compel the owner to identify those operat-

ing the vehicle, and explain by what authority, if not his own, it is being run.

3. NEGLIGENCE:
imputed neg-
ligence: act
of unauthor-
ized person.

Aside from this presumption, there was nothing to indicate that Thomas, in operating the car, was acting in behalf of the appellant. On the contrary, appellant testified that he did not know that Thomas was using the car, or that he had gone with it to Cedar Rapids, and swore that he had nothing to do with his going; and Thomas swore that he went to Cedar Rapids to get a check cashed, belonging to himself, and to obtain a valve for the pump on the land he had leased, and that his father had nothing to do with him or the automobile, in the trip that he had made. This evidence is uncontradicted, and precludes any finding that Thomas was acting as agent, servant, or employee of the appellant. *Kauffman v. Logan*, 187 Iowa 670. Nor was there any evidence that, at the time of the collision, defendants were engaged in a joint undertaking or common enterprise, other than operating a garage at Palo, or were using the automobile in connection therewith. That Thomas leased the five acres of land, was improving it at his own expense, save that his father had allowed him to move the old building belonging to him onto the five acres for a blacksmith shop, was undisputed, as was the testimony of Thomas that he had gone to Cedar Rapids for the purpose indicated. Surely, the appellant had no concern in procuring the check to be cashed, nor in obtaining the keg of beer. Thomas was to do all the repairing on the five acres; and, though obtaining the valve might benefit him incidentally in the future, he was not required to procure the same, and it was wholly in Thomas' interest that he

4. PARTNER-
SHIP: negli-
gent acts
outside scope
of partner-
ship.

undertook to obtain it. Manifestly, the appellant was not interested in or concerned with what Thomas went to Cedar Rapids to do, and, as he was not in the employment of appellant, the latter might not be found liable as principal. How can it be said that what Thomas did had any connection with the business of the garage, or with any-

thing in which appellant and his son were together engaged? Appellant was shown to have been without knowledge that Thomas was going or had gone to Cedar Rapids, until he learned of the collision. The most that could be said was that appellant was owner or partner in the ownership of the car. If he was owner, he was not liable, for that it must have been found that Thomas was not acting as his agent, and had the car without his consent, and was employing it in his private business. If it was owned by both, as partners or otherwise, the record is conclusive that it was not being operated within the scope of the partnership business or in any common enterprise. There is no escape from the conclusion that Thomas was transacting his private business, and not undertaking to execute some purpose or transacting some business of the partnership, if any there was, or of a common enterprise. Even though partnership property were employed, this was not employed within the scope of a partnership business. Of course, one partner is the agent of the other; and if, in the course of the partnership business, one partner commits a tort, the other may be held in damages therefor; but, if this is done, even in the use of partnership property, without the scope of such business, there can be no recovery against the same. 1 Cooley on Torts 253. Had Thomas been engaged in the transaction of partnership business, appellant would have been liable; for each partner is the agent of the partnership, in the transaction of its business. Upon a careful examination of the record, we find that the evidence was insufficient to carry the issues, as against appellant, to the jury; and on that ground, the judgment is—*Reversed*.

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

W. V. HIXSON et al., Appellants, v. BOARDS OF SUPERVISORS OF IOWA COUNTY and BENTON COUNTY, Appellees.

DRAINS: Substantial Benefits and Moderate Costs. An order establishing a drainage district will not be reversed, when it is made to appear that the improvement will result (1) in substantial benefits, (2) at comparatively moderate cost.

DRAINS: Appeal—Delay—Effect. The reluctance of the appellate court to interfere with orders establishing drainage improvements will, it is impliedly suggested, be increased in the same ratio that there is delay in prosecuting the appeal.

Appeal from Iowa District Court.—R. P. HOWELL, Judge.

JULY 6, 1920.

IN the district court, this was an appeal from an order establishing a drainage district. The order appealed from was made by the joint boards of Iowa and Benton Counties. In the district court, the order of establishment was confirmed. From such order of confirmation in the district court, the complaining parties have appealed to this court. —*Affirmed.*

H. M. Havner, R. E. Hatter, C. W. E. Snyder, Robert Healy, Edward F. Snyder, and F. Paul Harned, for appellants.

J. F. Kirby and Morling & Morling, for appellees.

EVANS, J.—The improvement in question involves a straightening of Buckeye Creek. This creek has its outlet in the Iowa River. It has its source in the hilly lands, some miles distant from the river, and has a watershed of about 25 square miles. It takes its course through the high ground without presenting any drainage problems. Low, flat

1. DRAINS :
substantial
benefits and
moderate
costs.

land extends along its course from the outlet to the foot of the hilly area. The water being discharged at the foot of the hilly land finds its way from that point to the river very sluggishly. In times of heavy rain, a considerable area is subjected to overflow. The engineering proposal was to excavate a ditch on a direct line from the point of discharge at the foot of the hill, to the river. The length of such ditch would be about 11,000 feet; whereas the length of the creek channel was approximately 19,000 feet. The fall along the old creek channel is less than 7 feet to the mile; whereas a fall of 10 feet to the mile could be secured for the shorter course of the proposed improvement. The engineer's estimate of the cost was less than \$4,000, with about \$1,500 of damages to be provided for. The area of the proposed district is about 2,000 acres, of which approximately 800 acres are subject to frequent overflow. The land included is of great fertility, and consequently of great value, if protected against the overflow.

The objections urged against the project were, in substance:

1. That only a small part of the included land was subject to serious overflow.

2. That the plan proposed was wholly inadequate, and that its cost would greatly exceed its benefits, and would be greater than the district should bear.

So far as the merits of the controversy are concerned, only fact questions are involved. The record is very voluminous. The appellants have filed their original abstract and two subsequent amendments thereto.

2. DRAINS:
appeal: de-
lay: effect.

To these, the appellees have added three amended abstracts. It will be readily seen that it will be impracticable for us to deal with the details of the evidence within the proper limits of an opinion. A careful reading of the record satisfies us that the district court properly refused to interfere with the order of establishment. We are satisfied from the evidence that the proposed improvement will result in substantial benefit at a comparatively moderate cost. This is enough

to forbid our interference with the statutory discretion of the joint board. If the merits of the project were more doubtful, we should be reluctant to interfere at this time with the order of the board, in view of the unusual delay attending the prosecution of the appeal to the district court. The appeal was formally taken in December, 1914. No petition was filed by the appellants in the district court until September 28, 1915. In the meantime, the contract for the improvement had been let, and much of the construction had been done. It is contended by appellees that the work done was that part of the improvement which was especially beneficial to the appellants. The contention is not without support in the record. But we indicate no opinion of its accuracy. The practical operation of the drainage statute requires that such an appeal as this should be prosecuted diligently; otherwise, the project adopted by the board could be defeated by mere delay. The burden of the appeal being at all times upon the appellant, its weight should be increased rather than lightened by undue delay.

That the cost of the improvement is comparatively moderate is indicated by the fact that the sum total of assessments of benefits to the eight appellants is approximately \$1,300, from which assessments no appeals were taken. No benefits were assessed against appellant Hixson. The order of the district court is—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

MAUDE ESTELLE HOLMES, Appellee, v. L. E. CURL et al.,
Appellants.

PLEADING: Demurrer to Answer Containing General Denial. A
1 ruling sustaining a demurrer to an answer will not be set
aside on the point that the answer contained a denial of a cer-
tain material allegation of the petition, when the record demon-
strates that said denial was abandoned in the trial court, and
that the parties, in disposing of the matter on demurrer, mutu-

ally proceeded on the assumption that the allegation in question was true, as alleged by plaintiff.

ADOPTION: Re-Adoption by Natural Parent—Effect on Right of
2 Inheritance. The legal adoption of a child confers upon the child the right to inherit from its adopting parent, and such right is in no wise changed by the subsequent act of the adopting parent in executing adoption papers back to the natural parent.

ESTOPPEL: Equal Possession of Facts. One may not be estopped
3 to assert a right, when the facts pertaining to that right are equally within the knowledge of both contending parties. So held where it was claimed that a child by adoption had permitted an estate to be closed, without asserting its right of inheritance.

Appeal from Shelby District Court.—THOMAS ARTHUR.
 Judge.

JULY 6, 1920.

Suit for the partition of real estate. Defendants appeal from a judgment upon demurrer to answer.—*Affirmed.*

Edward S. White and Thomas H. Smith, for appellants.

Cullison & Cullison, for appellee.

STEVENS, J.—Plaintiff alleged in her petition that, on May 27, 1884, she was, by written articles, adopted by Martin L. and Abigal Curl as their child, her father, Nyram R. Pratt, who was her sole surviving parent, consenting thereto; that said articles of adoption were duly filed for record, and recorded in Book 93, page 614, of the Miscellaneous Records of Shelby County, Iowa, and indexed in Miscellaneous Index 10, as required by law; that, on February 7, 1911, the said Martin L. Curl died intestate, seized of the NW $\frac{1}{4}$ of Section 29, Township 81, Range 38 west, leaving the plaintiff and the defendants, except Gerold

1. PLEADING:
 demurrer to
 answer con-
 taining gen-
 eral denial.

Adam Coenen and wife and William Coenen and wife, who are purchasers of said land from their codefendants, as his sole heirs at law; that plaintiff is the owner and entitled to the possession of an undivided one-sixth interest therein, and praying a partition thereof and for other equitable relief. The defendants, for joint answer to plaintiff's petition, admitted that Martin L. Curl died intestate, seized of the land described, leaving the defendants only, except the parties above named, as his sole surviving heirs at law; that, on or about the year 1884, the said Martin L. and Abigail Curl and Nyram R. Pratt executed alleged articles of adoption, in words and figures as charged in plaintiff's petition, and that same were duly recorded in Book 93, at page 614, Miscellaneous Records of said county, and indexed as alleged. The said defendants, among other matters, further alleged:

"Further answering the petition and amendment thereto of plaintiff, these defendants allege that the said alleged articles of adoption were not duly and legally executed, and were not duly and legally filed, indexed, and recorded; and that said alleged articles of adoption were wholly lacking in such compliance with the law as required to entitle plaintiff to any rights of an heir, as claimed by her; and that she takes no rights whatever as an heir, and by virtue of said alleged articles of adoption, or in any other manner whatsoever."

And also that, on or about April 1, 1892, the said Martin L. and Abigail Curl, by written articles of adoption, signed and acknowledged as required by law, re-adopted plaintiff to the said Nyram R. Pratt, her father, and that, by reason thereof, she lost all right of inheritance in and to the property or estate of the said Martin L. Curl. In a second count, defendants sought to plead an estoppel, the grounds of which will be referred to in detail later. Copy of the written articles of adoption, executed in 1884, were attached to plaintiff's petition, as was also a copy of the articles of re-adoption to defendant's answer. By an amendment, the

defendants voluntarily withdrew the portion of their original answer quoted above, but added:

"Defendants do not hereby waive any rights in this action under their general denial hereinafter set forth, but elect to avail themselves of every right asserted and every right properly claimed under such general denial."

The denial thereafter set out in their answer is as follows:

"Further answering the petition and amendment thereto of plaintiff, defendants deny that plaintiff is now, or, at the date of decease of Martin L. Curl and wife, was, or after the surrender of her custody and control by Martin L. Curl and his wife to the father of plaintiff was, or after the execution and recording of the instrument in the answer of defendants described (and recorded in Book 93 at page 614 of the public Miscellaneous Records of Shelby County, Iowa, in the office of the county recorder) was, the adopted child of said Martin L. Curl or of said Abigal Curl, under the facts as pleaded in the above-entitled cause; and defendants, further pleading herein, deny each and every allegation in the petition and amendment thereto of plaintiff not herein expressly admitted."

It is further alleged in said amendment that, after the execution of the second articles of adoption, Martin L. and Abigal Curl surrendered the care and custody of plaintiff to her father, and that she ceased thereafter to reside with or serve them.

To defendant's answer and each count thereof, the plaintiff interposed a general equitable demurrer, which was sustained; and, defendants having elected not to plead over, a decree was entered, finding and adjudging plaintiff as the owner of an undivided one-sixth interest in the above-described real estate, and ordering the same sold and the proceeds divided according to the interest of each of the respective parties hereto.

I. It is claimed by counsel for appellant that their answer denied the following allegations of plaintiff's petition: (a) That the articles of adoption relied upon were

in manner and form as required by law; (b) that same were duly and legally executed; (c) that Nyram R. Pratt was the sole surviving parent of plaintiff; and (d) that same were duly and properly filed, recorded, and indexed.

The due execution, recording, and indexing of the articles are alleged in plaintiff's petition, in addition to the specific allegations stated above. These allegations, however, amounted to nothing more than the statement of legal conclusions, and hence the denial had no other effect than to deny them as such. The allegation, however, that Nyram R. Pratt was the sole surviving parent of plaintiff was the statement of a material ultimate fact, which plaintiff was bound to prove, and not a legal conclusion.

On the other hand, it is contended by counsel for appellee that defendant's denial did not put in issue any of the material allegations of the petition, as distinguished from legal conclusions, and that, under the admissions of the answer, plaintiff made out a *prima-facie* case. Some reliance is also placed by counsel for appellee upon the recital in the articles of adoption describing Nyram R. Pratt as the sole surviving parent of plaintiff, and upon the fact that, under Section 3629 of the Code, any defense relied upon to avoid the articles of adoption must be specially pleaded. The written instrument was duly acknowledged before a notary public, and admissible in evidence without further proof. Code Section 4629. The relationship of plaintiff and Nyram R. Pratt is admitted and alleged in defendant's answer, and it is nowhere alleged therein, nor is claim made in argument, that he was not her sole surviving parent. It is contended by counsel for appellee, both in their written and oral arguments, and not denied by counsel for appellant, that defendant's denial was not relied upon in the court below to raise the question now argued, and that, in the submission of the demurrer, it was wholly ignored, and only the legal questions raised by the demurrer considered by either party or by the court. It is manifest from the record that it was not intended by defendants by said denial to raise the question of the authority of Pratt

to consent to the adoption. This is made clear by the withdrawal from their original answer of the portion quoted above. Evidently, counsel upon both sides sought to dispose of the question of plaintiff's interest in the estate upon demurrer, and they did not rely upon a technical denial of an allegation in plaintiff's petition about which there is manifestly no dispute. As the allegations of the petition in the court below were treated as sufficient to make out a prima-facie case, and the demurrer to the answer was disposed of on both sides without reference to the qualified denial contained therein, we will so treat the matter in this court. In view of this conclusion, it is unnecessary to determine or discuss the other matters referred to by counsel in argument upon this point.

II. No right of adoption existed at common law, but it is authorized by Chapter 7, Title XVI, of the Code of 1897. The Code of 1873 contained a similar provision.

2. ADOPTION :
re-adoption
by natural
parent.
Section 3251 confers authority upon the sole surviving parent to consent to the adoption of a minor child by written articles of adoption, and provides what shall be contained therein. Section 3252 requires that same be signed and acknowledged by such parent and by the adopting parties, and that it be recorded in the recorder's office in the county where the persons adopting reside, and be indexed with the name of the parent by adoption as grantor, and the name of the child as grantee, in its original name, if stated in the instrument. Section 3253 provides:

"Upon the execution, acknowledgment and filing for record of such instrument, the rights, duties and relations between the parent and child by adoption shall be the same that exist by law between parent and child by lawful birth."

But for the alleged re-adoption of plaintiff by her father, her right to inherit from Martin L. Curl must be conceded. The decision of this question, therefore, depends upon the effect to be given to the second articles of adoption.

Counsel for appellee contend that plaintiff did not lose her right of inheritance, acquired by the original articles

of adoption, for the reasons: (a) That Martin L. and Abigal Curl had no authority to execute the articles of adoption relied upon; and (b) that, if such authority existed, her right of inheritance was not affected thereby. Section 3251 of the Code requires that, if living, and not divorced or separated, the consent of both parents shall be given to the adoption of a minor child; but, if divorced, separated, or unmarried, the consent of the parent having the legal care and providing for the wants of the child is sufficient; or if either is dead, the surviving parent may consent thereto; or if both parents are dead, or if the child has been abandoned, the mayor of the city where it is living, or, if not in a city, the clerk of the district court of the county of its residence may consent to such adoption. The statute does not, therefore, in terms authorize the foster parents to consent to the adoption of their adopted child, or to execute articles for that purpose. If such authority is conferred by the statute, it is because they stand in the same relation to an adopted child as they would if it had been born to them in lawful wedlock. As already stated, the statute declares that the relationship between parent and child by adoption shall be the same as that existing by law between parent and child of lawful birth. The status, therefore, fixed by the original articles of adoption was that of parent and child, with the same right of inheritance as a child of lawful birth. The relation was not merely that of contract between Nyram R. Pratt and Martin L. and Abigal Curl, which could be canceled or terminated by mutual agreement. The adoption was for the benefit of plaintiff, and the right conferred upon her by the articles of adoption and by the statute could not be abrogated or destroyed at the pleasure of the father and the adopting parents. Plaintiff did not lose her right to inherit from her father by her adoption, but acquired an additional right of inheritance. *Wagner v. Varner*, 50 Iowa 532; *Hilpire v. Claude*, 109 Iowa 159; *Shick v. Howe*, 137 Iowa 249.

It has been held that the adoption of a child subsequent to the execution of a will has the same effect thereon as

the birth of a posthumous child for whom no provision is therein made. *Flannigan v. Howard*, 200 Ill. 396 (65 N. E. 782); *Glascott v. Bragg*, 111 Wis. 605 (87 N. W. 853); *Dreyer v. Schrick*, 105 Kan. 495 (185 Pac. 30); *Hilpire v. Claude*, 109 Iowa 159. If, therefore, the legal status of plaintiff was the same as that of the children born to Martin L. and Abigail Curl, and her right of inheritance identical therewith, then it must necessarily follow, whether they had authority to re-adopt plaintiff to her father or not, that her legal status was not changed or altered thereby, and her right of inheritance remained the same as though the second articles of adoption had not been executed.

Counsel for appellant rely upon the decision of the Supreme Court of Michigan in *In re Klapp's Estate*, 197 Mich. 615 (164 N. W. 381). In that case, the court held that all right of inheritance was destroyed by the subsequent adoption of the child to another by the adopting parents. The decision was by a divided court, and, so far as we have been able to find, has not been followed in any other jurisdiction.

The Supreme Court of Kansas in *Dreyer v. Schrick*, supra, specifically disapproved thereof, and it is held to the contrary in *Patterson v. Browning*, 146 Ind. 160 (44 N. E. 993), and *Villier v. Watson*, 168 Ky. 631 (182 S. W. 869). The court in *Dreyer v. Schrick*, supra, said:

"The plaintiff refers to the rule that, when an order of adoption has been set aside, the status of the child is the same as if no adoption proceeding had taken place, and cites cases sustaining the rule. It has no application to the present controversy. In the case of *In re Klapp's Estate*, 197 Mich. 615, it was held that a second adoption has the effect of 'revoking or superseding' the order made in the first adoption proceeding, and, since right of custody, obligation to nurture, etc., consequent upon the first proceeding, fall, the right of heirship, conferred by the same proceeding, falls. The defect in this reasoning is that, while a new domestic relation is created, the first proceeding

is not affected in any particular by the second. The first proceeding stands for all time, in all its integrity, attended by the same legal consequences as birth of a child to the adopting parents, unless formally annulled on sufficient grounds, in a proper proceeding to that end. The law creates capacity to inherit, and not birth or adoption. The law invests those born and those adopted with that capacity, without distinction. Some other law must be found which destroys the capacity in one case and not in the other, or it persists, without regard to whether it originated with birth or with adoption. The adoption statute has no such effect, and no other statute exists which does."

The questions here under discussion were not presented or decided by this court in *Clayton v. Whitaker*, 68 Iowa 412; and, in so far as the language of the court tends to support the theory of appellant, it was with reference to the consideration of a note given by the natural father to the adopting parent, to pay for keeping an adopted child after the mother had agreed to take the child back.

It is our conclusion, and we hold, that, whether the second adoption was authorized or not,—a question we do not decide,—the status of plaintiff, so far as it related to her right of inheritance, was in no wise changed by such adoption. She acquired no other or different right of inheritance from her father by the second alleged adoption than she already possessed.

III. The heirs of Martin L. Curl, except the plaintiff, conveyed the real estate in question to their codefendants. It is alleged in their answer that the plaintiff, at the time

of the administration of the estates of Abigail and Martin L. Curl, and of the purchase and sale of said real estate, resided in the vicinity thereof; that she knew that same was about to be sold; that, during the negotiations therefor and the actual conveyance thereof, she remained silent, and made no objection thereto, and asserted no claim, right, title, or interest therein; that she permitted said estates to be settled and distributed to the Curl heirs, with knowl-

3. ESTOPPEL :
equal pos-
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facts.

edge thereof, without complaint or objection; that valuable improvements have been made upon said premises by defendants and taxes paid thereon, with knowledge of plaintiff and without complaint or protest upon her part or contradiction of any kind; that defendants have at all times relied upon the silence of plaintiff, and her failure to assert any claim or interest in said property, when it was her duty to do so, and in further reliance thereon sold and conveyed the same; and that, because of such silence and failure of plaintiff to assert some claim or interest in said land, she is fully barred and estopped from claiming ownership or asserting an interest therein. Counsel for appellee refuse to accept the plea of estoppel as binding upon them, for the reason that it is not alleged that the plaintiff knew of her rights or interest in said land, either in fact or law, and that the means of knowledge were equally available to all parties.

It is not alleged in defendants' answer that plaintiff knew, either of the articles of adoption or the legal effect thereof, except as notice was imparted to her by the record. Defendants, as well as plaintiff, had constructive notice, and it must be assumed from the allegations of defendants' answer that the Curl heirs at least had actual knowledge thereof. The plaintiff was related to Martin L. Curl only by adoption, without which she would have had no interest whatever in his estate, and the allegations of defendants' answer that they relied upon and were misled by her silence must be based upon actual knowledge of the articles of adoption; otherwise, they would have had no occasion to consider or rely upon her silence, nor could they have been benefited or injured thereby. It is more than probable that the defendants misunderstood the legal effect of the second articles of adoption, and that this misunderstanding was what misled them. Unless plaintiff concealed some right or claim to an interest in said real estate, with knowledge thereof, no just inference of actual or constructive fraud could arise therefrom. 1 Story on Equity Jurisprudence (13th Ed.), Section 386. The articles of adoption were of

record in Shelby County; the means of ascertaining what, if any, interest plaintiff had in the land were equally available to plaintiff and to all of the defendants. Where the facts are known to both parties, or where they have equal means of ascertaining the truth, there can be no estoppel. *Logan v. Davis*, 147 Iowa 441; *Busby v. Busby*, 137 Iowa 57; *Crockett v. Cohen*, 82 W. Va. 284 (95 S. E. 959).

Clearly, the demurrer to this count of the answer was properly sustained. It follows that the judgment and decree of the court below must be and are—*Affirmed*.

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

FRANK A. HOLMES, Appellant, v. STELLA WINIFRED HOLMES, Appellee.

DIVORCE: Residence—Avoiding Decree for Fraud. A decree of divorce which specifically finds that petitioner was a bona-fide resident of the county in which the action was pending (defendant being a resident of this state) may not be impeached by the naked showing that petitioner, shortly after the decree was entered, took up her residence in another state.

JUDGMENT: Application to Set Aside—Sufficiency. Perjury committed on the trial of the material issues of a cause is not sufficient ground for setting aside the judgment after the entry term, and especially when the alleged perjury reaches only to a part of the evidence—would only extend the conflict already existing.

JUDGMENT: Application to Set Aside—Sufficiency. An application to set aside a decree for fraud may require a more specific and detailed statement of facts than would be necessary in pleading an ordinary cause of action. Every fact should be alleged which will enable the court to say, on the face of the pleading, that the decree is unconscionable, unjust, or inequitable, and that a different result will probably be reached on a retrial.

JUDGMENT: Setting Aside—Extrinsic Perjury. Perjury, extrinsic
4 or collateral to the material issues tried, may constitute grounds
for setting aside a decree.

Appeal from Fayette District Court.—W. J. SPRINGER,
Judge.

MARCH 16, 1920.

REHEARING DENIED JULY 6, 1920.

ORIGINAL proceeding in equity for the vacation of a judgment and decree in a divorce action, and for a new trial. A demurrer to plaintiff's petition was sustained, and he appeals.—*Affirmed.*

Bailie & Edson and H. E. Tuller, for appellant.

E. H. Estey, for appellee.

STEVENS, J.—I. It appears from the allegations of plaintiff's petition that he is and has been, at all of the times referred to in this action, a resident of Woodbury County, Iowa; that, on October 5, 1916, he and defendant were married, and lived together until December 1, 1916, and that, on December 25, 1916, she commenced an action against plaintiff in Fayette County for a divorce, upon the ground of cruel and inhuman treatment, such as to endanger her life, based upon the communication to her by plaintiff herein of a venereal disease, from which she became sick and suffered great physical and mental pain and anguish; that, on May 31, 1917, a decree granting the prayer of her petition was entered, which, on the 18th day of February, 1919, was affirmed by this court. As ground for setting aside said decree and for a new trial, plaintiff herein alleged in his petition that the same was obtained by fraud and perjury.

It is first alleged that defendant, plaintiff in the divorce

action, was not, at the time of commencing same, a bona-fide resident of Fayette County, but that she was, in truth and in fact, a resident of Minneapolis, Minnesota, to which place she returned, shortly after the trial, and where she has continued to reside; that she went to Fayette County only for the purpose of obtaining a divorce; that she was, prior to her marriage, and has been, since her return to Minneapolis, engaged in teaching music; that defendant appeared in the divorce action, and filed an application for a change of venue to Woodbury County, where he resided, which was overruled; that he specifically denied in his answer that the plaintiff therein was a resident of Fayette County.

It is further alleged that defendant herein testified, upon the trial of said cause, that Drs. Emmons and Pattison made a physical examination, and informed her that she was afflicted with a venereal disease; that, since the trial of said cause, plaintiff has learned that said testimony was wholly false, and that both of said physicians advised her to the contrary. The petition further charges that defendant herein employed E. H. Farin in the capacity of a detective and agent, who, in turn, employed one O. W. Davis to assist him, to procure testimony on her behalf in the divorce action; that the said Farin and Davis procured one George M. Hecklin as a witness, who testified that he had seen plaintiff herein at a roadhouse near Sioux City, in company with women of questionable character; that Davis asked him for a prescription for the cure of a venereal disease, stating that he wanted it for a friend, meaning the petitioner, who later asked him for a copy of the same prescription, saying that he had lost the first one; that the said Hecklin further testified that he saw a Mrs. Davis going to the room of petitioner in a hotel in Sioux City; and that the said Hecklin and Davis procured one Edith Ludvickson, a woman of bad character, to falsely testify that, while working as a chambermaid in said hotel, she saw stains upon the bed linen used by plaintiff, indicating the presence of a filthy disease; that, since the decision

of this court was filed in the divorce action, plaintiff has learned the matters above stated; that Hecklin has admitted that the matters testified to by him were wholly false and untrue; that said admission has been made orally, and in writing under oath, which plaintiff has in his possession; and that the said Hecklin is ready and willing, in case a new trial is granted, to testify that he committed perjury upon the former trial. To this petition, the defendant interposed what amounts to an equitable demurrer.

As already indicated, the jurisdictional question was made an issue in the trial of the divorce action, and the court specifically found that plaintiff was a bona-fide resident of Fayette County, and entitled to maintain her action there. The adjudication in that action is conclusive, except upon the ground of fraud. *Williamson v. Williamson*, 179 Iowa 489; *Bingman v. Clark*, 178 Iowa 1129; *Scott v. Scott*, 174 Iowa 740.

The only matters pleaded in plaintiff's petition tending to impeach defendant's claim that she was a resident of Fayette County in good faith is that she left there shortly after the trial, and resumed her former occupation in Minneapolis, where she has continued to reside. A finding by the court, upon a trial of the issues tendered herein, of the above facts, would not justify the setting aside of the decree and the granting of a new trial. Residence is largely a matter of intention. The statute does not require that the plaintiff in a divorce action reside in this state for any specified length of time, if the defendant is a resident thereof. She need only be a resident of the county in which the action is brought. The defendant had a legal right, in good faith, to change her place of residence, and the mere showing that she returned to Minneapolis, instead of going to some other city, is, in view of her former residence there, material only as tending to throw light upon her intentions at the time she claimed to have become a resident of Fayette County. The court passed upon the question of the good faith of her intentions in the divorce suit, and held that

1. DIVORCE:
residence:
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fraud.

she was a bona-fide resident thereof. That she returned to Minneapolis and resumed her former position, shortly after the decree was entered, may tend, to some extent, to indicate that the purpose of her coming to Iowa was to obtain a divorce, but is wholly insufficient alone to justify the court in setting aside the judgment for want of jurisdiction to enter same, or upon the ground of fraud.

II. False swearing or perjury upon the
 2. JUDGMENT: original case is not such fraud as will alone
 application
 to set aside: justify the vacation of a judgment and the
 sufficiency. granting of a new trial upon a petition in
 equity, filed after the term at which judgment was entered.
Graves v. Graves, 132 Iowa 199; *Croghan v. Umplebaugh*,
 179 Iowa 1187; *Sudbury v. Sudbury*, 179 Iowa 1039; *Kelly*
v. Cummins, 143 Iowa 148; *Guth v. Bell*, 153 Iowa 511;
Mengel v. Mengel, 145 Iowa 737.

Nor will a court of equity interfere to
 3. JUDGMENT: set aside a judgment upon the application
 application
 to set aside: of a party thereto, until it is made reason-
 sufficiency. ably to appear that the judgment is un-
 conscionable, unjust, or inequitable, and that the result
 would be other or different than that already reached if a
 new trial were granted. *Bingham v. Clark*, supra.

The testimony given upon the former trial, which it is alleged was false and corruptly procured, is that of the plaintiff in said suit, Hecklin, Davis, and Edith Ludvickson. It is alleged that defendant committed perjury when she testified that Drs. Emmons and Pattison, after a physical examination, advised her that she was afflicted with a venereal disease. So far as disclosed, neither of said physicians was a witness upon the trial, nor is reference made in the petition to the source of petitioner's information that they did not tell plaintiff in said cause what she testified they did, or the character of the evidence relied upon to establish the falsity of her testimony. The mere allegation that, since the trial, petitioner has been informed by some person not mentioned, or learned in some way not stated, that the plaintiff in the divorce action committed

perjury, is not enough. We must presume that evidence was offered upon the trial, tending to corroborate her claim that she was afflicted with a venereal disease, and we cannot presume what other evidence, in addition to her own and that of the witnesses named, was introduced.

If we look only to the petition filed herein, we find nothing to indicate whether medical testimony was offered upon this point or not; but, if we refer to the opinion of this court cited therein, we find that Drs. Ida McKean and Alford both testified that, upon a thorough examination of her, they found plaintiff in the divorce action suffering from the disease claimed. It is not alleged that either Dr. Emmons or Dr. Pattison is willing to testify that plaintiff was free from disease, and, so far as disclosed, testimony, if offered, upon this point would serve only to contradict the testimony of plaintiff, and to some extent weaken the probative value of the testimony of Drs. McKean and Alford. In other words, it would not necessarily establish either that plaintiff committed perjury or that Drs. McKean and Alford are untruthful or mistaken, but only to extend the conflict in the evidence. It is further alleged that the witness Hecklin testified upon the former trial at the instigation and solicitation of Farin and Davis, and, so far as shown, his testimony would be contradicted by both Farin and Davis, and that Davis would not recede from his former testimony. If, however, we again turn from the petition to our former decision, we find that the court apparently gave little weight to the testimony of Hecklin and Davis. While the testimony thereof is referred to at some length, the court characterizes it as unsatisfactory, and recapitulates the credible testimony upon which the affirmance is largely based. The only person named in the petition by whom petitioner expects to prove that perjury was committed upon the trial is Hecklin, who, it is alleged, has confessed in writing that he did commit perjury. Just what has worked the regeneration of this witness does not appear; but it is a long-distance chance that his purpose is sincere, or intended to right a wrong imposed upon the

parties and the court in the trial of the divorce case. By this we do not mean to question that the affidavit signed by him and prepared by his attorney was not fairly obtained, as alleged; but neither his written confession nor his testimony, if offered upon a retrial of the divorce action, would probably be given very great weight. We do not agree with the contention of counsel that the written confession of this witness would constitute a high degree of proof.

While it is charged in the petition that the testimony of Edith Ludvickson was corruptly procured by Davis and Farin, the allegations do not disclose that petitioner will be able, upon a retrial, to sustain the same by proof, unless by the testimony of Hecklin. It is not charged that the alleged bad character of the witness was unknown to petitioner at the time of the trial, or that he did not have opportunity of showing same. Her testimony could not have been very persuasive upon the former trial. It may be assumed that same was contradicted by petitioner and that the material circumstances referred to in the petition affording a further contradiction thereof were brought to the attention of the court upon the trial.

But it is insisted by counsel for petitioner that the demurrer, for the purpose of passing upon the sufficiency of the allegations of the petition, admits the truth thereof. But such facts are admitted only as are issuable, relevant, material, and well pleaded. The admission does not extend to the conclusions of the pleader or any matter inhering in the judgment. *Sudbury v. Sudbury*, supra.

A petition in equity for the vacation of a judgment, and for a new trial, is rather in the nature of a showing of merits than the statement of a cause of action, as that term is ordinarily applied. Its purpose is to bring to the attention of the court such facts as, if admitted by a demurrer, would show that the judgment complained of is unconscionable, unjust, or inequitable, and that it is reasonably probable that a retrial of the issues would result differently. The matters relied upon should be charged with sufficient fullness and explicitness to enable the court, in passing

upon a demurrer in conformity with the rule stated, to determine whether the facts admitted thereby call for the intervention of a court of conscience.

As stated by counsel for appellant in argument, it is apparent that petitioner relies primarily upon the written confession of Hecklin and the showing made thereby. If it were conceded that all of the testimony of this witness, together with that of Davis, Farin, and Ludvickson, was wholly false and untrue, the effect of such admission would go no further, upon a trial of the merits, than to remove the same from consideration, unless satisfactory proof was offered that the plaintiff in that case knew of the perjury, or had reasonable grounds to believe the testimony untrue. The elimination of this evidence would not tend to overcome her own or other testimony offered upon the trial as to plaintiff's condition, in the absence of knowledge upon her part that the witnesses testified falsely. Aside from the mere allegation that defendant herein knew that Hecklin, Davis, and Ludvickson were corruptly induced to testify falsely upon the trial, there is nothing to indicate upon what petitioner relies to make proof thereof. Unless plaintiff knew, or at least had reason to believe, that the testimony of these witnesses was false, when offered, the elimination thereof would in no wise weaken the testimony of herself or physicians that she was afflicted with the disease mentioned. As already stated, a mere showing that perjury was committed upon the trial does not entitle the petitioner to a new trial.

The court, in *Graves v. Graves*, supra, quoting from *Pico v. Cohn*, 91 Cal. 129 (25 Pac. 970, 27 Pac. 537), said:

"That a former judgment or decree may be set aside and annulled for some frauds, there can be no question; but it must be a fraud extrinsic or collateral to the questions examined and determined in the action. * * * What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely

keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party, and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest. *United States v. Throckmorton*, 98 U. S. 65, 66, and authorities cited. In all such instances, the unsuccessful party is really prevented, by the fraudulent contrivance of his adversary, from having a trial; but, when he has a trial, he must be prepared to meet and expose perjury then and there."

4. JUDGMENT:
setting
aside: ex-
trinsic per-
jury.

The petition does not allege such facts showing extrinsic or collateral fraud in the procurement of the judgment assailed as to entitle petitioner to the relief demanded; and, while the record upon the former appeal presented a most unusual, extraordinary, and unfortunate state of facts and circumstances, the issues were tried, and submitted to a court of large experience, and the record was again carefully examined and scrutinized upon appeal. We are convinced that the facts alleged and admitted by the demurrer do not make a prima-facie showing of fraud in the procurement of the decree, entitling petitioner to the relief demanded, and the demurrer was rightly sustained. The order appealed from is—*Affirmed*.

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

IN RE APPEAL OF W. D. McLAIN.

MUNICIPAL CORPORATIONS: Record Establishing District is a
1 **Finality—Assessing Excess Acreage.** A duly entered record of the lands included within a drainage or sewer district is the only competent evidence of the identity of the district. In assessing benefits, the council may not multiply the maximum benefits per acre by a multiplier which represents the number of acres which the council *intended and supposed* it had included within the district, but had not.

MUNICIPAL CORPORATIONS: Consent to Irregularities in Estab-

- 2 **lishing Sewer District.** Property owners may consent to *irregularities* in the exercise by the city council of its jurisdiction to establish drainage or sewer district, but failure to include certain lands in the record establishing the district is not a mere irregularity, but a total *failure of jurisdiction* over such omitted lands.

MUNICIPAL CORPORATIONS: Objection of Excessiveness—Non-

- 3 **necessity to Amplify on Appeal.** The plea before the city council of excessiveness in assessment will enable the property owner, on appeal from an adverse decision, to show, without amendment to his objections, that his assessment was arrived at by multiplying the maximum benefits per acre by a multiplier which represents more acreage of his land than was included within the district, especially when the assessment did not reveal such unauthorized computation.

MUNICIPAL CORPORATIONS: Estoppel to Object to Excessive

- 4 **Assessment.** Consent by a property owner that the city may build a sewer across his land, and an agreement by him to pay his "just and proportionate" part of the cost, do not work an estoppel to contest the amount assessed against him.

MUNICIPAL CORPORATIONS: Reduction in Assessment Because

- 5 **of Excessive Cost.** It may not be contended, on appeal from an alleged excessive assessment, that the improvement might have been built more cheaply, especially when it was built just as the objector had insisted.

Appeal from Story District Court.—R. M. WRIGHT, Judge.

MARCH 16, 1920.

REHEARING DENIED JULY 6, 1920.

In the district court, this was an appeal by McLain from an order of the city council of Ames, assessing drainage benefits against a portion of his farm. The district court awarded him partial relief. From such order of the district court, the city council has appealed. In the discussion of the case, we shall refer to McLain as the plaintiff, and to the city council as the defendant.—*Modified and affirmed.*

John Y. Luke, for appellant.

Lee, Garfield & Coyle, for appellee.

EVANS, J.—I. The drainage improvement under consideration herein was a storm sewer. This storm sewer carried the surface water from certain highlands within the city corporation, including Graeber's Addition thereto, down to Squaw Creek, where the outlet of the sewer was constructed. From its outlet, the sewer was constructed of drain tile across the Squaw Creek bottoms, and extended up to a connection with the storm sewers and catch basin formerly constructed in Graeber's Addition. The bottom land across which it was constructed was that of plaintiff, and was a part of his farm of 231 acres. About 160 acres of this farm are included within the city corporation. The farm abuts on the south side of the Lincoln Highway, and it lies between the city proper of Ames and the Agricultural College. Contiguous to it on the west is Graeber's Addition, comprising about 60 acres of ground. This addition was laid out with a view of furnishing a residence location convenient to the college. The north part of plaintiff's farm is located in the north one half of the northwest quarter of a certain Section 10. The main sewer crosses it in an east and west direction. A branch thereof runs northwesterly and southeasterly. The location of the sewer is within the north 57 acres of plaintiff's farm. For the purpose of constructing the improvement, the city council established a drainage district, pursuant to the statute. The boundaries of the district were made to include the north 57 acres of the northwest quarter of said Section 10, and all of Graeber's Addition, comprising about 60 acres. This was the total area of the drainage district. The cost of the improvement was a little less than \$8,000. The benefits assessed against the lands of plaintiff were \$2,011.

1. MUNICIPAL CORPORATION: record establishing district is a finality: assessing excess acreage.

Originally, this apportionment was entered in lump against the plaintiff's land, without specifying any description. Later, and in response to plaintiff's objections filed, the apportionment was divided, so that \$1,299 thereof was entered against the northwest quarter of the northwest quarter of Section 10, except 5 acres, and the balance thereof was entered against the northeast quarter of the northwest quarter. The plaintiff filed extended and specific objections to the assessment, all of which, however, were reducible to the ultimate objection that the assessment against him was excessive.

The particular fact in the case which has given the litigants their greatest trouble, and to which their briefs have been very largely directed, is that, in fixing the amount of the assessment against plaintiff's lands, account was taken, as alleged, of benefit accrued to land *outside* of the district. It was deemed by the city council that the plaintiff received benefit to the extent of \$37.10 an acre on the north 57 acres of his farm, and the computation was made, as alleged, upon that basis. Only 39 acres, however, of the plaintiff's farm were included within the district as established. That is to say, the district as established was made to include the north 57 acres of the northwest quarter of Section 10. Of this area so included, Coy owned 5 acres, and Roberts owned approximately 13 acres. The plaintiff owned the remaining 39 acres, and this was the north 39 acres of his farm. The sewer as constructed cut plaintiff's farm on a line outside of and further south than the north 39 acres, but within the north 57 acres. In explanation of this discrepancy, the defendant contends that there was a mistake in the description of plaintiff's land, made in the resolution of necessity, and that such mistake was carried through the successive proceedings of establishment; that the real intent of the city council was to include within the drainage district the north 57 acres of plaintiff's farm, and that all of its proceedings were had on that theory, and that the plaintiff knew it and acquiesced in it; that the plaintiff waived the irregularity, by failing to object thereto; and further, that

the plaintiff is estopped from raising such question, because of a certain paper signed by him, known in the record as Exhibit A, whereby he agreed to the construction of the sewer across his land, and whereby he agreed to pay his proportionate share of the cost thereof.

For the plaintiff, it is contended that this discrepancy was not discovered by him until the case came into the district court; that he did not know, nor did the record in any manner indicate, that the sum total charged against him was arrived at by considering benefits to other acres of his land than those included within the district. In the district court, the plaintiff filed amendment to his petition, which was, in form, an amendment to his objections, whereby he challenged the jurisdiction of the city council to take account of benefits to acres situated outside the boundaries of the district. A motion by defendant to strike this amendment, on the ground that the objection therein made was not made before the city council, was overruled; and this is one of the grounds of reversal laid by defendant.

Counsel for both sides have filed very extensive and very able briefs on the question of jurisdiction of the city council, and whether the nature of the jurisdiction involved was such that it could not be conferred by consent of the adverse party, and furthermore, whether the irregularities of the jurisdictional procedure were such as could or could not be waived. We shall not follow counsel far into that field.

It is undoubtedly true that there is a jurisdiction which can be conferred by consent, and a jurisdiction which cannot. It is sometimes said that jurisdiction of *subject-matter*

2. MUNICIPAL
CORPORATIONS:
consent to irregularities in
establishing
sewer district.

cannot be conferred by consent. Such a proposition is simple enough. It is also sufficiently accurate, if the meaning of its terms be thoughtfully guarded. Jurisdiction of subject-matter is easily distinguished from a personal jurisdiction. It should be further

noted that jurisdiction of subject-matter is not the equivalent of a jurisdiction *in rem*. Jurisdiction *in rem* may

be conferred by consent as readily as personal jurisdiction. "Subject-matter" over which jurisdiction cannot be conferred by consent has reference, not to the *res* or property involved in the litigation, but to the purported *subject* of the litigation. For instance, if a justice of the peace were to render a decree of divorce or a decree of foreclosure, it is not in the power of the litigants to confer upon him, or to enable him to acquire, jurisdiction to that end. The realm of his jurisdiction does not extend to those *subjects*. Jurisdiction of subject-matter has reference, not to jurisdiction in the particular case, but to jurisdiction in that *class* of cases. It has reference to the *nature* of the action and of the relief sought. The doctrine that it cannot be conferred by consent has its usual application to the acts of courts and tribunals of limited jurisdiction. Some states have criminal courts which have no civil jurisdiction; and some have civil courts which have no criminal jurisdiction. Other limitations of jurisdiction may be imposed. There is an appellate jurisdiction which is a class of its own, and which is limited, in the sense that it is contingent or conditional upon timely appeal by statutory method and within statutory time. Failure of such condition terminates its potential power to acquire thereafter any jurisdiction to review the judgment below. Consent will not confer it, nor waiver revive it. To put it in another way, jurisdiction of subject-matter is conferred by operation of law, and not by act of the parties or by procedure of the court. It cannot be ousted by act of the parties, if it exists, nor conferred by such acts, if it does not exist. Its existence antedates the particular litigation, and is not conferred by the litigation or by its procedure.

We may say, briefly and broadly, that it is ordinarily true that, where a tribunal can, by proper procedure, acquire full jurisdiction of the matter in litigation, irregularities in such jurisdictional procedure may be waived by the party in interest adversely affected, provided such waiver or consent is had before judgment. And this is so both as to jurisdiction *in personam* and jurisdiction *in rem*.

As applied to this case, the city council did have jurisdiction of this *class* of cases. It did have power to establish a district by proper procedure, and to assess the benefits therefor. This power existed by operation of the statute. It was independent of this particular litigation, and was neither greater nor less because of it. But it was still incumbent upon the city council, in order to exercise this jurisdiction in the particular case, to acquire jurisdiction *in personam* and *in rem* by means of appropriate procedure. If the procedure fails, the jurisdiction *in personam* or *in rem* fails, and the particular litigation falls.

Whatever the lack of jurisdiction, therefore, in this case, it was not a want of jurisdiction of subject-matter. It was also competent for plaintiff to waive and consent, if waive and consent he did.

II. We reach the conclusion, also, that the question of jurisdiction is not a controlling question in the case. The trial court sustained the jurisdiction of the defendant council to assess the benefits to the 39 acres included within the district. From this finding, the plaintiff has not appealed. The defendant council does not challenge the jurisdiction. The real question in the case is not whether the city council had jurisdiction to assess lands outside of the drainage district, but whether its assessment made on the land within the district is excessive. It does not affirmatively appear upon the record of the city council that benefits to other lands were included within the assessment. It is proper that we look into the reasons and data upon which the council fixed upon the sum total of benefits to be assessed against the plaintiff. If it estimated benefits upon a false or illegal basis, such basis cannot be sustained; and this is so whether it acted with jurisdiction or without it. The first question, then, is, What land was, in fact, included within the district established? All the proceedings of the city council in the matter of establishment contained the specific description which we have already set forth. There is no ambiguity in it. If the intent of the city council was otherwise, such intent was never expressed upon its records. If

the boundaries of the district had been indicated upon a plat on file, in a manner different from that set forth in the specific description contained in the resolution of necessity and in the notice, there might be some ground for treating the plat as controlling; but there was nothing of that kind. The plat which was later filed did not indicate the boundaries of the district, nor purport to do so. It did show Graeber's Addition and the location of plaintiff's farm and of the sewer and its branches. If the council was mistaken in its description of the land to be included, that might be ground for undoing its proceedings and correcting its mistake; but nothing of that kind was done. The mere intent of the city council was ineffective, either to establish the district or to defeat its establishment. The district could be established only by proceedings entered upon its records. Until it was established upon the records, it was not established at all. So far, therefore, as the proceedings of the city council in the matter of such establishment are concerned, they must be deemed a verity as they appear upon the records.

3. MUNICIPAL
CORPORATIONS: ob-
jection of ex-
cessiveness:
non-necessity
to amplify
on appeal.

It is urged by the defendant that the objection made by the plaintiff in his amendment to petition had been waived by his failure to include the same in his objections before the city council. Let us suppose that the amendment to the petition had not been filed at all. Indeed, for the purpose of this discussion, we shall so treat it. The objections filed before the city council did challenge the assessment as excessive and disproportionate. That presents the one ultimate question before us. If the amount assessed against the plaintiff's land is not greater than the just proportion of benefit received by his 39 acres within the district, then it must be sustained. And this is so, even though we should find that the city council arrived at this sum total upon a false basis, and upon a mistaken computation. We look, therefore, to the evidence. The only evidence in support of the assessment is that the benefits accrued to

this land were equal to \$37.10 per acre. We cannot, therefore, find the benefits to be greater than warranted by such evidence. The maximum of benefits, therefore, must be fixed at the product of \$37.10 multiplied by 39, which equals \$1,446.90. The larger sum, therefore, found by the city council must be deemed erroneous. That it was the result of a mistake of some kind is evident. Whether the council or its engineer mistakenly supposed that a greater acreage was included in the district, or whether they forgot the multiplication table, or made any other mistake in their computation, is only incidental to the inquiry, and not controlling.

On the question of waiver in the form of objections, it is to be noted further that there was nothing in the form of the entry of the assessment to indicate that it purported to include benefits accrued to lands outside of the district. And this was so, even after the lump assessment was divided and apportioned to the lands of plaintiff in each of the two separate 40-acre subdivisions. The method of making this assessment of record was to enter the figures upon the plat and schedule prepared by the engineer and filed by the commission, as follows:

“NW $\frac{1}{4}$ of the NW $\frac{1}{4}$ Sec. 10-83-24 except 5 acres in the NW corner, \$1298.50.”

“W 22 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 10-83-24, \$816.20.”

Appellant contends that such entries showed the consideration of benefits to the entire 35 acres owned by plaintiff in the NW $\frac{1}{4}$ NW $\frac{1}{4}$, and to the entire 22 acres owned by him in the NE $\frac{1}{4}$ NW $\frac{1}{4}$. This, however, is an erroneous assumption. The plaintiff did own 35 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$. If only one acre thereof had been benefited by the improvement, the amount assessed for such benefit would be assessed, under our statute, against all the land owned by the plaintiff in that 40-acre subdivision. The same would be true as to the land owned in the other 40. The assessment, therefore, was appropriately made, in each case, upon the 40-acre subdivision, so far as it was owned by

the plaintiff, even though the benefits considered were confined to a smaller acreage.

If, therefore, it had been otherwise incumbent upon the plaintiff to be more specific in his objections, and to have challenged the particular basis of computation adopted by the city council in its assessment, there was nothing in the form of the assessment to invite such specification.

In a word, the amount fixed by the city council is reduced, not because it included benefit to outside land, but because the evidence does not sustain it as to inside land.

4. MUNICIPAL
CORPORATIONS:
estoppel to
object to
excessive
assessment.

III. Was the plaintiff estopped to challenge this assessment by virtue of the certain instrument, Exhibit A, already referred to? It appears that certain negotiations were had between plaintiff and the city council, in advance of the proceedings now under consideration, and looking to the construction of the said improvement. Pursuant thereto, the plaintiff signed the following instrument:

“Ames, Iowa, September 1, 1914.

“We, the undersigned property owners, do hereby agree with the city of Ames, Iowa, that the said city of Ames, Iowa, may construct a sanitary sewer and storm sewer in, upon, and across our property, in accordance with the plans and specifications to be drawn by the city engineer of said city. That the sewers shall be constructed of 18-inch pipe commencing at the intersection of Lincoln Way and Beech Avenue, and the intersection of Greeley Street and Beech Avenue, and converging at a point east on the farm land of Wm. McLain, and from that point east to be constructed of 24-inch pipe to place of outlet. That we waive all damages in the construction of the said sewers across our premises. That we also waive the passing of a resolution of necessity and the publication of notice thereof; and we hereby consent that without such proceedings the said city of Ames may construct and contract for the main outlet for storm and for sanitary sewers for Subdistrict No. 2 of

District No. 3, College Heights Addition, and other lands Ames, Iowa.

"And we hereby agree to pay our just and proportionate cost and benefit in the said improvement.

"[Signed] W. D. McLain."

By the foregoing instrument, the city council obtained plaintiff's consent to lay the sewers across his land without claim from him for damages. He also bound himself therein to pay his proportionate amount of costs. It is, perhaps, true that, if this instrument had fixed the specific amount that plaintiff was to pay, he would be bound thereby, regardless of irregularities in the proceedings establishing the district. Such is not the situation. The amount which he should pay as his proportionate cost was left for future determination. The proportionate amount which plaintiff should pay could not be determined without determining also the proportionate amount which other beneficiaries should pay. These other property owners, many of them at least, had not bound themselves by any instrument. An establishment of a district was, therefore, necessary, before the proportionate amount which even the plaintiff should pay could be estimated. This was the course followed by the defendant.

While this instrument may be deemed effective to protect the city in the location of its sewer across the plaintiff's land, regardless of the boundaries of the district, we can see nothing in it which can be deemed to operate as an estoppel upon the plaintiff to question the *amount* fixed by the council as his "just and proportionate" share of the cost and benefit. But it is argued that it does estop him from contesting the amount of the benefits accrued to his land outside of the district. The argument is that he would have been liable under his contract for his share of the benefits accrued to his land, even if no district at all had been established. Assuming this contention to be theoretically correct, then the city council could not have been the tribunal which could adjudge such proportionate cost and benefit. Construing the contract as the defendant does, and

assuming that it could be enforced according to its terms, the city council would be one of the parties to it. To enforce it would require resort to a court of equity. The only way in which the city council could become a tribunal at all for such purpose was by the establishment of the drainage district. To sustain defendant's contention at this point would be to say that the city council could assess the plaintiff for benefits accrued to each of the 231 acres of his farm, regardless of the boundaries of the district. But the defendant itself would be appalled by the magnitude of such a claim, and it stops far short of it. It only claims for benefits to 57 acres; and it puts such claim upon the ground that such 57 acres *were included* within the district, within the real intent of the city council. So the logical keystone of defendant's argument is that, because of the real intent of the city council, which was frustrated only by a mere mistake, the 57 acres *were* included within the district. This only brings us back to where we started. Can the boundaries of the district, as established upon the record, be contradicted by the intention of the city council, it being shown that the failure to express such intent was the result of a mistake? In other words, is the discovery of the mistake a sufficient correction of it to eliminate it? The record remains. Until it is in some manner corrected or changed by appropriate procedure, it is the only evidence of the establishment and of the identity of the district which can be considered. We hold, therefore, that the instrument relied on is not effective as an estoppel upon the plaintiff to contest the amount assessed against him as his just and proportionate share.

5. MUNICIPAL
CORPORATIONS:
reduction in
assessment
because of
excessive
cost.

IV. The trial court reduced the sum total of plaintiff's assessment to an amount less than \$37.10 an acre on 39 acres. The amount of such reduction was \$134. The particular ground or basis for this reduction is not made to appear in the record. Our examination of the record does not satisfy us that such reduction should be made. The plaintiff introduced testi-

mony tending to show that he could have drained his land at a much smaller expense; that a 15-inch tile would have been effective for that purpose; that the extraordinary size of the sewer tile used, being 24 inches in the main and 18 inches in the branches, increased the cost of the improvement enormously, without any corresponding benefit to the plaintiff; that the actual benefit to the plaintiff was much less than \$37 an acre. On the other hand, it appears that the size of the drain tile to be used was insisted upon by the plaintiff, as a condition to his signing Exhibit A. Up to that time, the council had contemplated only a 20-inch main and 15-inch branches. The land of plaintiff was servient to the land comprising Graeber's Addition. This addition was upon high ground, and it cast its water readily upon the surface of the plaintiff's lower lands. The construction of the storm sewer through the plaintiff's land was not essential to the ready discharge of water from the Graeber Addition. The water being cast upon the plaintiff's land was held in the depressions covering much of its surface. Its highest ground was next to the banks of the stream, the precipitation of the silt, in times of overflow, having built up the surface next to the stream. It required a cut of 8 or 10 feet through this ground next to the stream. The water which was cast from the hills upon the plaintiff's ground, therefore, accumulated further back, without any outlet to the stream. Plaintiff's purpose in insisting upon a large sewer was to hasten the discharge of the water from the upper ground, in order that the drain might be relieved of its pressure, and thereby become efficient as a drain to his land. It is true that, when Squaw Creek overflows its banks, the sewer cannot, for the time being, drain the plaintiff's land. But such overflows are exceptional, rather than usual, and are brief in their continuity. The testimony for plaintiff to the effect that a 15-inch tile would have drained his land, is predicated upon a hypothesis of one-half inch of rain in 24 hours. While the plaintiff may be satisfied with such a hypothesis now, he would not entertain it when he insisted

upon a 24-inch drain. Assuming that a 15-inch drain was sufficient to carry off one-half inch of rainfall in 24 hours, the query remains, How large a drain would be necessary to carry off 3 inches of rain in 24 hours? Could the plaintiff deem his land well drained if he had to wait 6 days for a 15-inch tile to carry off 3 inches of rainfall? We do not hold that plaintiff's former insistence works an estoppel upon him now; but it is an important circumstance that bears heavily upon the weight of his present expression of opinion. His former insistence must be deemed to reflect his true opinion at that time. Inasmuch as he was undertaking, at that time, to pay his proportionate share, he had no interest in insisting upon a larger drain than seemed to him really necessary. That was his candid opinion then. He does have an interest now in belittling the importance to him of an enlarged drain. We think it clear that his former opinion is more trustworthy than his present one. Nor do we find that the benefits assessed to the lower ground were disproportionate in amount. The area of 57 acres of low ground was substantially equal to the area of Graeber's Addition, which was on high ground. Substantially all the drainage benefits went to the low ground. One fourth of the cost was imposed upon the 57 acres, and three fourths thereof upon the high ground of the addition. We see no fair ground for saying that this imposed upon the low ground an excessive share.

It is true that the area of the district was very small, and that the cost of the drain was quite appalling. It may be true that it was a greater cost than should have been imposed upon so small an area; but this was a question set for consideration before the establishment of the district. Plaintiff made no objection to it then, though he had full notice of what was proposed. Not only did he fail to object, but he had already signed the instrument Exhibit A. On that question, therefore, plaintiff had his day, and was content. It is not involved in this appeal. For the purpose of this appeal, it must be assumed that the benefits to the district were equal to the cost. The problem pre-

sented on this appeal is to apportion such cost justly, in proportion to benefits.

We do not overlook the point made in behalf of plaintiff concerning Exhibit A, that its conditions were not observed by the city, and, therefore, that it should not weigh against the plaintiff. The point made is that, under Exhibit A, the sewer was to *commence* at the intersections of Lincoln Way and Beech Avenue and Greeley Street; whereas it was constructed to commence at points much higher up. We do not so read the instrument. The particular sentence referred to is the following:

“That the sewers shall be constructed of 18-inch pipe commencing at the intersection of Lincoln Way and Beech Avenue and the intersection of Greeley Street and Beech Avenue, and converging at a point east on the farm land of Wm. McLain, and from that point east to be constructed of 24-inch pipe to place of outlet.”

The mandate of this sentence is that certain sections of the sewer should be “constructed of 18-inch pipe,” and that another section thereof should be “constructed of 24-inch pipe.” The participial phrase, “commencing at the intersection of Lincoln Way,” etc., is descriptive of the section which should be constructed of 18-inch pipe. There is no claim that the sections or branches were not constructed of 18-inch pipe from the respective intersections of Lincoln Way and Greeley Street with Beech Avenue to the converging point; nor is there any claim that the section from the converging point to the outlet was not constructed of 24-inch pipe. If the branches were, in fact, extended farther up than the particular intersections referred to, there is nothing in the instrument to forbid it.

Upon the whole case, we reach the conclusion that the assessment of the plaintiff must be fixed by such sum in dollars as equals the product of 39 multiplied by \$37.10. This sum should be apportioned on the land owned by plaintiff, as between the two 40-acre subdivisions. To this extent, the judgment of the district court will be modified, and in all other respects affirmed.—*Modified and affirmed.*

WEAVER, C. J., SALINGER and STEVENS, JJ., concur.

IN RE ESTATE OF SEXTON MOUNT.

ELLA R. WILKERSON, Appellant, v. WM. L. LONG, Administrator, et al., Appellees.

WILLS: *Equitable Conversion.* A will wherein testator, after making various devises to his children, directed that the "remainder" of his estate be sold, and the proceeds equally divided among his children, does not have the effect (because not so intended by testator) to convert into personalty, as of the date of the death of testator, a tract of land definitely devised to one of testator's sons "for life and after his death to his children," when the life devisee long survived the testator, and died without issue.

Appeal from Jefferson District Court.—C. W. VERMILION, Judge.

JULY 6, 1920.

THE controversy herein involves certain probate proceedings in the district court. It involves the title to a certain 40-acre tract of land, which was devised by the will of Sexton Mount, probated in November, 1885. An administrator *de bonis non* of the estate of Sexton Mount was appointed, upon the application of appellee Kurtz. This procedure was resisted by appellant, Wilkerson, upon grounds to be stated in the opinion. The trial court confirmed the appointment, and authorized the administrator to proceed, pursuant to the provisions of the will. Ella R. Wilkerson has appealed:—*Reversed and remanded.*

Starr & Jordan, for appellant.

Eicher, Livingston & Eicher and *E. F. Simmons*, for appellees.

EVANS, J.—Sexton Mount, then a widower, died testate, on or about November, 1885. He left surviving him three children as his sole heirs at law, and as his sole beneficiaries *in esse* of his will. These were John H. Mount, Ella R. Wilkerson, and Grace Mount Kurtz. Grace Mount Kurtz died testate in 1890, without issue, leaving John F. Kurtz, appellee herein, as her surviving husband. By Paragraphs 2, 3, and 4 of his will, the testator distributed several hundred acres of land with apparent approximate equality among his three children. Paragraphs 1, 5, 6, and 7 of said will were as follows:

“1. I give and devise unto my son John H. Mount the following described real estate situated in Jefferson County, Iowa, to wit: The northwest quarter of the northwest quarter of Section No. Three (3) in Township No. Seventy-three (73) North of Range No. Eight (8) West, the said John H. Mount to have and to hold the said tract during his life, and after his death unto his children.

“5. I further give and bequeath unto my said daughter Grace Mount one pair of ponies and harness now claimed by her, one cow, and one bed and bedding, and the sum of one thousand dollars.

“6. I give and bequeath unto my son John H. Mount and my daughter Ella Wilkerson all the remainder of my household and kitchen furniture and all other personal property of every description, except my money, notes, mortgages, bonds, and other demands.

“7. And I further direct that the remainder of my estate both real and personal, shall be sold and the proceeds divided equally between my said children, after paying all debts and expenses, and said one thousand dollars herein devised unto my daughter Grace.”

The estate of Sexton Mount was apparently fully administered under said will, and the executor discharged in 1887. The will of Grace Mount, who died in 1890, be-

queathed all her personal property to her surviving husband, John F. Kurtz. John H. Mount died in December, 1917, never having had issue.

It will be noted that Paragraph 1 of the will of Sexton Mount devised a certain 40-acre tract to John H. Mount "for life, and after his death to his children." The death of John H. Mount terminated his estate, and left no taker of the fee. Thereupon, Kurtz asserted a right to an interest in the fee thus failing. The general theory upon which he based his claim was that the fee never left the estate of Sexton Mount, but always remained therein; that, by the failure of any taker under the will, it became absolute; that it fell into the residuary estate, and passed to the three children of Sexton Mount by Paragraph 7 of his will; that, by the same Paragraph 7, the land was converted into personalty, under the doctrine of equitable conversion; that, as such personalty, it passed to him under the will of Grace Mount, whereby all her personalty was bequeathed to him. By application to the clerk in vacation, he obtained the appointment of an administrator *de bonis non* of the estate of Sexton Mount. In the first term of court following, Ella Wilkerson, appellant, filed an application to set aside such appointment. At the same time, the administrator *de bonis non* presented an application for an order to sell the real estate, under the purported direction of Paragraph 7 of the will. This application was resisted by Wilkerson, on the same ground as her application to set aside the appointment. The general ground was that Kurtz had no interest in the title to such 40-acre tract, and that, in any event, it was not personalty, and not subject to administration. By agreement, both applications were heard together, with the result that the administrator was authorized to sell the property, and to distribute the same in accordance with the contention of Kurtz.

It will be seen from the foregoing that the claim of Kurtz rests upon two general propositions: (1) That his wife, at the time of her death, had such a property interest in the tract as was devisable or assignable; (2) that the

provisions of Paragraph 7 of the will of Sexton Mount had, before the death of Grace Mount, worked an equitable conversion of such property interest into personalty, whereby it passed to Kurtz, under the will of Grace Mount. This will bequeathed to him personalty only. It is essential to the case of Kurtz that both of such propositions be sustained. The failure of either would be fatal to him in this proceeding.

In support of the first proposition, the general argument for Kurtz is that Paragraph 1 of the will devised a contingent remainder to the children of John H. Mount; that, inasmuch as there was no taker *in esse*, the fee remained in the residuary estate of the testator, and so continued, subject to the condition subsequent that a child should be born to John H. Mount; that, by Paragraph 7, such remainder in fee passed to the three children of Sexton Mount, subject to such condition, and became absolute through the death of John H. Mount without issue having been born. It is also argued that the devise to the children of John H. Mount lapsed, and that, therefore, the remainder in fee became a part of the residuary estate, and passed under Paragraph 7.

The argument for Wilkerson is that the full title to the 40-acre tract was devised to John H. Mount for life, and to his children after his death; that, though the devised remainder in fee was contingent, both in event and in person, yet, under the rule of common law, it was effective to carry the full fee title, and that nothing remained to the estate but a "possibility of reverter;" that such "possibility of reverter" was not a present property interest, and was not assignable or devisable; that, upon the final failure of the possibility of children to John H. Mount, the fee did revert, as of the time of such failure, to the heirs of the testator, and to Ella Wilkerson, as the only surviving heir; that, consequently, there was no property interest in Grace Mount, at the time of her death, which could pass by her will, or to which her surviving husband could succeed. It

is further argued, as to the second proposition above stated, that, whatever the property right, it was *land*, and not *personalty*; that there was no equitable conversion, and could not be during the life of John H. Mount, who long survived Grace Mount; and that the direction of sale contained in Paragraph 7 of the will was not intended to apply to the property in question.

The first proposition above stated as essential to the case of Kurtz is involved in the confusion of varying statutes and conflicting authorities. The trial court found it a question of great difficulty, and we so find it. We find little difficulty, however, in dealing with the second question; and, inasmuch as our conclusion thereon becomes decisive of this proceeding, we give it first consideration.

Did Paragraph 7 of the will work an equitable conversion of this land into personalty as of a date prior to the death of Grace Mount?

An imperative and absolute direction in a will that land be sold, and the proceeds thereof distributed, works an equitable conversion of the land into personalty, as of the date of the death of the testator. *Inghram v. Chandler*, 179 Iowa 304, and cases cited therein. For the purpose of this case, we may assume, also, that a *conditional* direction to sell land upon the happening of some future and uncertain event will also work an equitable conversion, as of the date of the happening of such event.

The direction to sell, contained in Paragraph 7, is absolute and direct, and was sufficient in form to work an equitable conversion of land into personalty, as of the date of the death of the testator. If, therefore, upon a consideration of the entire will, it can fairly be said that Paragraph 7 of the will was by the testator intended to apply to this land, then argument is closed.

We must look to the will in its entirety, to ascertain the intent of the testator. Paragraphs 1, 2, 3, and 4 of the will purport to be absolute devises of specific real estate. Presumptively, therefore, the testator did not intend, by Paragraph 7, any reference to such specific property so

devised. Looking to the will alone, there is nothing therein to indicate the contingent character of the remainder in fee, given by Paragraph 1 to the children of John H. Mount. Looking beyond the will to the circumstances surrounding the testator at the time of the making of the will and at the time of his death, with reference to which the will must be deemed to speak, it is made to appear that John H. Mount, at the time of the death of the testator, had no children, and was unmarried. Such fact was presumably known to the testator. Construing Paragraph 7 in the light of this fact, can it be said that it was the intent of the testator to direct the immediate sale of the land which had been devised in Paragraph 1 to the unborn children of John? To so hold would be to put Paragraph 7 in conflict with Paragraph 1. The direction of Paragraph 7 was absolute as to its subject-matter, and required an immediate sale thereof, and thereby worked an equitable conversion thereof, as of the date, of the death of the testator. It is clear, therefore, that both of these paragraphs cannot be put into effect according to their strict terms, if the subject-matter of Paragraph 7 be deemed to include the subject-matter of Paragraph 1.

Kurtz does not contend, in argument, that it was the duty of the executor, under Paragraph 7, to sell the 40-acre tract in question at any time except in the event of the death of John H. Mount without issue. This argument would reduce the direction contained in Paragraph 7 to a *conditional* one, though it is not such in terms. This is only saying that a conditional direction could have been made in Paragraph 7, consistent with Paragraph 1. But will the terms of Paragraph 7 bear such a construction? If Paragraph 7 had been, in terms, conditionally qualified in the respects stated, it could have been made consistent with Paragraph 1. In that event, however, such a conditional direction would work an equitable conversion, as of the time of the happening of such condition, and not as of the date of the death of the testator. *Inghram v. Chandler*, supra. Such condition had not happened at the time of the

death of Grace Mount, and there was, therefore, no equitable conversion at the time of her death. In order to convert this property into personalty, and thereby to bring the same within the scope of the bequest to Kurtz in the will of Grace Mount Kurtz, it was necessary that the direction in Paragraph 7 should be deemed immediately operative.

There is a further feature of Paragraph 7 which has its influence upon the result. It contains no direct residuary bequest. A bequest will be implied, as a matter of law, from the direction therein to sell and to distribute. In such a case, it is well settled that the implied bequest will not vest in the beneficiary unless the direction to sell is absolute, or, if conditioned upon a future event, until the happening of such future event. If, therefore, Paragraph 7 should be construed as casting upon the executor the duty to sell this property only in the event that John H. Mount should die without issue, then nothing vested in the beneficiaries, under Paragraph 7, as to this 40-acre tract, until the death of John H. Mount. See *Fulton v. Fulton*, 179 Iowa 948, and cases therein cited.

It is to be noted further that Paragraph 7, not only in strict terms directed a present and immediate sale of its subject-matter, but it directed also that the proceeds thereof should be divided between "my said children." John H. Mount was one of the beneficiaries of such proceeds. If there was to be no sale, and therefore no proceeds, until after the death of John H. Mount without issue, the testator could not have contemplated a distribution of proceeds to him after such event.

We do not overlook the argument for Kurtz that Paragraph 7 carried to the beneficiaries, not the body of the gift as respects this land, but a certain incorporeal interest in the fee which remained in the estate of Sexton Mount, by reason of the uncertainty that any taker of the fee under Paragraph 1 should ever be born. It is this incorporeal thing that is claimed to have vested in the beneficiaries under Paragraph 7. If this argument were conceded, it

would still be an interest in realty, and not personalty. To say that, under Paragraph 7, the testator intended that this incorporeal interest should be sold, and the proceeds thereof distributed to his three children, including the life tenant, would be only to becloud the absolute title which he had devised in terms under Paragraph 1. If such a provision had been included in express terms in Paragraph 7, it would have been at least an incongruous one.

It is also argued for Kurtz that the failure of the devise of the remainder under Paragraph 1, by the death of John H. Mount without issue, was the equivalent of a lapsed devise, and that such lapsed devise fell, as a matter of law, into the residuary estate. If that were conceded, yet the lapse did not occur until the death of John H. Mount without issue. It had not occurred at the time of the death of Grace Mount. It could not, therefore, have passed under her will.

Taking the will by its four corners, therefore, and construing it in the light of the circumstances under which it was to go into effect, we are clear that Paragraph 7 was not intended to operate upon the property described in Paragraph 1.

This conclusion renders it unnecessary that we should consider the question whether any incorporeal interest which might remain in the estate of Sexton Mount until a taker should come into being would pass at all, under a general residuary clause. At common law, it would not. The result of our conclusion is that Kurtz was not entitled to the appointment of an administrator *de bonis non*, in that the property in question was not personalty, within the provision of the will of Grace Mount Kurtz. This is a vital issue in this particular proceeding, and we have no occasion to go further than this narrow issue, as made by the pleadings and the procedure. For the reason indicated, the order of the trial court will be reversed, with direction to set aside the order of appointment of the administrator and the order of sale.—*Reversed and remanded.*

WEAVER, C. J., PRESTON and SALINGER, J.J., concur.

IN RE WILL OF JAMES K. HOOK.

CARL PERKINS et al., Appellants, v. IDA MAY HAYES et al.,
Appellees.

WILLS: Mental Capacity as Jury Question. Evidence tending to
1 show that an aged testator had been seriously bedridden for
some two years prior to his death, and was in a stupor at the
time the alleged will was executed, together with other attend-
ing facts and circumstances, held to present a jury question
on the issue of testamentary capacity.

WILLS: Testamentary Capacity—Unrecognized Expert Theory. An
2 opinion that one is mentally unsound, based on the theory that
a sick person cannot be of sound mind, does not rise to the
dignity of expert medical testimony.

Appeal from Mahaska District Court.—K. E. WILLCOCKSON,
Judge.

JULY 6, 1920.

THIS is a will contest. At the close of all the evidence,
there was a directed verdict for the proponents. The con-
testants appeal.—*Reversed and remanded.*

McCoy & McCoy and *Reynolds & Heitsman*, for appel-
lants.

Frank T. Nash and *Burrell & Devitt*, for appellees.

EVANS, J.—The testator was James K. Hook, who died
resident in Mahaska County, December 2, 1917. The will
in controversy was executed on June 12, 1917. The de-

1. WILLS: mental capacity as jury question.

cedent's estate was of the value of about \$50,000, comprising a farm and an interest in certain personal property thereon. He left surviving him his widow; his son Frank; his two daughters, Mrs. Hoit and Mrs. Hayes; and four grandchildren, being the infant children of his deceased daughter, Edith Perkins. Subject to a life estate granted to the widow, the will devised substantially all the property to the three surviving children, \$500 being bequeathed to the Perkins children. The contest is made on behalf of these grandchildren by their guardian.

In view of the conclusion reached by us herein, which will remand the case for a new trial, we shall avoid, as much as possible, a discussion of the evidence in its entirety, and shall state our conclusion briefly, and with as little prejudice as possible to the future consideration of the evidence by a jury.

Without intimating any opinion as to the relative weight of the evidence as it is set out before us, we think the evidence on behalf of the contestants was sufficient to go to the jury. Such being the case, we cannot deal with the comparative weight of it, or with the impeaching features of the record.

Mr. Hook was a man of high standing in his community, and of undoubted business capacity. He died at the age of 67. He had been a great sufferer from articular rheumatism for 17 years. His joints had become deformed, and he had gradually become physically helpless. In June, 1916, he had been greatly affected by the death of his son Willis. One year later, he was likewise affected by the sudden death of his daughter Edith, the mother of these contestants, who died on May 31, 1917, leaving her husband surviving her, and the four small children. By a prior will made in September, 1916, equal provision had been made for the four living children of testator, except that the share of Edith was so put in trust as to prevent the control or use thereof by her husband.

For the last 22 months of his life, the testator had been

confined to his bed, in the constant care of some member of his family as nurse. During this time, the pain suffered by him was so severe that it could be controlled only by the constant use of morphine. The general contention of the contestants is that, by reason of his long and severe illness and its attendant consequences, at the time of the making of the will in question he was not mentally competent to make the same.

The daughter Mrs. Hoit attended him as nurse throughout the night of June 11th, and up to about 11 o'clock of the morning of June 12th. She returned to his bedside at 4 or 5 o'clock in the afternoon of the same day. She testified, as a witness, that she gave him a morphine tablet in the night, and again in the morning; that the effect of these tablets was to produce a stupor; and that he was in such stupor at the time of her leaving, at 11 o'clock; that, upon her return in the afternoon, he was still in a stupor; that she remained with him for the rest of the day; and that he did not at any time speak or give recognition to any person during such time.

This witness, though a beneficiary of the will, was a witness on behalf of contestants, and frankly avowed herself as insistent upon the invalidity of the will. Considerable evidence was introduced on behalf of the proponents, as well as considerable cross-examination tending to show the hostile attitude of the witness. But such evidence was impeaching only in its character, and was for the consideration of the jury alone. The evidence of the witness, however, has corroboration in the cross-examination of the witness Harbor, one of the subscribing witnesses to the will, and witness for the proponents. He testified as follows:

"On the day the will was made, Mr. Hook did not ask me to sign the will as a witness. I cannot recall anything he said, the day I witnessed the will; he did not say much of anything. I did not see Mr. Hook make his mark on the will. Mr. Nash was between me and Mr. Hook. I did not hear any conversation between Mr. Hook and myself or between Mr. Hook and anyone else there on that occasion,

in reference to the will. The will was not read to Mr. Hook while I was there, and he did not read it."

The method of execution of the will by the testator was that he rested his hand upon the hand of his attorney, while the attorney wrote his name thereto.

Without entering into further details, or giving any consideration to contradictory or impeaching evidence, we think that this evidence, in the light of the record, made a question for the jury.

2. WILLS: tes-
tamentary
capacity:
unrecognized
expert
theory.

The contestants did introduce the evidence of the attending physician and two other physicians who had attended the testator on one or two occasions during his illness. These physicians all testified to their opinion that he was mentally unsound. This opinion, however, was based, in part at least, upon the convenient theory that, inasmuch as he was bodily sick, he could not have been mentally sound; that the mind is dependent upon the brain, and that the brain is dependent upon the other organs of the body; and that an autopsy disclosed a mortal condition of all such organs, though no examination was made of the brain. Such theory is mere subtlety, and not expert medical opinion. It is of no aid to a judicial investigation of the sufficient mental capacity of a testator to make a will.

So far, therefore, as this feature of the medical testimony is concerned, we quite disregard it in reaching our conclusion. The medical evidence did tend to show an advanced state of arterio-sclerosis, as indicated by high blood pressure during life, and by the revelations of an autopsy thereafter. There was some nonexpert evidence, also, of hallucination and mental wandering.

For the reason indicated, the directing of a verdict for the proponents cannot be sustained. The judgment below is, therefore, reversed, and the cause remanded for a new trial.—*Reversed and remanded.*

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

HELEN JOHNSON, Administratrix, Appellant, v. LINCOLN HOTEL COMPANY, INCORPORATED, et al., Appellees.

NEGLIGENCE: Chosen Ground of Recovery. One who alleges a
1 *specific* act of negligence as ground for recovery must stand or fall thereon.

APPEAL AND ERROR: Harmless Error—Defendant Disproving
2 **That Which Plaintiff Must Affirmatively Prove.** Plaintiff who proffers no testimony of a fact which he must affirmatively show is true, cannot be harmed in a legal sense by the reception of incompetent testimony which tends to show that such fact is not true.

Appeal from Linn District Court.—F. O. ELLISON, Judge.

MAY 11, 1920.

REHEARING DENIED JULY 6, 1920.

ACTION to recover for personal injury. Opinion states the facts. Directed verdict for the defendant. Plaintiff appeals.—*Affirmed.*

Maurice P. Cahill and Redmond & Stewart, for appellant.

Dawley & Jordan and Johnson, Donnelly & Swab, for appellee.

GAYNOR, J.—The defendants are the proprietors of the Lincoln Hotel in Cedar Rapids, Iowa. John T. Swanson was a guest in this hotel, on and prior to the night of December 26, 1918. On that night, he fell into
1. **NEGLIGENCE:** the shaft of a passenger elevator in this
chosen
ground of
recovery. hotel, and received injuries from which he died. This action is brought by his adminis-

tratrix to recover damages alleged to have been sustained by his estate by reason of his death.

The action is predicated on negligence:

(1) In that the defendants failed to provide a safe and suitable locking appliance for the door or entry to the elevator shaft.

(2) In that it negligently permitted the door to be unlocked and opened at times when said elevator was not at said door or entry.

(3) In that it failed to employ competent elevator operators for said elevator, and employed one who was not competent to operate the same.

(4) In that it failed or neglected to place lights or warnings about said door and entrance to said elevator, in order that persons upon the premises, and about to enter the same, might see and be warned of any danger attending the act.

The answer was a general denial.

The cause was tried to a jury; and, at the conclusion of the evidence, on motion of the defendants, the jury was directed to return a verdict for the defendants. Verdict being returned for the defendants under the direction of the court, and judgment entered thereon, plaintiff appeals, and assigns as error:

(1) That the court erred in overruling objections to the cross-examination of certain witnesses, and as to the admission of certain exhibits.

(2) That the court erred in directing a verdict for the defendant.

Before entering upon a discussion of the errors relied upon for reversal, a brief statement of the evidence tending to support plaintiff's contention is proper. No one of the witnesses saw the accident. There is no evidence to support plaintiff's first assigned ground of negligence. There is no evidence that there were not suitable and safe locking appliances for the door at the entry to the elevator. There is no evidence at all to support the third ground, to wit, that defendant failed to employ competent operators for

said elevator, or that it did employ one who was not competent to operate the same. There is no evidence to support the fourth ground, to wit, that the defendant failed and neglected to place lights and warnings about the door and at the entrance to the elevator, so that persons rightfully on the premises and about to use the same might see and be warned of any danger that attended attempting to enter the elevator. There is no evidence tending to sustain plaintiff's contention on these three points. In fact, the evidence affirmatively shows the fact to be contrary to the plaintiff's contention. This leaves but the second ground of negligence as the only ground upon which any evidence has been offered which tends, remotely even, to sustain a claim of negligence. The evidence—assuming that it is rightfully in the record—consists of statements made by the deceased soon after the injury, which, we assume, are offered as part of the *res gestae*. A witness by the name of Parr testified:

"I was standing near the clerk's desk. I heard someone scream, and I observed the elevator door was very nearly clear open. I saw Swanson in the bottom of the elevator pit, about three minutes later. He said he stepped into the elevator, thinking it was there, and when he found it wasn't, he grabbed the door, and couldn't hold, and he fell. There were marks across his fingers from the bottom of the hand. I examined the entrance to the elevator later, and found bent edges and the latch bent straight. I didn't see the accident. The lights were burning in the lobby. There is an arc light about 15 feet from the elevator. I could see the elevator door from where I stood. The door to the elevator was a sliding door. At the time he fell, I heard a lady scream; and, when I got to the elevator door, I found it open, almost the whole width."

On cross-examination, he testified:

"After the accident, I looked to see the condition of the door and examined the latch, and found it to be in apparently perfect condition. When the elevator is at the floor, there is a bright light from the car that can be distinctly

seen as far away from the elevator as the clerk's desk. At the time of the accident, the light in the car was burning as brightly as usual."

Mrs. Regina Swanson, the divorced wife of the deceased, attended him after his injury, and testified:

"My husband said that he felt warm that night, and decided to go to his room and get his overcoat and take a walk; that, as he was going towards the elevator, he called a bell boy to take him upstairs in the elevator; that, after he called the bell boy, he walked over towards the elevator; thought that the boy was following him; that, when he stepped into the elevator shaft, he thought the elevator was there."

The plaintiff has alleged specific grounds of negligence on which she predicates her right to recover. The only ground charged on which she has offered proof is that the

2. APPEAL AND
ERROR: harm-
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atively prove.

door was negligently permitted to be unlocked and opened when the elevator was not there. There is no evidence that the elevator was left open. Plaintiff offered no evidence to show how the door was opened, or that it was, in fact, open before or at the time deceased came to the entry. The evidence clearly shows that there was a bright light in front of the elevator; that, when the elevator was at the floor, there was a bright light in the elevator itself. It shows that the deceased was a guest in this hotel, and had been there for some time, and, we take it, was perfectly familiar with his surroundings, and had frequently passed up and down this elevator before the accident. The plaintiff, having chosen the ground upon which she would seek recovery, and having alleged a specific act of negligence on which she predicates right to recover, is necessarily confined to proof of the alleged negligence as a basis for recovery. On the trial of the case, as a part of the cross-examination of Parr, the defendant was permitted to prove that, soon after the accident, Parr made a statement of the facts as he then understood them. These statements

tended to show that the deceased opened the elevator. These statements, so introduced by the defendant as a part of the cross-examination of Parr, did not tend to contradict what he had said, but added this statement to what he had already testified to under oath. Defendant objected to the introduction of this statement, on the ground that it was not cross-examination, and did not tend in any way to contradict the testimony given by the witness. We think there was error in allowing this statement to go in; and this is the first error upon which the right to reversal is predicated. It will be noted that the case did not go to the jury. It was determined by the court. The evidence, though not competent, did not prejudice the plaintiff, for the reason that the plaintiff had failed to establish the negligence charged, and the statement only tended to negative the affirmative of a proposition which the plaintiff was bound to prove, and to establish which she had offered no evidence. Without affirmative proof that the door was left open by the defendants, plaintiff's case must fail, and proof that the deceased himself opened it would only emphasize plaintiff's failure to establish its original proposition, and would add nothing to and take nothing from the failure.

We do not need to discuss the contributory negligence of the deceased, nor does it become a factor in the determination of cases of this kind until it is affirmatively shown that the negligence charged, and upon which the right to recover is predicated, has been established; for, even though the deceased were wholly free from negligence, his administratrix could not recover, without proof of actionable negligence on the part of the defendant.

Now, we have said that the plaintiff has selected a ground upon which she predicates her right to recover. She asserted a specific act of negligence which, she says, was the proximate cause of the injury. By this charge of a specific act of negligence, she necessarily excludes from consideration any other act of negligence, omission of duty or otherwise, that might be considered in the determination of the controversy. By her charge of specific negligence,

she chooses to rest her case upon proof of the specific negligence, and inferentially excludes the consideration of any other act or omission to act which might be involved under the general rule governing the liability of common carriers. See *Ashcraft v. Davenport Locomotive Works*, 148 Iowa 420; *O'Connor v. Illinois Cent. R. Co.*, 83 Iowa 105; *Gandy v. Chicago & N. W. R. Co.*, 30 Iowa 420.

Moreover, it is apparent that the relation of passenger and carrier did not exist at the time this accident occurred, nor is it traceable to any duty which the defendant owed the deceased as a common carrier. We need not, therefore, consider and discuss those cases now urged upon our attention, in which the doctrine has been so frequently announced that proof that the plaintiff was a passenger, and that injury occurred to him while the relationship existed, and while in care of the carrier as a passenger, casts a burden upon the defendant to exculpate itself. As we say, the relationship of passenger and carrier did not exist. Plaintiff bases her right to recover on distinct acts of omission or commission. The burden of proof, therefore, rests upon her to show the negligence charged; and, whether she attempted to do this by circumstantial or direct evidence, it cannot be said that she has done so until there is a preponderance of the evidence offered and submitted in her favor upon the question. An ultimate fact cannot be said to be established until there is evidence of its existence.

We think the plaintiff failed to make a case, and that the court was right in sustaining a motion for a directed verdict. Its action is, therefore,—*Affirmed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

META KASPER et al., Appellees, v. ANDREW KASPER et al., Appellants.

GIFTS: Parol Gift of Land—Evidence. Evidence reviewed, and held insufficient to establish a parol gift of land with that degree of clearness required by law.

Appeal from Jones District Court.—JOHN T. MOFFIT, Judge.

NOVEMBER 11, 1919.

REHEARING DENIED JULY 6, 1920.

THE plaintiff brings this action in her own behalf and in behalf of her minor daughter, to have quieted in her the title to 240 acres of land. She claims this in her own right as widow, and in her daughter's right as heir of one Rudolph Kasper. Her claim is that the father and mother of Rudolph, who are defendants in this suit, gave this land in controversy to Rudolph, in consideration of his paying \$725 annually during the lifetime of the father. The district court granted her substantially the relief prayed for. The defendants appeal. Opinion states the facts.—*Reversed on defendants' appeal; affirmed on plaintiffs' appeal.*

Herrick & Reed, F. F. Dawley, and Edwards, Longley, Ransier & Smith, for appellants.

Remley & Remley, J. H. Trewin, and J. J. Locher, for appellees.

GAYNOR, J.—The plaintiff Meta Kasper is the widow and Ruth Kasper is the only child of one Rudolph Kasper.

Rudolph was the son of the defendants, Andrew and Kate Kasper. Andrew and Kate are still living. Rudolph died on the 14th day of December, 1915, at the age of 26 years. Andrew Kasper was 51 years of age at the time it is claimed he gave or "bargained" away the land in controversy, and was 56 years of age at the time this suit was commenced. Andrew was the owner of about 600 acres of land, was a farmer, and resided on the lands known in this record as the "home place." He had two children living, Rudolph and Lena. Prior to the happening of the matters hereinafter referred to, he had constructed on this place a large and beautiful dwelling house. Before that, he had occupied a smaller house, immediately adjoining this new one. In 1911, Andrew and his son, Rudolph, who was then married, lived on this home place, Rudolph in the old house, and Andrew, with his wife and daughter, in the new house.

Certain facts appear in this record about which there is no controversy. That we may have a better understanding of the relationship existing between this father and son, at and prior to the time it is claimed the contract relied upon was made, it is well that we mark some of these undisputed facts.

Rudolph was married to the plaintiff Meta when he was about 21 years of age. At that time, he was residing as a member of his father's family, and his father owned all the personal property on the farm. After Rudolph's marriage, in December, 1910, Andrew sold to Rudolph a half interest in the personal property, live stock, etc., on the home farm. The estimated value of this property was \$10,000. Andrew took a note for the half interest, signed by Rudolph and Meta. This note was paid,—whether in full or not does not definitely appear; but at least \$1,386 was paid thereon. This payment was on March 7, 1911. It appears that some of the personal property had been sold in the meantime, by consent of both parties. Thereafter, Andrew sold to his son his remaining interest in the personal property, and took Rudolph's note therefor in the amount of \$3,850; and thereafter, Rudolph was the owner

of all the personal property on the farm. This note may, however, have included a portion of what Rudolph agreed to pay for the first half. After Rudolph became the owner of the half interest in all the personal property on the farm, and had given his note therefor, signed by himself and Meta, he and his father, on the 4th day of March, 1911, entered into a written agreement, by the terms of which Andrew leased to Rudolph all of what is known as the "homestead farm," containing 240 acres, more or less, and all that part of the farm familiarly known as the "Lovell Farm" not heretofore leased to Tjaden. The Lovell farm contained approximately 200 acres. This lease, by its terms, was to commence on the 1st of March, 1911, and to end the 1st of March, 1912. The agreement in the lease was that one half of the proceeds of the farm should go to each: that is, one half of all the crops raised and harvested and not fed out on the farm, and one half of all the increase of stock, and one half of all the proceeds of milk sold. The lease recites: "The intention being that each should have one half the net proceeds of the farm." This lease further recited that each party should furnish one half of the stock upon the farm, and one half the necessary feed, and one half of the seed to be sown upon the farm. It further recited that, should Andrew desire to return to the farm from Monticello, to which place he contemplated moving, before the expiration of the term of the lease, he should have the privilege of doing so; and, in that event, he should have the exclusive use of what is known as the new house. If he did not return, Rudolph should have the right to use the new house.

In the summer of 1911, and after the making of this lease, Andrew and his wife did move to Monticello, leaving the new house vacant. Rudolph continued to occupy the old house until the fall of 1911. It appears that the old folks concluded not to return to the farm, and Rudolph and his wife took possession of the new house. This taking was consistent with the right granted in the lease. It is not disputed that they took possession of the new house some

time in the fall of 1911. While Rudolph and his wife were occupying this farm under this first lease above referred to, and on October 17, 1911, another written lease was entered into between Andrew and his son. This lease was for one year from March 1, 1912, the date when the other lease expired, to March 1, 1913, and it covered the lessor's home farm of 290 acres, at a yearly rental of \$725, to be paid as follows: One half December 1st, and one half March 1st. In this lease, it was agreed that Rudolph should pay all road taxes assessed against the farm, and do all the necessary work in keeping the fences in repair during the year 1912, and Andrew should furnish the material therefor; posts for fencing to be cut and hauled by Rudolph from Andrew's timber.

It will be noted that Rudolph continued the occupancy of the (290) acres, and paid \$2.50 an acre therefor. The plaintiff is claiming, however, only 240 acres under the oral "bargain" under which she claims now that Rudolph became the owner of 240 acres. Whether Rudolph paid this \$725 annually under the lease for the year ending March 1, 1913, and under renewals of this lease for subsequent years, or in pursuance of the claimed "bargain" hereinafter referred to, is a matter of dispute in this record. The claim of the defendants is that, after the making of this last written lease, the same was renewed, from year to year, at an annual rental of \$725, with this exception that, after the year 1913, Rudolph should make all repairs and improvements upon the farm at his own cost, and as he willed.

It will be noted that Andrew had but two children; that he was married; that his wife was living; and that he was then but 51 years old. There is no doubt in this record that he intended to give this farm to this son upon his death, and that the nominal rental was made to encourage the son—who was given somewhat to drink—to reform his habits, and to encourage him to keep the farm in repair, and to assure him that improvements made on the farm would be ultimately for his own benefit.

It is the claim of the plaintiff in this suit that, after

this last lease was made, on October 17, 1911, and somewhere between October 17th and the 1st of November, 1911, a new oral *contract* was made between Andrew and his son. She terms it "a new bargain about the place." She says:

"I heard some talk between Rudolph and his father in regard to this new bargain. There was present Rudolph and I and his father and Uncle Tom. (Uncle Tom died before this suit was commenced.) I took no part in the conversation. It was about the 1st of October or the 1st of November, 1911. Rudolph asked his mother for some material, to fix up things he wanted done, and his father said: 'No, my boy, I am not going to fix any more; you can take hold of it and fix it up; you are my only son,—take it and fix it up. It is yours, and, if you pay me \$2.50 an acre as long as I live,'—and Uncle Tom said, 'Give the boy something; give him a start; give him something right out, so he knows what he has got,' and Andrew, the father, said: 'No, I can't,—I can't do any better—I can't give it right out—I have to have something out of it as long as I live. I can't do any better,—isn't that reasonable?' Rudolph smiled, and said, 'That is all right.' At the time this conversation took place, Rudolph wanted paint and paper and planks for partitions, and he wanted some woven wire. Up to that time, Rudolph and I had not occupied the new house at all. In September, Andrew offered Rudolph the key to the new house, saying that it didn't look well to see the new house empty, and it might excite comment among the neighbors to see the son living in the old house and the new house empty, and he offered Rudolph the key; but Rudolph refused it. Later, Rudolph got the key."

She claims that this was after the "new, oral bargain" was made. She further testifies that, after Rudolph got the key, they fixed up the new house, and got ready and moved in, and got some additional furniture. That was in the fall of 1911, or early in the winter of 1911,—somewhere about there. She says:

"We just cleaned it up, and varnished the floors, then cleaned the old house up, and painted it all over from top

to bottom on the inside. Certain men came down and did the work. Rudolph paid them."

It is the claim of plaintiff that Rudolph's possession after November 1, 1911, is referable to and in pursuance of this oral bargain,—not to the lease.

It is significant, at least, that, in none of these conversations recited above by the plaintiff, was any reference made to the lease under which Rudolph was then occupying the land, or to the written lease made for the year 1912. There was no provision in the lease of 1911 for the making of improvements by either party. There was a provision in 1912 to the effect that Andrew should furnish materials for repairs. Rudolph then had a most advantageous contract with his father for the year 1912. The record discloses that the rental value of that land at that time was from \$6 to \$7 an acre. These leases alone would suggest that the father had given the son, as the witnesses testified, "a very good start."

The plaintiff is her only living witness to this contract under which she claims that the title to the 240 acres, a part of the 290 acres included in the lease, passed to her husband; and this is the contract under which she and her daughter are now claiming this 240 acres, as heirs at law of Rudolph. All the rest of her testimony, in so far as it has any probative force, consists of statements claimed to have been made by Andrew subsequently, to the effect that he had given the boy this land, and the further fact that Rudolph made valuable improvements on the farm after November 1, 1911. The fact that the leases hereinbefore set out were made, and that Rudolph was in possession of this land under these leases, and that they created this relation of landlord and tenant between Rudolph and his father, is not disputed. It is the claim of the plaintiffs that, about the 1st of November, 1911, Rudolph became dissatisfied with the arrangements under which he was to farm the land, and that this new arrangement or bargain was the result. No change of possession of the land took place after this alleged

oral contract. The only change in the occupancy of the farm was from the old house to the new house, and it will be noted that this change was provided for in the lease made on March 4, 1911. It will be further noted that the lease commencing on the 1st of March, 1912, covered 290 acres, for which Rudolph was to pay \$725, or \$2.50 per acre, for the year ending March 1, 1913, and that, under this lease, defendant was to pay for all improvements. The record discloses that the farm was in very good repair at that time; that, so far as repair was concerned, it could need but very little. It is the claim of the defendants that Rudolph occupied the premises during the year 1911 under the written lease heretofore referred to, covering that year; that he occupied the premises during the year 1912 under the second lease; that, in the fall of 1912, and for every succeeding year, this last lease was renewed, except that the father was not thereafter to furnish any of the material for improvements, because of the small rental he was receiving. It will be noted that Rudolph's right to possession under these written leases by their terms did not expire until the 1st day of March, 1913. It is not disputed that he continued the occupancy during 1913, 1914, and 1915, and made some valuable improvements during that time. All permanent improvements were made after the year 1912, and during the years 1913, 1914, and 1915, and were such as made the farm more convenient and useful for the occupant. During all the time of Rudolph's occupancy, and up to the time of his death, Andrew never claimed, and Rudolph never paid to Andrew, more than \$725 annually for the use of the premises. Andrew paid all the taxes assessed against these premises during all these years, and insured in his own name all the buildings, and paid for the same.

In January, 1914, Andrew made a will, in which are found the following provisions:

"Subject to the life estate of my wife, I hereby will, devise and bequeath unto my son, Rudolph Kasper, what is known as my home farm in Wayne Township, Jones County, containing 240 acres, being the farm on which he is now

living, and also 20 acres of timber land in Section 27, in Richland Township."

The will further provided that, if the widow, Kate Kasper, desired, and his son Rudolph so desired, she might permit him to use what is known as the home farm, in Wayne Township, referred to in the will, during her life tenancy, at a yearly rental of \$725 a year, the taxes to be paid by her, and all repairs and insurance by him.

Plaintiff testified that, some time in the fall of 1913,—but she is not certain of the date; it may have been, and probably was, in the fall of 1914,—she heard some talk between Rudolph and his father, touching the making of some writing in regard to the land. Rudolph said he would like to have something to show that it was his place, and said that, if anything should happen, there would be trouble. The father replied:

"Well, my boy, what do you take your parents for? Do you take them for skimmers and thieves? Do you think they would do anything like that, that they could be in their graves and think they could do anything like that?" and Rudolph said that was business, and the father said, "Oh, we will fix it up in Doxey's office."

After this conversation was had, to which the plaintiff testifies, the will above referred to was made, and it was made in Doxey's office and left in Doxey's office. The will would seem to be the natural result of this conversation, assuming that such a conversation ever occurred. It would seem to indicate at least the father's understanding of his obligation to his son touching the land, and this thought would seem to be confirmed by the following testimony given by the plaintiff. She testifies that, after the will was made, the father came to Rudolph's house, with Rudolph's mother. The mother seemed out of humor, laboring under some stress of feeling, and, when she came into the house, she said to the plaintiff's mother:

"Now the boy has his way. He has something to show it is his. It is a shame he couldn't take his parents' word for it. We always took our parents' word for it."

She said they had made a will for it; that it was in Doxey's office; that, if he didn't believe it, he could go and look at it. (Mr. Doxey is an attorney.)

Assuming that this conversation was had between the father and son, touching the making of some paper that would show that he would ultimately be entitled to this property, it is not unreasonable to assume that Rudolph, prompted at least by curiosity,—certainly by self-interest,—would have gone to Doxey's office and examined this will. He lived nearly a year after the will was made. It is not shown that he ever made any complaint of the manner in which his father disposed of the property to him, nor does it appear that he ever afterwards asked his father for any other writing to indicate his father's wishes in the disposition of the land to him; and we assume further, because it is a natural assumption, that, if Meta, the plaintiff, understood, at the time the mother came there and announced the making of the will, that Rudolph already had the property under an oral contract, she would have demurred to this method of disposing of the land to him. It does not appear that she did. Ordinarily, the conduct of people touching property is consistent with their claim of right to the property. If Rudolph understood that his father had given the property to him outright, in the fall of 1911, and if, in his conversation with his father, he had in mind an instrument in writing that would show he had the present title to the land, it would seem not unreasonable to think that he would have at least demurred to some extent to this method of disposing of the land.

While plaintiff rests her case entirely upon this contract or "bargain" to which she has testified, she has sought, through the mouths of many witnesses, to corroborate her story by testimony to the effect that Andrew was heard to say many times, prior to the making of the will, that he had given this land to the boy. A careful analysis of this testimony does not give the probative force which counsel asks for it. As showing the character of the testimony relied

upon, a witness was called by the plaintiff, and was asked this question:

"Did you hear Andy say that it was Rudolph's farm? A. Yes, sir. Well, he told me it was Rudolph's farm when the old man died. Q. Did he say he had given it to Rudolph? A. Yes, sir. Q. Did he say anything about the start he had given the boy? A. Yes. Q. What did he say? A. Well, he had given him a good start to live; said that a good many times. He told me what a nice farm it was. He told me Rudolph had the nicest farm in Wayne Township; that it was as good a farm as any other young fellow had. This was during the years 1913, 1914, and 1915. I was working for Rudolph. Andrew was down to the place many times, and helped with the farming. His father said, a good many times, that he wished Rudolph would stop drinking so much. Rudolph got drunk, and sometimes was arrested for being drunk, and, every time he got drunk, his father and mother would come out and help him. His father would say many times that he wished Rudolph would stop drinking; that he had an awful good chance for a young man; that, if he would leave whisky alone, he would be a good man. His mother said this, too. When the father said he would give the farm to Rudolph, it was always connected with, he wished he would quit drinking whisky. When he said he had given the boy a good start, it was always connected with, if he would stop drinking, it would be an awful good chance. I knew of Rudolph's drinking. He was drunk shortly before he died."

Mrs. Mundinger testified that she heard Andrew say that he had given Rudolph the farm; that he was improving it; that it would be for his own benefit at the last. She testified:

"He did not say anything about payment. One time, I asked Andrew how the boy was getting along on the farm. He said: 'Just fine. He is fixing up everything just fine, and it will be for his own good'. He did not say the boy was paying anything."

She testified that she worked for Andrew's brother,

Thomas; that Andrew visited there quite often; that she heard a conversation between Thomas and Andrew, about the time that Andrew went to Monticello; that Andrew said he was going to give the farm to the boy; that they were going to move off the place, and the boy should fix up the place as well as he could, for his own home.

"I heard a conversation between him and Mr. Barney. Mr. Barney asked him how the boy was getting along, and he said: 'Just fine. He is fixing up the place good. It will be for his own good at last.' He said he had given the boy a better start than most people."

The witnesses, in their testimony, are continually confusing in their speech the word "give" and the word "gave." Sometimes they say that Andrew said he "had given" it to the boy. Again, they say that Andrew said he "would give" it to the boy. This is marked in the testimony of Elizabeth Barney, one of plaintiff's principal witnesses. She testified that, at one time, Andrew said that the home place belonged to the boy; that the boy was supposed to fix the place up, because it was for his own good, and he was to pay \$2.50 an acre, as long as Andrew lived. They were talking about what a good start he had given the boy, and that the boy was to get the good out of the improvements. The boy was to put on the improvements for his own good. At another time, she says they were talking about giving the boy a start, and giving him the place, and the improvements he was to put on out of his own money, for his own good. "He would just naturally say what a good start he would give the boy." At another time, she claims that, in a conversation at Rudolph's, when she and others were present,—particularly Lena Kasper and Mr. Beery,—her husband, John Barney, said jokingly to Mr. Beery, "You had better go out of the store and move out on the farm," and Andrew said:

"Oh no, this place belongs to the boy. The place up in the timber there belongs to the girl."

This statement is denied by both Lena and Mr. Beery.

She was cross-examined, and, on re-direct examination, this question was asked:

"In your examination this morning, you answered the question, to wit, 'Go ahead and relate the conversation you had when you were in the carriage on the trip to the farm,' and you answered as follows: 'Well, I cannot say any more. They were just talking about giving the boy a start—just how they would give him the place—the improvements he was to put on the place out of his own money, for it was for his own good.' I now ask you whether you meant that they would give him the place, or whether they had given him the place."

Her answer was, "The word was supposed to be 'given.'"

One Cullup testified that he heard Andrew say, in 1914, that he had given the place to the boy; that the boy was paying \$2.50 an acre for it, and keeping it up; that he was paying \$2.50 an acre until the old man died.

One Barney, who, the record shows, was on very friendly terms with Rudolph and his wife, and strongly biased in their favor, and who had had trouble with Andrew at one time, over the payment of rent, when occupying Andrew's land, was called. His testimony is to the same effect as the testimony hereinbefore set out, and of the same character, although much more circumstantial. Many of the conversations testified to by Barney are the same as testified to by the other witnesses. Among other things, he said:

"I asked Andrew how the boy was getting along. He said he was getting along fine. This was in 1914. He said he had given him the place, and he was getting \$2.50 an acre as long as he lived. I asked him why he didn't give it to him altogether, and he said he ought to have something out of it. He told me that he had put quite a bit of expense on the place."

We have not attempted to set out all this testimony, nor would it be profitable to do so. We have to say that it is of that uncertain and unsatisfactory character which always exists when a witness undertakes to repeat conversa-

tions had with another. It is said to be the most uncertain testimony courts have to deal with, in searching for the ultimate fact. It is uncertain because of recognized human infirmity. It involves a correct understanding of what the party whose speech it is sought to repeat at the time the conversation was had, actually said. There is involved in it the memory of the witness of what is said. It involves a correct repetition of what the memory retains of what was said. It involves the disposition of the witness to be accurate in what he repeats. The changing of a word may convey an entirely different meaning from what the speaker intended to convey. Here we have the witnesses confusing continually the phrase he "had given" with the phrase he "would give." The phrasing of the thought one way tends to corroborate the defendants' theory. The best they can do, and the best they attempt to do, is to give the impression of what was said, couched in their own language. Taking it as a whole, we are left in serious doubt as to what the words were that Andrew used in these conversations with these parties; whether he said he "had given," or whether he said he "would give." The confusion arises from the fact that he had given him a good start. The record discloses that. He had put him on a farm of 290 acres, which was well improved, and had given him \$10,000 worth of personal property, taking his note only therefor. Andrew might well and truthfully have used the words, "I have given him a good start." The witnesses, in their recollection of what he said, may well, and we think have, confused what Andrew said touching the start he had given the boy, and what he said touching the giving of the land. Indeed, a careful analysis of the testimony, with the exception, perhaps, of one witness or two, leaves the mind impressed with the thought that Andrew never intended to convey, by what he said, the thought that he had actually passed the title to Rudolph. The relationship existing between them at the time it is claimed this contract was made, what was then said, what was done afterwards, as shown by the undisputed record, negative the idea that he ever did, in fact,

intend to give, or that Rudolph ever conceived the idea that he had given him, the title to this property. He was Andrew's only boy. No doubt, with all his faults, Andrew loved him still. Andrew was anxious to see him get ahead in the world. He was doing the best he could to give him a start in the world; but, as disclosed by the record, Rudolph was not making the best of his opportunity. When Rudolph asked for some writing to evidence that he would ultimately have the property, the father made the will; and, after Rudolph died, and the estate was called for administration, his wife, Meta, who is now claiming this property under an oral contract, made away back in 1911, made no claim to this property as the widow of Rudolph, but surrendered possession to Andrew, without questioning Andrew's right to the possession. Her conduct is wholly inconsistent with the claim that she now urges, and we say that what she has offered to corroborate her in her claim is insufficient for that purpose. The burden rests on the plaintiff, and she must prove her claim by clear and satisfactory evidence.

We need not give all the testimony of the defendants, although the defendants' testimony tends strongly to negative the claims that she makes. We think that, on her own testimony, she has failed to make out her claim by that character of evidence which the law requires. The payment of this \$725 a year is the only evidence of any payment made by Rudolph under this oral contract under which the plaintiff seeks title to this land, and this payment is more consistent with the obligation expressed in the lease than it is with the claim made by her in this suit. She is claiming that Rudolph received, in this bargain of sale, only 240 acres. The record shows that, during all these years, he has occupied the 290 acres, the number of acres the use of which was granted him in his lease. The amount he has paid is the exact amount of 290 acres at \$2.50 an acre. This circumstance strongly negatives her claim.

As said in *Schiels v. Horbach*, 49 Neb. 262, 270 (68 N. W. 524):

"It is a well-established rule that, where one is in possession as tenant at the time he contracts for the purchase of the demised premises, his subsequent possession will be presumed to be under the lease, unless it be clearly shown to result from the subsequent agreement."

See, also, *Casady v. Casady*, 184 Iowa 1241, in which it is said that:

"The burden was, therefore, upon the plaintiff to rebut the presumption that possession, admitted to have been originally subject to the title and ownership of the father, ever became otherwise by perfected gift *inter vivos*."

In our judgment, the record bristles with the thought that whatever improvements Rudolph put on the farm were made in anticipation of ultimate ownership, but not in a reliance upon present ownership. The law that governs this case has been well settled. We need not refer to the authorities. It is simply a fact question, and we resolve it against the contention of plaintiffs. We think the court erred in granting plaintiffs the relief it did, and its judgment is, therefore, reversed.—*Reversed on defendants' appeal; affirmed on plaintiffs' appeal.*

LADD, C. J., WEAVER and STEVENS, JJ., concur.

JOHN T. KELLEY, Administrator, et al., Appellees, v. M. N. KELLEY, Appellant.

TRUSTS: Engrafting Trust on Legal Title. A trust will not be engrafted on a legal title, in the absence of very clear and definite supporting testimony. Evidence involving dealings between a mother and son, with intermingling of funds from various sources, reviewed, and held insufficient to establish any trust relation.

Appeal from Pocahontas District Court.—JAMES DELAND, Judge.

APRIL 13, 1920.

REHEARING DENIED JULY 6, 1920

ACTION in equity for an accounting. Decree as prayed, and defendant appeals. The facts, so far as material, are stated in the opinion.—*Reversed and remanded.*

T. F. Lynch and Healy & Faville, for appellant.

Ralston & Shaw and Price & Burnquist, for appellees.

WEAVER, C. J.—The plaintiffs and defendants are the children and heirs at law of Rhoda Kelley, who died October 9, 1917. The father of the parties, Charles Kelley, died in the year 1890. He was the owner of considerable land, and by his will left a 40-acre tract to each of his 9 children, and a farm of 320 acres to his widow. Before his death, he had also deeded another 80-acre tract to his son, the defendant herein. Charles Kelley was a man of intemperate habits and violent temper, which resulted in breaking up the family home. The defendant, commonly spoken of in the record as Michael, or Mike, went to Kansas, where he took up a homestead. Several other members of the family, including the mother, soon followed him to that state. The mother made her home with Mike, who was unmarried, and remained there until her husband's death, in Iowa, a period of about 2 years. Returning then to Iowa, she resumed her home on the farm, with some of her younger children. In 1895, Mike returned from Kansas, and, being still unmarried, he too made his home with the mother, and cultivated his own land. Just how the home farm was then being operated or cared for does not clearly appear, until about 1898 or 1899, when, the son John and the daughter Mary having married and moved away, Mike took over the general control of the premises, under some express or tacit understanding between him and his mother. The exact nature and scope of that arrangement is the subject of the controversy out of which this litigation has arisen.

The business relations between mother and son, thus initiated in 1899, continued, uninterrupted and apparently without dissension or disagreement, until the year 1917. The mother was then about 82 years of age, and more or less broken down in health and strength. About this time, some of the other children believing or claiming to believe that Mike had obtained or was likely to obtain some undue advantage of the mother with respect to her property rights and interests, and that legal proceedings were required for her protection, John T. Kelley, acting under a power of attorney obtained from their parent, brought an action in her name against Michael, to compel an accounting. The case had been pending but a short time when Mrs. Kelley died, and John, having been appointed administrator of her estate, was substituted as plaintiff. Four of the heirs joined him as plaintiffs, while others or some of them, are impleaded with Michael as defendants.

Stated as briefly as practicable, the issues upon which the case was finally tried are as follows: The plaintiffs allege that Michael and his mother united in a joint adventure or partnership for the operation and use of the lands belonging to both of them as one "common, joint enterprise," and that their business dealings and relations with each other were conducted on that basis until their severance in the year 1917; that Michael took, and at all times had, the active charge and management of the joint enterprise, mingling his mother's personal property with his own; farmed their lands together, mingling the income and profits thereof in a common fund; rented other lands and worked the same for their joint benefit; purchased four additional tracts of land, taking title to one tract in his mother's name, and to the other tracts in his own name, payment for such lands being made from the joint or common fund; and that he also, with said moneys, purchased and paid for certain shares of stock in various corporations, in all of which stock his mother was entitled to an equal share.

The plaintiffs further allege that Michael has never in any manner accounted to his mother or to her administrator or heirs for the profits for her share or interest in the property or profits so acquired by him, and they ask that he be now required to render such account, and that he be decreed to hold the title to one half the lands acquired by him during the alleged partnership in trust for the benefit of the plaintiffs.

The defendant denies that he ever entered into any partnership or joint adventure with his mother with respect to their property or the property of either of them, or in the use thereof, or in the profits or proceeds arising from the use of such property. He admits, however, that he did go into possession, management, and control of his mother's said property in the year 1899, and continued therein until the year 1917; but he alleges that the possession and control of her property were acquired by him, and at all times held and exercised by him, as the tenant of his mother, and not as a partner or joint adventurer. He admits that, during said period, he purchased and acquired the title to about 400 acres of land, and his mother also bought and took title to an additional 80 acres; but alleges that such purchases by them were made in their individual right, and that neither had or acquired any right or interest whatever in the lands bought by the other.

He further alleges that, during said period, he paid to his mother very considerable sums of money, paid debts for and on her account, expended much money, at her request, for the construction of buildings and for the tiling of her lands and making other improvements thereon, making up an aggregate of payments to her equal to or in excess of the rental value of the premises. He also alleges a settlement with his mother in her lifetime, and satisfaction and discharge of their mutual claims and demands.

It should also be said in this connection that Henry Kelley and Charles J. Kelley, sons and heirs of the deceased Rhoda Kelley, do not join in the prosecution of this

suit and file a disclaimer of any right or interest in the property held or claimed by Michael, and that Martha Wells, a daughter and admitted heir of the deceased, does not appear to have been made a party to the litigation, either as plaintiff or defendant. On trial of these issues, the district court found for the plaintiffs, and awarded them relief substantially as prayed. The defendant, Michael Kelley, appeals.

I. Arguments of counsel have been principally directed to the question whether the evidence satisfactorily discloses the existence of a partnership or joint enterprise between the mother and son, as charged in the petition. For a case of this general nature, involving transactions covering such a long period of years, the evidence offered is singularly meager, and very much of that which is produced is quite indefinite and lacking in substance.

Plaintiffs, at the outset of the trial, called the defendant Michael to the witness stand, and inquired into the business relations between him and the deceased; and, except as to matters and conditions thus developed, there is an entire absence of direct evidence from which the truth of the controversy can be determined. It is the theory of counsel for appellee that Michael's own testimony is sufficient to sustain the decree rendered below; but, when we turn to the record of his testimony, we find that he distinctly and explicitly denies the existence of any partnership or joint enterprise. True, appellees are not necessarily bound by the testimony of Michael; for, although they made him their witness, it was still competent for them to show, if they could, that the fact is otherwise than as stated by him. But, in calling him as a witness, they do vouch for his general character as a man of truth and veracity, and the burden is upon them to establish by a preponderance of the evidence, the alleged partnership or joint venture which he denies. Counsel say, however, that such conclusion is justified by his own admissions. Let us see. In the course of the examination, the appellant conceded that he managed and controlled

the mother's land, cultivated it, raised the crops, and sold and converted them into money or other property; that he, at the same time, was managing and controlling his own land in the same way; and that he mingled the proceeds and profits thereof with the proceeds and profits derived from his mother's land. He kept but a single bank account. He kept no books. When he bought land, he made the first payment from the moneys so accumulated, and later, when he took up his purchase-money mortgages, he paid the debt from the same source. He bought shares of corporate stocks, and, in so far as they are yet paid for, payment has been made from the proceeds of his farming operations. Meanwhile, with his increase in property, his indebtedness has grown in nearly the same ratio, and his outstanding obligations, at the time of the trial, aggregated nearly \$100,000.

Counsel lay principal stress on the so-called "common fund" into which went all the earnings and profits of the farming operations, and from which defendant drew indiscriminately, not only to meet current expenses and demands, but for the promotion of all business ventures and transactions in which he, from time to time, engaged; and, because of this manner of doing business, it is argued that mother and son must have been partners or joint adventurers, and that said "fund" and the profits acquired therewith by the defendant are, to the amount of one half thereof, impressed with a trust in his hands for the benefit of the mother and her heirs.

Unfortunately for this theory, the admitted manner of doing the business, the exclusive control of the profits by the defendant, the failure to keep separate accounts or distinct funds, and their use by him in enterprises and investments other than in farms and farming, do not give rise to any necessary inference of a partnership or joint enterprise. They are equally consistent—indeed, much more consistent—with the truth of defendant's contention that he was the tenant on his mother's land, and not her

partner. As tenant, he could rightfully have the entire management and control of the land, and the title to the proceeds of the farm operations would be in him alone. In such case, the law imposed upon him no duty to keep separate accounts or separate funds, or to account therefor to his mother or to the plaintiffs. His obligation to his mother, in such case, was the duty to pay rent. Their business relation was that of debtor and creditor—landlord and tenant. Failure to pay the rent would expose him to an ordinary action for its collection, but not to an equitable demand for an accounting, as for a trust; and, in mingling the proceeds from the use of his mother's land with those from his own land, and in using the combined fund so produced in purchasing property in his own name and right, he wronged no one, nor did a trust in favor of any person result from such action on his part. Except the appellant, no witness pretends to have any knowledge or information as to the terms or conditions on which he took charge of his mother's farm. There is no circumstance shown from which any inference may be drawn that appellant took any advantage of his mother's ignorance or weakness, or that she was not at all times fully advised and consenting to the use he was making of her property. That she was receiving, in some degree at least, an income therefrom, is shown by the fact that, during this period, she purchased and paid for an additional 80 acres of land. The trial court also found that, during the same period, improvements had been made upon her land to the amount of nearly \$7,000. Her taxes were paid, and there are still other items of credit claimed by the appellant, upon the correctness of which we shall not undertake to pass, for reasons hereinafter indicated.

As we have before said, the plaintiffs demanded, and the court below decreed, that the lands purchased in the defendant's name, during the period from 1899 to 1917, were obtained by him for the joint benefit of himself and mother. There is no more firmly established rule of law and equity than that the legal title to land held by a

claimant in possession will not be set aside or burdened with an implied or resulting trust except upon clear and satisfactory proof. *Malley v. Malley*, 121 Iowa 237; *Andrew v. Andrew*, 114 Iowa 524; *Murphy v. Hanscome*, 76 Iowa 192. And, if the testimony, when fairly construed, is consistent with any reasonable theory which will allow the legal title to stand, no trust will be declared. Something more than a mere preponderance of the testimony is required. *In re Estate of Mahin*, 161 Iowa 459, 466. The evidence in the record before us falls far short of this recognized measure of proof. The sole item of testimony on which to base the demand for setting aside the deed, or for engrafting a trust upon the title so conveyed, is the statement or admission of the appellant, which is, in substance, as follows: Of the four tracts of land which the decree charges with a trust, he says he made the purchase of the first 120 acres in 1899, which was about the date he went into the possession of his mother's farm, and manifestly before he had received any of the profits of that arrangement. He bought it on a contract, making the initial payment from his own funds, some of which he had received from the sale of his Kansas property. He was already the owner of another 120 acres, to which plaintiffs lay no claim, and, from his income and profits subsequently derived from his own land and the use of his mother's land, he made the subsequent payments. His other purchases were made at a later date, when, according to his story, he was receiving, not only the income from the land leased from his mother, but also from his own 240 acres; and from these combined resources, such purchases were paid for. Such explanation is not inherently improbable or unreasonable. Indeed, he is not charged with the burden of explaining his purchase or the validity of his title. The burden of disturbing that title or imposing upon it any trust is on the plaintiffs, and there is nothing in the defendant's testimony (which constitutes the sole evidence on which plaintiffs rely) which in any manner overcomes

or rebuts the presumption of validity attaching to the conveyances.

We are of the opinion that the plaintiffs have distinctly failed to establish their claim of a partnership or joint adventure between Rhoda Kelley and Michael Kelley, and that the decree sustaining such claim and awarding relief on that basis must be reversed.

II. The cause having been brought and tried in equity, we think that, notwithstanding the reversal of the decree below, the court may properly retain jurisdiction of the proceedings for the complete adjudication of the controversy. The defendant, while conceding his liability to his mother or to her estate for the rent of her lands in his possession, and while contending that such obligation has already been met or discharged, expresses his readiness to make due accounting, if the court finds it has not already been made. The record in this respect is entirely too indefinite, fragmentary, and incomplete to afford any basis of judicial settlement of this question. The cause will, therefore, be remanded to the district court for the trial of this issue, with instructions to the court to permit the parties to file new or amended pleadings with respect thereto, and introduce evidence thereon, but not to reopen or retry the issues considered and passed upon in the first paragraph of this opinion.—*Reversed and remanded.*

LADD, GAYNOR, and STEVENS, J.J., concur.

H. C. LARRABEE, Appellant, v. DES MOINES TENT & AWNING COMPANY et al., Appellees.

NEGLIGENCE: Negligence Arising Out of Contract Relation—

- 1 **Strangers to Contract.** A temporary amphitheater, erected in the public street by a contractor for another, with negligence of such a nature that the same might have been readily discovered on quite reasonable examination, is not such an imminently dangerous structure as to come within any exception

to the rule that *negligence arising out of contract relations will not give a cause of action to one who is a total stranger to the contract.*

NEGLIGENCE: Res Ipsa Loquitur. Principle recognized that the
2 doctrine of *res ipsa* is applicable only, as a general rule, when all the instrumentalities which might cause an injury are under the *exclusive* control and management of the defendant.

NEGLIGENCE: Extent of Permissible Reliance on Contractor. A
3 photographer who has caused a temporary amphitheater to be constructed by a contractor for photographic purposes, and has exclusive custody of such structure after its completion, may, perhaps, so rely on the skill of the contractor as to be excused from *inspecting* the structure and from *discovering* weakened timbers; but he may not be excused from *guarding* the structure in order to prevent the removal of supporting parts thereof, if such guarding appears reasonably necessary.

Appeal from Polk District Court.—THOMAS J. GUTHRIE,
Judge.

JULY 6, 1920.

ACTION for damages for personal injuries resulting from negligence. At the close of the evidence, there was a directed verdict for each defendant. The plaintiff appeals.
—*Affirmed in part; reversed in part.*

Frank T. Jensen and R. S. Milner, for appellant.

Miller, Kelly, Shuttleworth & Seeburger and Nourse & Nourse, for appellees.

EVANS, J.—I. At the time of the injury complained of (March 15, 1917), the plaintiff was attending at Des Moines the state convention of a telephone association.

1. NEGLIGENCE: The defendant Bittle was a photographer,
negligence who proposed to the association to take a
arising out group photograph of its members, and for
of contract that purpose caused seats to be erected for
relation: strangers to
contract.

the convenient sitting of the group. These seats, upon Bittle's invitation, were occupied by a group of 30 or more; and, while occupied, the whole structure suddenly collapsed, whereby the plaintiff suffered a severe injury to his foot. These seats had been rented by Bittle from the Des Moines Tent & Awning Company, defendant, whose employees had put the structure together. This structure is referred to in the record as "circus seats." It was in the line of the business of the Des Moines Tent & Awning Company to furnish such seats for rental for temporary purposes. These particular seats had been bought from a reputable manufacturing company, engaged in the manufacture of such seats. This structure was composed of 22 pieces of timber, which were put together according to a formula, for the purpose of use. These pieces included uprights, or jacks, which were the support of the structure; upon the jacks rested stringers, or risers; upon the risers rested boards, which furnished the seating. There were three stringers, and three jacks, or uprights, under each stringer. The employees of the Des Moines Tent & Awning Company had finished the structure, and had left it in the possession and control of Bittle, who was to have the use of same for one hour. The collapse occurred within about 15 minutes from such time. The structure was constructed on the west side of the Chamberlain Hotel, facing west, and extending over the sidewalk into the street. The seats were arranged in tiers, the higher ones being about 9 feet high. Some of the jacks, or uprights, rested upon the sidewalk. Pedestrians passing along the sidewalk passed under the structure. The record does not disclose the real cause of the collapse. The plaintiff introduced evidence to show the accident and the injury suffered by him, and rested. His reliance is upon the doctrine of *res ipsa*, and he contends that the fact of the accident was sufficient to warrant the inference by the jury that it was the result of the negligence of the *defendants*. The defendants did not present a common defense. Each appeared by his own counsel, and filed a separate answer. Their liability re-

spectively is not governed by the same rules. We shall, therefore, deal separately with the question of the liability of each, and deal first with that of the defendant Des Moines Tent & Awning Company.

There was no privity of contract or invitation between this defendant and the plaintiff. This defendant dealt with Bittle alone, and its contractual liability was one to Bittle alone. It delivered to Bittle the identical thing for which Bittle contracted, and caused it to be set up in the manner and at the place directed by Bittle.

It is broadly true that, where the charge of negligence is based upon a breach of duty arising out of contractual relations, no cause of action arises in favor of one not in privity to such contract. To this general rule there are exceptions. Such exceptions arise when one has, by sale or otherwise, put into circulation, so to speak, some noxious or imminently dangerous thing, which is likely to cause serious injury to any person into whose hands it may come. These include poisons not labeled, explosives, vicious animals, etc. This exception applies, not only to sales of personalty, but may also apply to the construction of structures imminently dangerous to human life, while such structure is within the possession and control of the wrongdoer. If the thing sold or constructed be not imminently dangerous to human life, but may become such by reason of some concealed defect, then a liability may arise against such vendor or constructor, if he knew of the defect and fraudulently concealed it. The liability in such case is predicated upon deceit. Subject to these exceptions, the general rule is stated by Wharton as follows:

"Thus, a contractor is employed by a city to build a bridge in a workmanlike manner; and, after he has finished his work, and it has been accepted by the city, a traveler is hurt, when passing over it, by a defect caused by the contractor's negligence. Now, the contractor may be liable on his contract to the city for his negligence, but he is not liable to the traveler, in an action on the case for

damages. The reason sometimes given to sustain such a conclusion is that otherwise there would be no end to suits. But a better ground is that there is no causal connection, as we have seen, between the traveler's hurt and the contractor's negligence. The traveler reposed no confidence on the contractor, nor did the contractor accept any confidence from the traveler. The traveler, no doubt, reposed confidence on the city that it would have its bridges and highways in good order; but between the contractor and the traveler intervened the city, an independent responsible agent, breaking the causal connection." Wharton on Negligence (2d Ed.), Section 438 *et seq.*

To the same effect are the following authorities: *O'Neill v. James*, 138 Mich. 567 (101 N. W. 828); *Zieman v. Kieckhefer Elevator Mfg. Co.*, 90 Wis. 497 (63 N. W. 1021); *Heizer v. Kingsland & Douglass Mfg. Co.*, 110 Mo. 605 (19 S. W. 630); *Slattery v. Colgate*, 25 R. I. 220 (55 Atl. 639); *Simons v. Gregory*, 120 Ky. 116 (85 S. W. 751); *Young v. Smith & Kelly Co.*, 124 Ga. 475 (52 S. E. 765); *McCaffrey v. Mossberg & Granville Mfg. Co.*, 23 R. I. 381 (50 Atl. 651); *Fitzmaurice v. Fabian*, 147 Pa. 199 (23 Atl. 444).

In order to bring the defendant within the exceptions, it was incumbent upon the plaintiff to prove the necessary facts to that effect. He introduced no evidence to that end. The structure was not imminently dangerous, though it be true that defects in material or in construction could make it such. It was professedly a temporary structure, and could be knocked down in a mere moment. This could be done by the removal of any of the supports, or jacks, and could be caused in such manner by any pedestrian or bystander. It was erected over a crowded thoroughfare. After the collapse, one stringer was found broken. Whether this break *caused* the collapse or was the *result* of it, in no manner appears. At the place of the break, the stringer (a two by six) was penetrated by a five-eighths-inch bolt. This is the only defect, if such, disclosed. Bolts were a part of the structure, and were essential to its plan. The

evidence shows, without dispute, that this stringer could not have broken at such place, unless the jack thereunder were removed.

Upon such a state of facts, can it be said that mere proof of the accident is sufficient evidence to warrant an inference by the jury of the negligence of this defendant within the exceptions above stated?

It is to be remembered that the doctrine of *res ipsa* does not ordinarily apply unless it is made to appear that all the instrumentalities which would be likely to cause the accident were under the exclusive con-

2. NEGLIGENCE: *res ipsa loquitur.* trol and management of the defendant, and that the accident was such as would not

ordinarily occur if due care had been exercised in the control of such instrumentalities. There is no dispute in the evidence in this record. The details of the construction are shown by the evidence on both sides. It is undisputed that the structure was put together in proper form. The evidence does not disclose the actual cause of the collapse, but the whole tendency is to show that there must have been some interference with the supports. It may be that so temporary a structure, built for the purpose of being quickly knocked down, should have been carefully guarded, for the few moments of its occupancy, against interference by pedestrians or bystanders. But no such duty devolved upon this defendant. Its employees, having completed the structure, left it to the control of the defendant Bittle, as they had a right to do. Upon the whole record, therefore, our conclusion is that the trial court properly directed a verdict for this defendant.

II. We have no argument for the defendant Bittle. The plaintiff entered upon the structure in question upon his invitation. The invitation was, indeed, a distinct re-

3. NEGLIGENCE: extent of permissible reliance on contractor. quest made by Bittle, for the purpose of photograph, which was doubtless to be offered for sale thereafter to the members of the group. He sustained a voluntary re-

lation to the plaintiff, which imposed upon him the duty to exercise reasonable care for plaintiff's safety while he occupied the structure upon which he was invited. Whatever the actual cause of this accident, such cause could be found to be fairly within the range of Bittle's supervision and control. The accident was one which would not ordinarily happen. A jury might find that ordinary care on his part would require that he should have inspected the structure before its occupancy, and that he should have guarded its supports against interference, accidental or otherwise, by passers-by. He did not inspect, and did not guard. His reliance upon the employees of his codefendant might be sufficient to justify his failure to inspect. This would be a jury question, upon the whole record. But reliance upon the employees of his codefendant would not justify a failure to guard against interference, if such guarding was required by ordinary care. It may be true, also, that he was not required to discover the alleged defect in the stringer, because of the bolt hole therein. We are inclined to that view. Upon the whole record, however, we think that the circumstances of the accident, as disclosed by the evidence on behalf of plaintiff, were such as entitled him to rest. These circumstances sufficiently tended to show negligence of some kind, within the range of this defendant's duty to plaintiff, and he was entitled to go to the jury thereon. It was, of course, open to this defendant to rebut such tendency by such evidence as he could produce.

We think, therefore, that it was error to direct a verdict in favor of this defendant. The judgment below will be affirmed as to the first-named defendant and reversed as to the last.—*Affirmed in part; reversed in part.*

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

ELLA L. C. LINDSAY, Appellant, v. JOHN J. LINDSAY,
Appellee.

PLEADING: Want of Verification—Waiver. Failure to move to
1 strike an unverified answer works a waiver of the defect.

AFFIDAVITS: Cross-Examination of Affiant Discretionary. Whether
2 an affiant shall be called for personal cross-examination is very
largely within the discretion of the court. (Sec. 4678, Code,
1897.)

DIVORCE: Wife Liable for Temporary Alimony and Suit Money.
3 A wife, plaintiff in a divorce action, may, on a proper showing,
be compelled to pay temporary alimony and suit money to an
impecunious husband.

DIVORCE: Insufficient Temporary Alimony. In the absence of a
4 definite showing of inadequacy in the allowance of temporary
alimony, the appellate court will decline to interfere, and will
leave the matter for adjustment on final hearing on the merits.

Appeal from Delaware District Court.—H. B. BOIES, Judge.

JULY 6, 1920.

IN this action for divorce, the defendant made application, and the court allowed money for his support, pending the hearing on the merits, and for suit money to enable defendant to present his defense and his cross-petition on the merits. The court ordered, and judgment was entered accordingly, that plaintiff pay \$15 per week, and \$250 suit money. The plaintiff appeals, claiming that the court had no power, under the statute, to make any allowance, and that, under the evidence and circumstances, none should have been allowed, in any event. After plaintiff had perfected her appeal, the defendant also appealed, on the ground that the allowance made was too small. Plaintiff is the appellant.—*Affirmed on both appeals.*

Trewin, Simmons & Trewin, for appellant.

A. M. Cloud, Yoran & Yoran, E. B. Stiles, F. B. Blair,
and *Arnold & Arnold*, for appellee.

PRESTON, J.—The parties were married in 1887. At that time, defendant was a young, practicing physician and surgeon, with little means. Plaintiff testifies that he was considerably in debt, and had very little income. Prior to February 4, 1917, defendant had a breakdown, physically and mentally. On Sunday morning, February 4th, defendant was found in his office, with an ugly wound in his neck. He was on the couch, partly clothed, and the body cold. He had attempted suicide. A few days thereafter, and on February 7, 1917, upon plaintiff's undertaking to be responsible for his treatment, he was taken to a sanitarium at Hinsdale, Illinois. He seemed to improve for a time, but afterwards became worse, and his condition was quite serious. Later, he was taken back to the town of his residence, but not to his home, or rather, plaintiff's home. On February 20, 1917, plaintiff caused an original notice of this divorce proceeding to be served upon defendant at Hinsdale, and on February 28, 1917, she filed her petition for divorce, alleging cruel and inhuman treatment and habitual drunkenness. The petition goes somewhat into details as to the alleged treatment by defendant, some of which defendant, in the motion to strike, claims were frivolous and scandalous. She claims that defendant has handled her property, and has not accounted for the receipts, and that she has largely supported him; that defendant demanded that plaintiff should turn over to him money or property; that he circulated reports in the community that plaintiff and her daughter were spending defendant's earnings and income, and so on. Plaintiff, at her expense, caused the petition to be published in full in a newspaper in the town where the parties lived. On October 9, 1917, defendant filed his unverified answer, admitting the marriage, and so on, and denying all other

allegations in the petition; and, on January 8, 1918, he filed an amendment to his answer, setting up a cross-petition, which was verified, asking a divorce from the plaintiff, and alleging that, for several years, plaintiff had been guilty of such cruel and inhuman treatment as to endanger his life; that she continuously planned to secure from defendant all his property, and to transfer all his earnings to her; that, though they had a beautiful home, all furnished, she compelled him, for many months, to use the cellar as their abode, and refused to allow defendant to occupy other parts of the house; that, for many years, plaintiff defamed defendant's character by making false and slanderous statements concerning him, and ruining his practice, and so on; that, because of such treatment, defendant became excitable and nervous, and is no longer able to practice his profession; that plaintiff was presented with considerable property by her father, in his lifetime, and under his will secured other property; and that plaintiff has secured all the net proceeds of defendant's earnings; that plaintiff now has property of approximately \$100,000, and defendant is entirely without means to defend plaintiff's action and prosecute his cross-petition; that he is ill, and requires large sums of money, for the payment of doctor's bills, board, and the constant attendance of a nurse. The reply denies defendant's claims. Motion for temporary alimony and suit money was filed, in which the allegations of the cross-petition were referred to, and the application was supported by the affidavits of defendant's brother-in-law, who says that, from long association with defendant, he is familiar with his family life and financial history and present needs; that he has read defendant's cross-petition, and believes the averments therein to be true; that plaintiff is the owner of a valuable homestead in the city of Manchester, Iowa, and another dwelling which is rented; also, two valuable farms in Delaware County, one of 155 acres and another of 240 acres, and other property in Fayette County and in South Dakota, and a considerable amount of per-

sonal property; that, before defendant had been at the sanitarium a sufficient time to gain the required benefits, and be restored to his normal condition, plaintiff ordered the sanitarium to give defendant no further credit on her account, after February 28, 1917; that the expense of defendant at the sanitarium was from \$35 to \$85 per week, and that his expenses at Manchester at a private home are \$20 per week, and are likely to continue so for a considerable and indefinite time. The defendant's application was supported also by the affidavit of a Doctor Dittmer, who has been the attending physician of defendant in Manchester for a year. Defendant also alleges that, at the time of the filing of said affidavit, he was suffering from a nervous breakdown, which incapacitated him from earning a livelihood, and that there is little, if any, hope of his ever being able to earn a living; that, before said breakdown, and down to the time thereof, which breakdown occurred about a year before, defendant had a lucrative practice. The plaintiff resisted defendant's application, and supported the resistance by offering court records showing confession of judgment by defendant on his notes that were barred, given to some of his relatives, and the sale of defendant's interest in an estate at about \$4,500; also, plaintiff's petition and answer to cross-petition, and her affidavit; the affidavit of her daughter Florence; the affidavits of Dr. Moyer and one Tompkins, an accountant, who examined defendant's books, which books were quite incompletely kept, and which did not show that any of defendant's individual income or property went into plaintiff's property. She stated that, so far as the books show, defendant received from her properties, or from her, amounts at least equal to disbursements by him for repairs and improvements on her property; that the examination by the accountant was from the years 1904 to 1917, but that some of the books were missing, and for some of the years he did not mention the receipts from plaintiff's farms; that he examined all the books that were available. In rebuttal, defendant offered the evidence of his

sister and her husband, and other witnesses, and additional affidavits by some of them. The general tendency of the evidence is to sustain the claims of the different parties. We think it unnecessary to go into the details. The plaintiff denies that she is worth \$100,000. The record does show, however, that she has considerable property, though the value of it is not given definitely by any of the witnesses. Dr. Moyer first visited defendant at the sanitarium, February 11, 1917, and expressed a view that it was a case of drug addiction, grafted primarily on an unstable nervous system, with certain physical defects that appeared later in life; that his teeth were bad,—had pyorrhea and several abscesses, which depressed the general health; that defendant refused to have his teeth removed. Plaintiff says that defendant had been troubled with infected teeth for several years. That, on February 24th, defendant had improved physically and mentally, and at that time, there was no trace of illusion or aberration, with one special characteristic of alcoholic cases; that defendant said to him that, prior to the attempted suicide, he had been taking large quantities of bromides, and had used alcoholic liquors freely, and tobacco in large quantities; that, at that time, there was no good reason why defendant should remain in the institution, because he had gotten about all the benefit he would get; that, at that time, the doctor advised that defendant leave the institution next week; that, thereupon, plaintiff gave notice that she would not be responsible for further expense at the sanitarium. Defendant, however, remained at the institution, and was visited again by Dr. Moyer, March 14, 1917, and he found defendant worse, and found a condition somewhat at variance with his former conclusions, and that he had been mistaken previously, in part at least; and, on June 14, 1917, Dr. Moyer again visited defendant at the sanitarium, and says that defendant was then losing ground rapidly, and that, if he should fail as much in the next two weeks as he had in the past two months, his condition would be

critical. Thereafter, defendant was brought to Manchester, Iowa.

The trial court found, among other things, that, soon after defendant was taken to the sanitarium, plaintiff notified the institution that she would no longer be responsible for her husband's bills, and at the same time filed original notice on the defendant of the divorce suit; and that she has, at all times since, failed and refused to furnish anything towards defendant's support, or for his care or medical treatment; that defendant, at the time of the commencement of this action, and ever since, has been and is now sick, without earning capacity, and without means to support himself, and has no funds with which to defend the action or prosecute his cross-petition; that plaintiff is amply able to provide for her husband, without hardship to herself; that Section 3177 of the Code is sufficient authority under which the court can require plaintiff to pay temporary alimony for the separate support and maintenance of her husband, and suit money to enable him to defend this action and prosecute the cross-petition; and that this is a proper case for such allowance. These findings of fact are sustained by the evidence, and we think the court's conclusions of law are correct.

It is said by plaintiff that defendant voluntarily left his home, before the attempted suicide, and that he did not return to his home when he left the sanitarium. This last is accounted for, doubtless, because plaintiff had already brought a suit for divorce against him, which was then pending. There are one or two preliminary matters that may be considered briefly before going to the principal question.

1. Appellant makes a point that the answer originally filed by defendant was not verified. There was no motion to strike for that reason. The objection was waived. We

have no occasion to pass on the effect of failure to verify a petition. Code Section 3588; *Rush v. Rush*, 46 Iowa 648; *Richardson v. King*, 157 Iowa 287, 295.

1. PLEADING:
want of
verification:
waiver.

We do not find that defendant filed any affidavit himself. It is stated in argument that the defendant's cross-petition was verified, but the abstract does not show that it was verified by the defendant personally.

After Dr. Dittmer's affidavit was filed, he was called for cross-examination, and his evidence shows that, at the time of the hearing of this application, defendant was mentally unbalanced. The evidence on this subject will be referred to more fully in connection with the next paragraph.

2. At the hearing, plaintiff moved that defendant be required to appear in court for cross-examination, for that the motion for temporary alimony is supported by the cross-petition, signed and purporting to be verified by the defendant. She also claimed that such cross-examination would show that none of defendant's net earnings or money or property went into improvements on plaintiff's property, and would show, further, that defendant appropriated large amounts of income from plaintiff's property to his own use, and that there is no foundation in fact for the statements as to the alleged misconduct of plaintiff, as set forth in the cross-petition, and that it will show that defendant has means and property of his own with which to support himself, and pay his attorney, and that his present condition is brought about by his own bad habits and misconduct. This motion to require defendant to appear was supported by an affidavit by the plaintiff, and Dr. Dittmer was then called, who testified, in substance, that, if defendant were called to be examined about his business affairs, his physical condition was such as that he could not undergo such a strain; that defendant wouldn't talk, and wouldn't answer any questions asked by witness; that he would not leave the house without a considerable fight about it,—this due to his mental condition, and that his general physical condition would not warrant it; that defendant formerly weighed 175 pounds, but now weighed

2. AFFIDAVITS:
cross-exam-
ination of
affiant dis-
cretionary. •

107 pounds; that he refuses to take care of himself, or take a bath; that he refuses to have his night clothes changed, and has for months; that he is mentally unbalanced on his own physical condition; that he thinks taking a bath would produce some mysterious thing; that he will not have his teeth treated for pyorrhea. Witness gives his opinion that defendant would not have the mental ability, and would not come into court and defend the divorce case, and that, if defendant were subjected to a cross-examination as to his financial affairs, he would be very much disturbed about it. He thinks the service of the notice of suit at the sanitarium had a very bad effect on defendant, and says that, after that, there was a change for the worse in his condition. This motion was overruled, but without prejudice to plaintiff to renew the application at some future date. The ruling appears in the abstract before the evidence of Dr. Dittmer, but evidently it was after.

The statute provides that, where an affidavit is filed, the person making it may be required to appear for cross-examination. Code Section 4678. We have held that it is a matter of discretion with the trial court whether he will require it. *State v. Bitter Root Val. Irr. Co.*, 185 Iowa 60. See, also, *McCombs v. Travelers Ins. Co.*, 159 Iowa 445. There was no affidavit filed by the defendant,—simply his verified cross-petition; and the proposed cross-examination was on that, and, for the most part, would bear upon the merits of the case. Under the circumstances, we think the trial court did not err in overruling such motion.

3. A party applying for temporary alimony is not required to prove in advance a case entitling to divorce. *Campbell v. Campbell*, 73 Iowa 482; *Wick v. Beck*, 171 Iowa

115, 142; *Main v. Main*, 168 Iowa 353, 360;
3. DIVORCE: wife liable for temporary alimony and suit money. *Barnes v. Barnes*, 59 Iowa 456. The general rule in this state is that it is within the power and duty of a court, where the opposing spouse is without means to make defense, and is in need of maintenance, to require the opposite party to

pay the same, if able to do so. Under such circumstances, the public has an interest in the matter, and public policy, as well as the statutes, authorizes and requires it. Such applications are made more frequently by the wife, for the reason, we assume, that ordinarily the husband controls the finances. The wife would be at the mercy of the husband in his application for a divorce, if she is without means. We see no reason why the same rule ought not to apply where, as here, the suit is by the wife, who has means, and the application made by the husband, who is without means. It may be, as contended by appellant, that, at common law, the wife is not responsible for support or counsel fees for the husband. This seems to be the rule even as to permanent alimony, but there may be statutory authority to the contrary. 19 Corpus Juris 204. We have held that permanent alimony may be awarded to the husband. *McDonald v. McDonald*, 117 Iowa 307. They say, too, that the sections of our statute, Sections 3153 to 3170, in Chapter 2, Title XVI, of the Code, do not change this rule. The contention is that Code Section 3177 provides for a provisional summary remedy to meet the exigencies of a case where the family relationship is broken up, and to provide that, where the obligation of support exists, under Section 3165, Code Supplement, 1913, the court may order provision for support and suit money to prosecute or defend the action. Code Section 3179 provides that, in making such order, the court is to take into consideration the age and sex of the plaintiff, the physical and pecuniary condition, and other pertinent matters. The use of the word "sex" would indicate that it was contemplated that either party could make the application. If it had been contemplated that only the wife could make such application, it would have been unnecessary to use the word. Section 3177 is found in Chapter 3, Title XVI, and we think it is not controlled or conditioned upon the preceding chapter. Section 3177 is a special provision, relating to maintenance and rights of parties during litiga-

tion. An allowance thereunder has been sustained, as within the power and jurisdiction of a trial court. Appellee cites at this point *Hamilton v. Hamilton*, 129 Iowa 628, 630, *Mengel v. Mengel*, 145 Iowa 737 (157 Iowa 630), and argues that the husband, under the circumstances shown here, may make the application and have the allowance, whatever the rule may have been at common law. It is argued by appellant that defendant's mental and physical condition was caused by his habits before the divorce suit was commenced. This may be so, and it may be so determined on the final hearing. But we think the vital point is as to what his condition was and is at the time of the hearing of the application and the trial, and whether he shall be given a reasonable opportunity to defend against the plaintiff's charges, and to prosecute the cross-petition. The order and judgment are sustained and affirmed as to plaintiff's appeal.

4. As to the defendant's appeal, we think, to say the least, that the order of the court as to support was conservative, but it is subject to modification in the district

4. DIVORCE :
insufficient
temporary
alimony.

court, and may be increased or decreased upon proper showing. 19 Corpus Juris 241; *Mengel v. Mengel*, 157 Iowa 630. There

seems to be some bitterness between the parties, and it may be a long-drawn-out contest. The court has a general knowledge, himself, of value of support, attorney's fees, and so on. The principal witnesses for plaintiff were the plaintiff herself and her daughter; and altogether, on this hearing, only five or six other witnesses were used. There is no showing in the application as to the number of witnesses likely to be heard on the trial on the merits, nor the length of time that the trial is likely to last. There was evidence tending to show that it was costing \$20 per week for the care and support of defendant in Manchester, a part of which was being furnished by defendant's sister or other relatives, as we understand it. This showing was in the affidavit of one Klaus, which was filed with the application, who says that such continued

expense is likely to continue for a considerable and indefinite time. It may be that the statement is somewhat indefinite. Defendant has filed in this court an affidavit of one Burrington, who is giving the defendant the care, and has, since August, 1917, and down to January, 1919, who says that, during all said time, his agreed compensation was \$20 per week. This affidavit was not before the district court. Under the circumstances, we prefer that the district court should determine the matter, if any additional proper showing is made there. We assume that the allowance for support and suit money, as fixed by the district court, stands, and will continue from the time it was made until the final hearing, unless modified by the district court, upon a proper and sufficient showing. An application was filed and submitted with the case, asking an additional allowance for attorney's fees in this court, and for printing. Under the rule, the printing will now be paid for by the appellant; but we think there should be an additional allowance for attorney's fees, for preparing the argument and attending oral argument in this court, and \$100 will be allowed therefor. The appeal of defendant is affirmed.—*Affirmed on both appeals.*

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

AGNES LINNEMANN, Guardian, Appellee, v. GUSTA KIRCHNER,
Executrix, Appellant.

PARTIES: Real Party in Interest. One in whose name a contract
1 is made for the benefit of another, or the beneficiary of such contract, may be a party plaintiff to enforce the contract.

LIMITATION OF ACTIONS: Unwritten Continuing and Unexe-
2 cuted Contract. An action to recover sums of money, under a continuing and unexecuted contract for the support of plaintiff's wards, is not barred, though brought more than five years after the expenditures were made.

FRAUDS, STATUTE OF: Party's Direct Obligation. A contract
3 directly binding the obligor for the support and education of
the wards of another is not within the statute of frauds.

PLEADING: Pleading Conclusion. An allegation that "the con-
4 tract alleged * * * is so vague * * * that it cannot be
enforced, and (defendant) denies that said contract has any
validity," is a pure conclusion, and properly stricken on mo-
tion.

ELECTION OF REMEDIES: Single Contract. The doctrine of
5 election of remedies has no application to an action wherein
plaintiff rests his right of recovery on a *single* contract, even
though his testimony is conflicting as to when and where the
contract was made.

APPEAL AND ERROR: Indefinite Brief Point. A brief point which
6 asserts "that the court erred" in a certain ruling, and then, in
substance, directs the court to wander through the reporter's
notes to find the *reasons* for such error, will be given no consid-
eration.

TRIAL: Instructions—Correct But Not Explicit. A correct instruc-
7 tion, but one not just as explicit and all-embracing as counsel
would like to have it, is sufficient, in the absence of a request
for amplification.

APPEAL AND ERROR: "Moot" Questions. Remanding a cause
8 for complete retrial *may* render an assignment of error wholly
moot. So held where the assignment was (1) excessive ver-
dict, (2) verdict contrary to charge, (3) improperly permitting
the belated filing of a claim, and (4) refusal of a continuance.

EVIDENCE: Conclusion. It is objectionable to permit a witness,
9 after reciting what was said, to interject the statement, "He
as much as said that, you know."

TRIAL: Order of Evidence. One may be permitted to show the
10 amount of his expenditures for which recovery is sought, *be-
fore* proving the contract giving right to recover therefor.

EVIDENCE: Hearsay. Testimony that a third party "consented"
11 to a contract is not hearsay when plaintiff's claim is that the
making of such contract was conditional on the consent of such
third party.

TRIAL: Examination—Question Not Revealing Purpose. One may
12 not complain of the exclusion of a question which does not re-

veal what was sought to be proven, and counsel makes no statement of what he expects to prove.

WITNESSES: Transaction with Deceased. The *interest* which will
13 exclude a witness from testifying to a transaction with a deceased must be *direct* and *immediate*.

WITNESSES: Transaction with Deceased—Disqualifying “Inter-
14 est.” A guardian who, under a claim that decedent obligated himself to pay for the care of the guardian’s wards, prays for an allowance *for the wards* from decedent’s estate is, irrespective of her position as a plaintiff, incompetent to testify to the terms of the contract with decedent, *or to any essential fact dependent on the contract* when it appears that, if the prayer be granted, a fund will be created from which the guardian will be personally reimbursed for large outlays made for her wards.

VERDICT: Motion for Direction—Waiver and Effect. A defendant
15 who unsuccessfully moves for directed verdict at the close of plaintiff’s evidence, and does not renew the motion at the close of *all* the evidence, waives error in the ruling; yet he may, in motion for new trial, continue to insist that the evidence is insufficient to support the verdict.

Appeal from Muscatine District Court.—F. D. LETTS, Judge.

JULY 6, 1920.

APPELLEE has verdict and judgment against the said estate, on a claim that C. B. Kirchner, in his lifetime, made verbal contract to pay for the support and education of the said wards of appellee. Hence this appeal.—*Reversed and remanded.*

F. W. & Louise Eversmeyer and J. F. Devitt, for appellant.

Hoffman & Hoffman and Dawley, Jordan & Dawley, for appellee.

SALINGER, J.—I. There are 92 “errors relied on for reversal,” and 61 brief points. The two fill 56 pages of print.

The argument of the appellant upon these covers 118 pages; the reply brief, 31 pages. This is not said by way of criticism. We have no desire to interfere arbitrarily with the conception that counsel have of their duty to their client, nor with their method of presentation. It is said to explain why it is impossible, within the reasonable limits of an opinion, to go into a detailed consideration of all the points raised,—said to justify our limiting consideration to what seems to us to be of outstanding importance, and to matters that may require consideration on another trial.

II. Appellant says that plaintiff does not assert the alleged contract was made with her as guardian; that she pleads it was made with her as an individual; and that

she has made no assignment to the guardian. Upon this, it is urged that plaintiff is not the real party in interest. We hold the point is not well made, if for no other reason than that either the maker or the beneficiary of a contract made by one for the benefit of the other has standing to sue on such contract.

III. The claim of appellee is that one Kirchner, now deceased, orally agreed to support and educate the minor wards of appellee. We hold that such claim is not barred

by Subdivision 6 of Section 3447 of the Code. If the contract alleged was made, it is not yet completed by either party to it. The children are still to be cared for. Money is still to be expended. Appellee could have deferred the beginning of action until the contract had been entirely performed. It is, therefore, manifest that, though she asked for an allowance to carry out the contract completely, and did so more than five years after the contract was made, the statute does not bar her. The

alleged promise is not within the statute of frauds. Therefore, the court rightly struck out of the pleadings the conclusion that the contract relied on "would be invalid for the reason that

1. PARTIES:
real party
in interest.

2. LIMITATION
OF ACTIONS:
unwritten
and unexe-
cuted con-
tract.

3. FRAUDS,
STATUTE OF:
party's
direct
obligation.

parol evidence is incompetent to establish such contract as the guardian attempts to set up." The citations of appellant are cases of a naked promise to meet the obligation of another. If the contract alleged here was made, the promisor did not undertake to discharge the obligation of another, but to induce Agnes Linnemann to expend time and money on the request of the promisor.

IV. There is a complaint asserting that the court erroneously struck out Paragraphs 5, 6, 8, and 10 of the answer of defendant. Paragraph 5 asserts the statute of frauds, and its striking off has been disposed of. Paragraphs 6, 8, and 10 were not stricken at all.

V. Paragraph 3 of the answer had an allegation that
 "the contract alleged by plaintiff is so vague
 and indefinite that it could not be enforced,
 and denies that said contract has any valid-
 ity whatever." This was rightly stricken,
 for being a mere conclusion of law.

VI. No occasion for ordering an election arises where
 but a single contract is relied on, even if
 those who speak to its creation differ as
 to when and where it was made.

VII. One brief point charges error, "for the reason
 that the court erred in admitting testimony on behalf of
 claimant over the objection of the executrix, as shown by
 the shorthand notes of the reporter, taken
 on said hearing, and in support thereof ap-
 pellant cites and relies upon the facts and
 authorities stated in Points 3, 5, 6, 7, 10,
 11, 12, 13, and 14 hereof." Another complaint is the court
 should have sustained that part of the motion for new trial
 which charged that "the court erred in sustaining objec-
 tion to testimony offered in behalf of the executrix, as
 shown by the official report of the shorthand reporter, taken
 upon the said trial, and in support thereof they cite and
 rely upon the facts and authorities set out in Points 23,
 24, 25, and 26 hereof." Another brief point is, "The court

4. PLEADING :
 pleading
 conclusion.

5. ELECTION OF
 REMEDIES :
 single con-
 tract.

6. APPEAL AND
 ERROR : in-
 definite brief
 point.

erred in giving the eighth instruction on its own motion to the jury," and that there was like error as to the ninth instruction and the tenth. We have settled that these are too broad and vague to obtain appellate review.

VIII. As to Instructions 4 and 9, no exception was taken. No complaint now made of Instructions 3, 6, 7, 10, and 11 was raised by any exception to the charge. The

charge terminated liability on attainment of majority, but failed to say that liability would be terminated by the death of either or both of the children before majority. Ap-

7. TRIAL: instructions: correct but not explicit.

pellant complains because such a limitation was not added. The charge was right, as far as it went. The failure to add what should be done if there was a death during minority constitutes a mere paucity, and, as no instruction was offered on the point, that paucity may not now be made the ground for reversal.

IX. The opening statement of counsel for appellee is complained of on the ground that it was an argument on the merits. We have examined the argument set out in the abstract with care, and see nothing in it that makes the permitting it an abuse of discretion. Nor do we feel at liberty to interfere with the discretion the court had, by holding that, as matter of law, the argument went beyond a reasonable and fair statement of what counsel construed that evidence to be which he expected to adduce. In so far as it can be claimed statements made in this opening argument were mere conclusions, there is nothing to consider here, because, as to these, the court sustained objections.

Moreover, it is settled in this jurisdiction that, where there is a reversal on other grounds, the question of misconduct of counsel is a moot one. *Davis v. Hansen*, 187 Iowa 583.

Other complaints raise questions that have become moot. It is said that the verdict is contrary to the charge of the court, and that the verdict is excessive. It may not offend

8. APPEAL AND ERROR: "moot" questions. in either respect on retrial, even if we assumed it did so now. As to the matter of permitting the claimant to file an alleged new claim after she had largely concluded her evidence and was about to rest her case, and the overruling of motion for continuance on that account, these court actions are very largely discretionary. And they have become moot, because, on the new trial, it will be immaterial that a continuance was refused; and the filing of the alleged new claim will have been made far in advance of the trial.

X. A witness was asked what the decedent said, if anything, "about furnishing money." Objection was made that this called for an objectionable statement and conclusion of the witness, and the objection overruled. There was testimony that the decedent said, "Well, he wanted them educated, he wanted them kept together and raised right," and that decedent was anxious for Mrs. Linnemann to take the children, and that she had responded she didn't know how she could take them; that decedent wanted the children to be kept together, where he could visit them; that he would see Mrs. Linnemann was paid for it; that he would furnish the keeping, and that "he as much as said that, you know." This, also, was objected to for being an objectionable opinion, statement, and conclusion; and the objection overruled. In these rulings, we find no reversible error, but suggest that, on retrial, the witness be not permitted to say, "He as much as said that, you know."

XI. Testimony as to what had reasonably been expended in the maintenance and schooling of these children was rightly admitted. Appellee could not make her case by any one piece of testimony. In the event of her succeeding in showing that the alleged contract was made, the testimony as to the reasonableness of these expenditures would bear on the amount of allowance that should be

10. TRIAL: order of evidence.

made. Of course, such testimony avails the claimant nothing, if it shall transpire that she has failed to prove the existence of the alleged contract.

As to the evidence received on what was customary schooling, appellant urges that it should not have been received, because there was no showing as to the surroundings of the parties, nor as to the education or social standing of C. B. Kirchner, throwing light on what he meant by education, if he ever used such a term. No matter what he may have meant by the term, it was still competent to show what it would reasonably cost to educate these children.

XII. There was testimony that, when decedent made the proposal for the care of the children, Mrs. Linnemann said she would have to consult with her husband about it.

11. EVIDENCE: She was questioned as to whether her husband
hearsay. had agreed that she might keep the children. Objection was made that this

called for hearsay, and asked for the conclusion and opinion of the witness. The answer was that the husband felt like the witness did; that they were not prepared to take on any additional expense at that time; but that, when she told him the agreement she had made with decedent, the husband consented, under those conditions, to take the children. A motion to strike urged that this answer was an objectionable conclusion. All these objections were overruled, and we think rightly so. It was all part of an attempt to prove that a contract had been made. On the evidence of the appellee, the making of the contract depended upon the consent of the husband. On that theory, it was proper for her to state that the husband had consented to the making of the contract, and so saying was neither hearsay nor an objectionable conclusion. It was, in effect, a way of testifying that a contract had been completed.

XIII. Barney Kirchner was asked this question:

"You may state whether or not, on Sunday afternoon, prior to the death of your daughter, in February, 1910, you

had a talk with her in which she told you—”

This was objected to on the ground that things were put into the question which the daughter may have told the witness; that it was leading; and that it was an attempt to get evidence before the jury which would be inadmissible if asked as a question. It was sustained, and that ruling is complained of.

The argument assumes that the ruling excluded a declaration by the decedent, and that such declarations were competent to rebut the claim of the plaintiff. There was no proferat, and we do not feel warranted to assume what appellant does.

XIV. Appellant concedes the record does not show decedent knew the children were at Cedar Rapids, but urges that appellee claims the reason that decedent wanted her to take the children was that they should be kept together where he could visit them. Upon this, it is assigned as error that the court excluded testimony that decedent never visited the children at Cedar Rapids. We would not reverse on the point, but suggest that such testimony might well be admitted.

XV. One A. M. Parmeter was objected to, under the prohibition of Code Section 4604. The theory of the objection was that, as grandfather, he might sometime be made liable to support these children, under Section 2217 of the Code of 1897. We hold this objection was rightly overruled, because the liability created by that statute did not make the witness directly and immediately interested, within the provisions of Section 4604.

XVI. The suit is brought by Agnes Linnemann, guardian. Over apt objection, she was permitted to give testimony which tended to establish the contract alleged by her in the claim filed by her. She argues that the reception of said testimony did not violate some of the provisions of Code Section 4604. If that be granted, yet it is of no

12. TRIAL: examination: question not revealing purpose.

13. WITNESSES: transaction with deceased.

14. WITNESSES: transaction with deceased: disqualifying "interest."

avail, if other provisions of that statute do condemn the receiving of her testimony. One of the prohibitions of that statute is that, in such a transaction as this proceeding, no one may testify, if he be a "person interested in the event" of the proceeding. Was this witness thus interested? The claim filed alleged that she entered into oral contract with one C. B. Kirchner, now deceased, by the terms of which Kirchner was to pay for the keeping and education of the children, Bernard and Gladys Parmeter, for whom Agnes Linnemann is acting as guardian. In fair effect, it is further pleaded that, by the terms of this contract, this witness was to take these children in charge, was to keep and care for them, and to supervise their education. There is a further plea that the guardian has already expended large sums of money for that education and for their necessities, and has done so out of means that she has earned, and others which have been given to her by her husband; and it is further averred that a large sum is justly due for the board and keeping and care of these children for a term of years. The guardian introduced receipts, showing payments she had made for the education of these children, and it was put before the court that there had been other expenditures made by her in their behalf, for medical attendance, clothing, and the like. The defense of the ruling receiving the testimony concerning the contract made between Linnemann and Kirchner is indicated in a statement by counsel in open court. It declared that the claimant was not suing for money for herself, but for an allowance to be made to her wards, and that the only purpose of offering these evidences of her expenditures was "to show how much it has been costing these children to live, not with the idea of recovering for it, but to show how much really Mr. Kirchner had agreed to pay out." We are not prepared to hold that, because this guardian was not asking a judgment for herself, for expenditures made by her under the alleged contract, that, therefore, she does not have an immediate and direct interest in establish-

ing the existence of that contract. We feel clear a witness may be so interested as to be disqualified to speak to certain subjects, though he seeks no recovery in the very suit in which he is thus testifying. Witnesses have been held disqualified for interest, though they made disclaimer of the right to recover. That was the holding in *Ivers v. Ivers*, 61 Iowa 721, at 723. There, plaintiff, as administrator of the estate of Martha Ivers, brought action to recover of defendant the value of certain property which, it was alleged, belonged to the estate of decedent, and as to which it was claimed that defendant took possession of and appropriated the same. One Ann Johnson, daughter of the decedent Martha, was inquired of respecting certain personal communications between the witness and deceased. It will be noticed that this heir could get no judgment in that case, but that, if the action went against the defendant, she would have a right to claim a share of the judgment, based upon misappropriation of property of the estate. It was held her testimony was rightly rejected, although she filed a disclaimer in which she "disclaims all interest in this action, or the result thereof, and all and every interest in the personal estate of Martha Ivers, deceased." The holding in this court was based on the statement that "the disclaimer of the witness did not operate as a release of her interest." Surely, a statement by counsel that the testimony of Agnes Linnemann was not offered with the idea of recovering for her what it had cost the children to live, was not a relinquishment of her right to be paid for what she had expended in their behalf, should an allowance be made to pay for the maintenance of the children because the court found that Kirchner had made a contract to pay therefor.

True, we have held that the interest which disqualifies the witness must be legal, certain, and immediate (*Birge v. Rhinehart*, 36 Iowa 369); and that the witness must be interested in the sense that he will either gain or lose by the direct, legal operation and effect of the judgment, or in the sense that the record will be legal evidence for or

against him in some other action (*Wormley v. Hamburg*, 40 Iowa 22). The same rule prevails as to the interest required to permit intervention. *Reard v. Freiden*, 184 Iowa 823. The suit involved whether a promissory note, given for bank stock purchased, should be surrendered by an insolvent bank, and whether plaintiff's status as a stockholder should be canceled, so that, in addition to receiving back his note, he would be released from obligation to contribute as a stockholder. We held the creditors of that bank had the right to intervene. Our argument was that, if plaintiff prevailed, it would diminish what the interveners could collect, and that, therefore, they had the direct and immediate interest required, even on the test whether they would gain or lose by the direct, legal effect and operation of the judgment. We are unable to distinguish this case from that of *Freiden*, in principle. It is as certain as that there will be seed time and harvest that, if this suit fails because the alleged contract is found not to be established, this witness will lose thousands of dollars; that, on the other hand, if she succeeds in proving the alleged contract, she will obtain a fund out of which to satisfy claims she has because she acted under the contract. Though she asked for no direct allowance to her, she did assert that a certain contract was made. She testified to what, if believed, proved she had expended money for things which the contract stipulated Kirchner should pay for. So, she testified to what gave her an immediate right to reimbursement, if an allowance was made to the wards because of the alleged contract. She testified to how much she had expended under the terms of the contract. No one has urged that these expenditures were improper. It may not be argued for this appellee that she testified falsely in saying how much she had expended. If she fails to establish the contract, she loses all this expenditure. For it is quite manifest the little children have nothing wherewith to pay, and, for that matter, it is doubtful whether they could be held to

be under any obligation to repay. With the contract established, she will be reimbursed for a very large outlay. On failure to establish the contract, she must lose this reimbursement, and obtain nothing for her outlays. It would strain reason to hold that she was not interested in the event of this proceeding—was not directly and immediately interested in whether the contract to which she testified should be adjudged to have been made. Her testimony is within both the letter and spirit of the statute. That statute seeks to protect those who have become unable to utter a denial of testimony that seeks to seize estates they have left behind. The reason of the statute rests on the fear that, without it, there will be a tendency to have testimony against one dead, swayed by self-interest. Both the letter and the spirit of the statute, therefore, exclude this testimony that the alleged contract was entered into. The same excludes testimony to the effect of what acts were done in reliance upon the alleged contract. The keeping of and the expenditure for these children is not binding on the estate of the decedent, unless the contract alleged was made. It follows that, if the witness may not speak to the contract, she may not speak to any essential thing dependent upon the contract, or to anything making recovery thereon possible. It follows she may not speak either to the making of the contract or that certain things done by her were done in reliance upon its terms. What she did gives her no right to recover, unless the contract be proved. Prohibited from testifying to the existence of the contract, all evidence which is effective only where the contract is competently established, is prohibited, as much as testimony that the contract was made. We therefore hold that the court erred in overruling the objections to this testimony.

XVII. A motion to direct verdict, made at the close of the testimony for the plaintiff, urged there was no competent testimony of the existence of the alleged contract.

15. VERDICT:
motion for
direction:
waiver and
effect.

This motion was overruled, and was not repeated; therefore, we cannot review its overruling. True, the motion for a new trial repeats that it was error to overrule the motion to direct, but our decisions all agree that nothing is gained by such an exception in motion for new trial. But as well settled is it that failure to repeat the motion to direct does not bar urging in motion for new trial that the verdict returned is not sustained by the evidence. If, then, we must find there is no competent evidence of the alleged contract, so much of the motion for new trial as urges the insufficiency of the evidence must be held to have been well made. As a result of our holding that the testimony of Agnes Linnemann may not be considered, there is no evidence to sustain the making of the alleged contract, unless the testimony of the witness A. M. Parmeter supports the claim that said contract was made. For one thing, this witness states that what he speaks to occurred at a stated time, and on a described occasion; while the testimony of Agnes claims the contract to have been made at a different time and occasion. But waive that,—does the testimony of Parmeter make a case for the jury? To shorten the discussion, let us concede *pro arguendo*, that this witness testified decedent, C. B. Kirchner, proposed to Agnes Linnemann just such a contract as she asserts. The trouble is that, though this is granted, the testimony of this witness is merely a corroboration of the testimony of the plaintiff, wherein she makes clear that she refused to accept the proposition, and took it under advisement, and for consultation with her husband. All this witness heard merely demonstrates that the parties did not come together while he was present. It follows his statement that the children were taken to Cedar Rapids is no evidence that they were taken because of an acceptance of Kirchner's proposal, of which acceptance this witness confessedly knows nothing. Mrs. Linnemann alone is able to supply this missing link, and, as we have seen, is not permitted to do so. We are, therefore, constrained to hold, on the

record before us, that so much of the motion for new trial as asserted the verdict to be without support should have been sustained. This speaks to the case as it now stands, while there is no competent evidence that the contract was made. And she may testify on what she did under the contract if its existence be ever competently shown.

XVIII. Possibly appellants are raising the question whether there is not a total failure to prove acceptance. Assuming that the point is properly before us, we prefer not to determine it on this appeal. Having held there is no competent evidence of a contract, we should not now determine finally whether there is no proof of acceptance. It will be time enough to say whether a jury could find that there was no contract because there was no acceptance, when we have competent evidence in the record to show that a contract was even proposed.

XIX. We stop here, because other complaints presenting alleged errors have been made harmless by our final decision, and because other matters are not likely to occur on retrial.

For the matters disposed of in Division XVII and XVIII of this opinion, the cause is—*Reversed and remanded.*

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

LOVE BROTHERS, Incorporated, Appellee, v. J. C. MARDIS,
Appellee, et al., Appellant.

MECHANICS' LIENS: Personal Contracts with Owner's Agent.

- 1 Contracts by an agent in his own name, (1) pursuant to his contract with the owner, (2) for the benefit of the owner, and (3) with the owner's approval, bind the owner's property, even though the materialman originally supposed he was contracting with the owner's contractor.

PRINCIPAL AND AGENT: Retaining Benefit and Denying Authority. A principal may not retain the benefits of a contract and then deny the authority of an agent to enter into such contract.

MECHANICS' LIENS: Timely Filing. The issue whether a lien was filed within 30 days becomes quite unimportant when it is conceded that the materialman filed within 90 days, and the court finds that he was a principal contractor.

Appeal from Polk District Court.—THOMAS J. GUTHRIE, Judge.

MARCH 10, 1920.

REHEARING DENIED JULY 6, 1920.

SUIT to foreclose a mechanics' lien. There was a decree for the plaintiff, and the defendant Iowa Congregational Hospital Association has appealed.—*Affirmed.*

Craig T. Wright and L. M. Grimes, for appellant.

Halloran & Starkey, for appellee.

EVANS, J.—I. The defendant Mardis is known in the record as the "contractor," and the Hospital Association as the "owner." In August, 1914, they entered into a contract for the construction of a hospital building in the city of Des Moines. Mardis, as contractor, undertook the construction for the Hospital Association as owner. The plaintiffs furnished certain material and performed certain labor in the erection of stairways and elevators in said improvement, pursuant to contract with Mardis. The contract between the Hospital Association and Mardis is denominated in the record as a "percentage contract:" that is to say, Mardis did not agree to construct the building for any fixed price. He did agree to construct the same for actual cost, plus a profit to himself of ten per cent of

1. **MECHANICS' LIENS:** personal contracts with owner's agent.

such cost. The contract constituted Mardis as the agent of the Hospital Association, for the purpose of employing all labor and purchasing all material to be used in the performance of the contract. All his contracts of employment and purchase were to be subject to the approval of the building committee of the Hospital Association. One of such contracts entered into by Mardis was with the plaintiff herein, and out of such contract this suit has arisen. The contract was entered into by Mardis in his own name, and not in the name of his principal. At the time it entered into such contract with Mardis, the plaintiff supposed that it was dealing with him as a contractor. Later, it discovered the terms of the contract between Mardis and the Hospital Association. Thereupon, it claimed to recover from such Hospital Association as its principal debtor. It also filed a mechanics' lien. It claims its right to a lien, either as a principal contractor or as a subcontractor.

The general nature of the defense set up is that the plaintiff had chosen to enter into a contract personally with Mardis, and that it must look to Mardis alone for payment; that defendant is not liable to plaintiff as an undisclosed principal, because Mardis did not assume to act as agent in such transaction, and because, further, Mardis was not authorized as agent to enter into such a contract in his own name; that, in October, 1917, the plaintiff rendered a statement of account to Mardis for an amount then accrued on its contract, being the sum of \$1,200, and that the defendant thereupon paid such amount to Mardis, in the belief that the plaintiff was looking to Mardis for payment. The sum total of plaintiff's contract was \$2,011, of which amount, the sum of \$1,500 has been paid. Defendant pleads also an election by plaintiff to look to Mardis as its debtor, and pleads an estoppel by reason of the defendant's payment to Mardis while the plaintiff was treating Mardis as its debtor.

To put the argument of defendant in a very few words, it contends that, though Mardis was constituted its agent

under its contract, he did not act as such agent in his contract with the plaintiff; that the defendant cannot be held as an undisclosed principal, because Mardis had no authority to represent it as an undisclosed principal, or to enter into contract for defendant in his own name. The briefs on both sides have been devoted largely to the nature and extent of the liability of an undisclosed principal. We may as well assume, preliminary to further discussion, that the defendant would not be liable as an undisclosed principal, unless the contract with the plaintiff was entered into by Mardis pursuant to his contract with the Hospital Association, and unless it was fairly authorized by the defendant, either by the terms of the contract or by the subsequent acceptance of benefits thereunder. There is no question of apparent agency involved. The plaintiff did not enter into the contract in reliance upon any supposed agency, because it knew none. We turn, therefore, to the facts in the record.

The pivotal question of fact is: Did Mardis *intend* to enter into the contract with plaintiff for the benefit of the defendant, and pursuant to his contract with it? If yea, did he exceed his authority by entering into such contract in his own name? We may set forth here sufficient of the contract to throw light upon this question, without assuming to set it out at length:

"This agreement made this 22d day of August, 1914, by and between J. C. Mardis Company, as party of the first part, hereinafter designated the 'contractor,' and the Iowa Congregational Hospital Association of Des Moines, Iowa, second party, hereinafter designated the 'owner,' witnesseth: That in consideration of the mutual agreement herein contained the parties agree with each other as follows:

"First: The contractor agrees that he will construct in the most substantial and workmanlike manner, the following described work, to wit: A 3-story and basement and subbasement, fire-proof hospital building at Fourteenth

and Clark Streets, Des Moines, Iowa. Alternate No. 3 may be accepted by the owner provided he does so within a reasonable length of time. Alternates No. 2, No. 5 and No. 7, are a part of this contract. * * *

“Sixth: The owner hereby appoints the contractor his duly authorized agent for the employment of all labor and purchase of all material necessary for the construction of the work and authorizes the contractor to purchase all said materials for the owner’s account. The owner agrees to pay the weekly pay rolls and all material and other bills direct when same have been passed for payment by the contractor, subject to the conditions set forth in Section eleven (11) of this contract.

“Seventh: The contractor shall receive all material and check same as to quality and quantity. * * *

“Eleventh: The contractor agrees that he will not purchase any materials for the owner’s account for use in the construction of the work unless, or until, the price and quantity thereof has been approved by the owner. He will furnish the owner a statement of the prices of all materials he proposes to purchase; and if within five (5) days from delivery thereof to the owner, the same shall not have been disapproved in writing by the owner, the price or prices shall be deemed to have been approved. The contractor, however, shall have the right to make small purchases from time to time of materials that shall be required, without submitting the price thereof to the owner, and may purchase same without further authority from the owner; the total, however, of any individual purchase shall not exceed three hundred fifty dollars (\$350.00). In case the owner shall disapprove any of the prices submitted by the contractor, the extent of any delay caused thereby shall be added to the time in which this contract is to be completed. * * *

“Twelfth: The contractor agrees to render the owner a weekly statement of all pay rolls and a monthly statement of all expenditures, which the owner agrees to pay to

the contractor within five (5) days after receipt of each statement. * * *

"Fifteenth: Upon final completion and final acceptance by the owner and upon the payment by the owner, to the contractor of the amount then unpaid, and owing to him the contractor agrees to execute and deliver in due form a general release under seal to the owner of all claims, demands and cause of action, of every nature, and to give the owner final and complete receipts and acquittances."

We quote as follows from the contract entered into by Mardis with the plaintiff:

"This agreement made and entered into this 3rd day of April, 1917, by and between J. C. Mardis Company of the first part and Love Brothers, Incorporated, of the second part, witnesseth: That the said Love Brothers, Incorporated, agrees and hereby binds himself to furnish all labor and material necessary to execute and finish complete elevator enclosures and stairs for *Iowa Congregational Hospital* as directed below and according to the drawings and specifications prepared for said work by Proudfoot, Bird & Rawson, architects, for and in consideration of the sum of \$2,011.00 for the work done on the aforesaid building. * * *

"It is further agreed by the party of the first part, that in consideration of the faithful performance of this contract by the party of the second part he hereby agrees to pay the said Love Brothers, Incorporated, the aforesaid sum, 85 per cent to be paid as the work progresses, and in accordance with the terms of the original contract between the first party to this contract and the owner of the property. Final payment to be made within 30 days after completion of the work and acceptance of same by the architects."

We have quoted sufficiently from the contract of plaintiff to show that it purported to be entered into pursuant to the contract of Mardis with the Hospital Association.

If there was anything in the contract between Mardis and the Hospital Association which directly required

Mardis to enter into contract for material in the name of his principal, it must be found in the excerpts which we have above quoted. The defendant relies upon Paragraph 11 of such contract, and especially the first sentence thereof. It will be noted therefrom that the contractor was forbidden to "purchase any materials for the owner's account" until price and quantity had been approved by the owner. It is contended that the phrase "for the owner's account" is the equivalent of "in the owner's name." Assuming that such phrase will bear such construction, it is not a necessary construction. The record contains ample evidence of the construction which the parties themselves put upon it. All the contracts for material entered into by Mardis were in writing. A form of contract was used by him, which is referred to in the record as "standard." All the contracts were written upon such blank form, and were, in that respect, uniform. They all purported to be entered into by Mardis as purchaser. Each and all of them were submitted to the building committee of the Hospital Association in advance of their execution, and were approved pursuant to the original contract. The contract with plaintiff is one of such uniform contracts. No question was ever raised as to the propriety of having these contracts made in the name of Mardis. On the contrary, one member of the building committee testified as a witness that they deemed it probable that Mardis could make contracts more beneficial to his principal by making the same in his own name than he could otherwise. The expenditures under these contracts were all reported by Mardis, as required by his contract with the Hospital Association. On October 9, 1917, he reported expenditures under seven of these purchasing contracts. He asked for partial payments on each of them, to a total sum of \$5,066. One of these contracts so reported was that of plaintiff, and \$1,200 was called for thereunder. The full sum of \$5,066 was paid to Mardis by one check. The foregoing is a sufficient indication of the mutual construction which the Hospital Association and Mardis put upon their own

contract, as to whether Mardis was forbidden to make his purchasing contracts in his own name, or whether it was permissible to him to withhold disclosure of his agency and to enter into such contracts in his own name. It is beyond doubt that the committee of the Hospital Association approved that method of contracting by Mardis, and that it was deemed a performance of his duties as agent, under the terms of his contract with the Hospital Association. The payment made by the committee was in strict accord with such contract. The agreement therein was that the "owner agrees to pay to the contractor within five days after the receipt of each statement." Clearly and concededly it was the duty of Mardis to have applied the sum so paid to him upon the respective purchasing contracts. But his duty arose out of his agency, and was a duty he owed to his principal.

It must be said, therefore, that the contract with plaintiff was entered into by Mardis for the benefit of his principal, and that there was no breach of duty or excess of authority on his part in entering into the same in his own name.

If this question were a doubtful one, the Hospital Association is confronted with an insurmountable obstacle to its defense, in that it has knowingly received and still retains the benefit of the performance of this contract thus entered into in its behalf. It cannot plead a want of authority in its agent to enter into the contract, while it retains the fruit of it.

II. There is some dispute in the record as to whether the claim for mechanics' lien was filed within 30 days from the date of the final performance of the contract. The conclusion which we have reached and announced in the foregoing division renders this dispute unimportant. If the contract of plaintiff is to be deemed a contract with the Hospital Association as principal, then, to that extent, the plaintiff was a principal contractor, and not a sub-

2. PRINCIPAL
AND AGENT:
retaining
benefit and
denying
authority.

3. MECHANICS'
LIENS:
timely
filing.

contractor. If a principal contractor, then concededly its claim was filed in time.

It is also urged that the decree entered in the district court is inconsistent in that personal judgment was entered against both the principal and agent, Mardis. It is true that, ordinarily, if the principal is liable, the agent is not. But this is not necessarily so. It is always in the power of the agent to make himself liable, by a personal undertaking on his part. Whether Mardis did so in this case, we will not inquire. He did not defend, and has not appealed. The question of his liability, therefore, is not before us. The decree entered below must be—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

GLADYS McKENNY, Appellee, v. J. M. DAVIS, Appellant.

ASSAULT AND BATTERY: Other Offenses to Show Purpose. In

1 damage action for lascivious assault, evidence of an unalleged previous and nonremote assault on plaintiff is admissible, as bearing on defendant's purpose in making the later assault, on which recovery is sought.

EVIDENCE: Lascivious Relation of Parties. In damage action

2 for lascivious assault, statements by defendant to plaintiff and others, suggestive of a lascivious disposition toward plaintiff, are admissible, as tending to prove such disposition.

TRIAL: Misconduct in Argument—Inadequate Objection. Objec-

3 tion to improper argument is waived by the objecting counsel by tacitly directing the arguing counsel to proceed with his argument, after a controversy as to the propriety of the argument.

TRIAL: Verdict—Impeachment. Jury-room arguments based on

4 the evidence may not be shown by affidavits.

Appeal from Harrison District Court.—SHELBY CULLISON,
Judge.

JULY 6, 1920.

ACTION for damages consequent upon alleged assaults resulted in a verdict and judgment for plaintiff. The defendant appeals.—*Affirmed.*

J. A. Murray, for appellant.

Burke & Welch and *Robertson & Harens*, for appellee.

LADD, J.—I. The petition is in two counts, one alleging that defendant had assaulted plaintiff about September 1, 1917, with the purpose of having intercourse with her, and the other that he did so about February 15, 1918. After plaintiff had testified concerning the assault first alleged, she swore that, later in the year, defendant came to the house where she lived, and, over objection, was permitted to relate that he then put his arms about her, pulled at her dress, and undertook to get her into an adjoining bedroom, saying that she “would have to come through, because there was nobody there” but the two. She also swore, over objection, that he hurt her by taking hold of and jerking her; that it made her nervous and sick for a month or so. This last evidence tended to show the extent and nature of the assault upon her, and, as we think, was admissible for that purpose. The evidence of the assault itself was clearly admissible, as bearing on his purpose and object in making the assault in February following. *Smith v. Hendrix*, 149 Iowa 255. As pointed out in *Mawich v. Elsey*, 47 Mich. 10 (10 N. W. 57):

“In view of the nature of the injuries charged, and of the issue, it was competent to show, if it were true, that his previous manner towards her had been lascivious, and such as to imply that he was coveting her person. It would not have been the giving of proof of an independent and collateral cause of action; for the offer was

not to show any conduct amounting to a cause of action, nor would it have been proof of matters indicative of general depravity or wickedness, as a ground of argument, that he was hence more likely to commit the acts imputed. But it would have been a submission of evidence to explain surrounding circumstances, and show that the defendant's antecedent manner and state of mind towards the plaintiff had tended in the direction of the particular acts complained of, and that the different incidents were but parts of the same line of conduct; and the evidence, if believed, would naturally have lent credence to the plaintiff's case."

II. Testimony of conversations between the parties hereto over the telephone, in one of which defendant is said to have suggested that plaintiff come to his office, and in

another of which he proposed to go "hazelnut hunting," and said that her husband "did not have to go," was received, over objection. The ruling was correct; for the

2. EVIDENCE:
lascivious
relation of
parties.

purported conversations tended to prove his lascivious disposition toward her. For the same reason, the testimony of Brown, that defendant had said to him that he believed he could put his arms around and hug plaintiff, but could not have intercourse with her, was admissible. He was a married man at the time, and she, with her husband, was in his employment on his farm. Their three children were living with them, and there appears to have been no occasion for his remarks, other than expressing his own inclinations.

III. An attorney for plaintiff, in the course of his argument, referred to the statement of plaintiff's husband, which was stricken on motion, that he had "heard he [defendant] was that kind of a man;" when counsel for

3. TRIAL: mis-
conduct in
argument:
inadequate
objection.

defendant objected, "as improper argument," and thereafter moved to "strike out the argument of counsel as improper."

"Mr. Robertson: I didn't understand that the statement was stricken.

"Mr. Murray: That is all right. If it had not been, you don't need to make any argument about it. Go ahead with the argument, Mr. Welch.

"Mr. Welch: If you want the argument stricken, you can have it go out.

"Mr. Murray: Let Mr. Welch take care of this part of it."

As there was no ruling, the court must have regarded what counsel for appellant said as waiving the objection. As he advised the orator to go on with his argument, instead of taking advantage of his consent that what he said be stricken, there was no other conclusion to reach.

There was but one other objection, and that related to plaintiff's home, and how plaintiff regarded it. This was within the record, and not open to criticism.

4. TRIAL:
verdict: im-
peachment.

Complaint is made that the jury was not instructed for what purpose the evidence of the transaction at the farm should be considered. No instruction of this kind was requested, and, under the well-established rule, in the absence of a request, the court is not required to give such an instruction.

The affidavit of a juror was filed in support of motion for new trial, in which he recited the arguments used in the jury room, based on the evidence adduced, by suggesting untenable reasons for the verdict. Such matters inhere in the verdict of the jury, and may not be established by affidavits. This is so well settled as to not require argument. No fact appears to have been asserted, not shown by the evidence. It was otherwise in *Douglass v. Agne*, 125 Iowa 67, on which the appellant relies.

The verdict was not excessive, and, as we discover no reversible error in the record, the judgment must be and is—*Affirmed*.

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

D. B. MAXSON, Appellee, v. MANSFIELD CRESS, Appellant.

WATERS AND WATERCOURSES: Natural Course of Drainage—

- 1 Evidence. Evidence held to justify the decree of the trial court as to the course of natural drainage.

ARBITRATION AND AWARD: Oral Agreement for Oral Award.

- 2 An oral agreement for an oral award is valid.

FRAUDS, STATUTE OF: Oral Agreement in re Drainage. An oral

- 3 agreement to arbitrate a dispute as to the course of natural drainage over lands is not within the statute of frauds.

Appeal from Linn District Court.—F. O. ELLISON, Judge.

JULY 6, 1920.

ACTION in equity to restrain the defendant from obstructing a natural waterway. Cross-petition by defendant, also praying an injunction. The material facts are stated in the opinion. The court dismissed defendant's cross-petition, and caused a decree to be entered in favor of plaintiff, substantially as prayed. Defendant appeals.—*Affirmed.*

Redmond & Stewart, for appellant.

Voris & Haas, for appellee.

STEVENS, J.—I. Plaintiff is the owner of the N $\frac{1}{2}$ and the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$, and the defendant of the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 31, Township 85, Range

1. WATERS AND
WATER-
COURSES:
natural
course of
drainage:
evidence.

7. He alleges in his petition that, during all of the time referred to therein, and for many years prior to his ownership of the lands described, there was and is a natural

swale or watercourse, extending from a point near the southeast corner of plaintiff's land in a northwesterly direction to a point near the northeast corner of defendant's land, which it enters a short distance south of said corner, and thence, extending in a northwest, westerly, and southwesterly course, crosses defendant's land; that the said swale or watercourse serves as an outlet for large quantities of surface water, accumulating thereon and in the vicinity thereof; that the defendant has placed an obstruction or dam composed of rocks, dirt, and debris of various kinds across said waterway on his 40, near the northeast corner, thereby diverting and causing the surface waters to flow to the north and northwest over the lands of plaintiff, to his great damage. In a second count of his petition, he alleges that, in 1913, for the purpose of permanently settling and adjusting all controversy between the parties as to the natural course of drainage, he and defendant orally selected, and agreed to submit the question to, five farmers residing in the vicinity; that the parties named as arbitrators subsequently viewed the premises, and unanimously agreed and averred that the natural course of drainage was across the lands of defendant, substantially as alleged in Count 1 of plaintiff's petition; and that, notwithstanding said agreement and award, the defendant persists in obstructing said waterway by said dam, as above stated. Plaintiff prays that the defendant be permanently enjoined from interfering in any way with the natural flowage of surface water across his premises, and that he be required to remove the dam, and for damages.

Defendant, for answer, after admitting the formal allegations of plaintiff's petition, denied that a swale or natural watercourse extends from the lands of plaintiff on and across the southwest quarter of Section 31, and avers the fact to be that the natural course of drainage is to the northwest, onto the lands of plaintiff; that one Wallace Thomas, who was then the owner of said northwest quar-

ter, more than 50 years before this controversy arose, caused a ditch, on the south side of the northwest 40 thereof, and for a short distance north and south from the northeast corner of defendant's tract, and intersecting therewith, to be constructed, for the purpose of carrying away the surface water coming from the southeast; and that said system of drainage was continuously maintained thereafter, until the plaintiff permitted the said ditches to become filled and obstructed with earth and debris, causing the water to flow upon the lands of defendant; that the said ditches became an easement appurtenant to defendant's land, and an easement on the plaintiff's land; and that the defendant is entitled to have the same opened and maintained; and, by way of cross-petition, prays that plaintiff be enjoined from allowing same to become obstructed, and that he be peremptorily ordered to remove all such obstructions therefrom, and to keep said alleged drainage system open. Defendant further admitted that an attempt was made to arbitrate the differences between the parties, but denies that the arbitrators selected agreed or made an award, either orally or in writing.

The court found that there was a natural watercourse or swale across the land of defendant, and ordered him to remove the obstruction placed therein, and permanently enjoined him from in any way interfering with the flowage of surface water in the said natural waterway, and dismissed his cross-petition.

It is conceded that the surface waters accumulating thereon and from a somewhat extensive area to the southeast flow, in the natural course of drainage, across plaintiff's southeast 40 toward the northwest; that there is a ditch of small dimensions, extending from the southeast corner thereof the greater part of the way east and west across the south side of the northwest 40, intersecting with a smaller ditch, situated on the southeast 40, extending a few rods south along the east line of defendant's 40, all located substantially as the alleged Thomas ditch; that, about 12 years prior to the trial, the defendant caused a

quantity of rock to be deposited across a depression at a point about 15 rods south and 3 or 4 rods west of the northeast corner of his tract; and that a portion of the rock was removed by him some time after the alleged submission of the controversy between the parties to arbitration.

William Thomas, called by the defendant, testified that he and Thomas Biggs, by the use of a team and scraper, in 1866 excavated a ditch which is designated herein as the Thomas ditch, to distinguish it from a later ditch, which we have designated the Dutton ditch. In this he is corroborated by William Andrews, who, at the time, resided with his mother on the north 8 acres of the southwest 40.

W. R. Dutton, whose father, at one time, owned the Maxson land, testified that he lived thereon for 36 years before plaintiff purchased the land in 1912, and that there was no ditch on the south side of the northwest 40, or east of defendant's tract on the southeast 40, prior to about 1907, when the present ditches were excavated by him; and the testimony of two other men who were present upon the trial corroborates Dutton in all essential details. All of them testified that they excavated the east and west ditch with a 4-horse road grader, and that no ditches were previously visible in that vicinity.

David Newman, another witness, testified that he had lived near the lands in question for 30 years; that he worked for Mr. Dutton about 18 years ago on the Maxson land; and that no ditches were at that time observable thereon.

The defendant and other members of his father's family testified that the ditches were dug as claimed by Thomas, and continuously thereafter kept open. According to the testimony of plaintiff, the purpose of digging the ditch on the south side of the northwest 40, which was done with the road grader, was to construct a road for his private use.

It further appears without dispute in the evidence that a gate opening from the southeast quarter onto the northeast quarter of plaintiff's tract at the northwest corner was maintained for a great many years, and later removed, a short distance east. It is claimed by the older witnesses for defendant that the north and south ditch passed under the gate, and intersected with the east and west ditch, through which the surface waters flowed to the northwest, and finally to the southwest, to the highway along the west side of defendant's 40. Four of the five alleged arbitrators were called on behalf of the plaintiff, and testified that they viewed the premises, carefully observing the elevations of the land and the natural course of drainage, and that it was the unanimous conclusion of the arbitrators that it was across the northeast corner of defendant's tract, near his north line, running thence westerly in a southwesterly direction to said highway. It appears to be conceded, also, that, in time of heavy freshets, the water passing over defendant's land would, to some extent, spread out to the north, over the northwest 40.

The general surface of the lands in question is substantially level, and we are not aided in our investigation by elevations. Defendant places considerable emphasis upon the alleged Thomas ditch, dug more than 50 years ago. No witness was called by plaintiff to deny that a ditch was dug, as claimed by him; but there is evidence that, for more than 36 years preceding the trial, no such ditch was visible; and it is established, without substantial conflict in the evidence, that one Dutton, whose father owned the Maxson land, excavated the present ditch on the south side of the northwest 40, with a 4-horse road grader. It is conceded by him that he subsequently cleaned the ditch out, on two or more occasions. Of course, the evidence of plaintiff's witnesses that no ditch was visible on the premises until one was placed there by Dutton, 12 or 13 years ago, does not necessarily conflict

with the testimony of Thomas and other witnesses who corroborate him as to the existence of the ditches referred to by him. It does, however, tend to show that, for many years prior to the Dutton ditch, the alleged system was not in working condition. It appears that the rock dam complained of was erected about the time the ditches were excavated by Dutton, whether immediately before or after is not shown. The north side of defendant's 40 is in pasture, and it is conceded that there is a depression, fully sodded over, extending west for several rods from the dam. According to the testimony of defendant, the rock and earth were placed there for the purpose of filling a hole, and keeping the water from going west in the depression, or dead furrow, as claimed by plaintiff. Four of the five disinterested parties who were chosen to arbitrate the controversy found, as arbitrators, and gave it as their opinion as witnesses, that the natural course of flowage was across the northeast corner of defendant's tract; thence in a westerly and southwesterly direction across the same to a highway on the west side thereof. Numerous witnesses called by defendant testified that the surface water formerly ran across the northeast corner of his 40, but that it continued in the same direction onto plaintiff's land, and finally to the southwest, across defendant's land, a short distance east of the highway. Manifestly, if the Thomas ditches ever existed, they were placed there for the purpose of preventing the surface water from crossing the northeast corner of defendant's tract, and to carry it around the corner thereof, and west across plaintiff's land. It is impossible to determine from the evidence how long this condition continued, but it appears to us from the evidence that it must have ceased to exist many years before the Dutton ditches were dug, with the digging of which defendant apparently had nothing to do.

It is difficult to determine from the conflicting evidence the exact course of drainage at the point in question; and, while we are left in some doubt thereby, we are disposed to follow the view of the trial court. The ditches, and also

the depression, are very shallow, and indicate that the course of the water may be easily diverted to the west or northwest. We have not attempted to set out all of the facts on either side deemed material by counsel, but have only called attention to a few of the more important matters.

II. It is earnestly argued by counsel for appellant that the evidence wholly fails to establish a completed arbitration of the controversy, for the reason that no award in writing was made or signed by the arbitrators. That there was an oral agreement to submit the matter to arbitration is conceded, but defendant claims that the understanding and agreement were that the award should be in writing, so that it could be recorded. He so testified. Plaintiff, however, denied that anything was said about a written award, and both parties concede that the finding of the arbitrators was to be final, conclusive, and binding upon them.

The five parties selected as arbitrators were mutually agreed upon, and all of them appear to have been notified by defendant of their selection, and he thought the premises were visited and inspected by them for the purpose of settling the controversy. According to the testimony of the arbitrators, nothing was said by them to the defendant about an award in writing. They all agree, however, that, at the suggestion of the other members, Mr. Deekin, after he went home, prepared a brief finding, to which he attached a rough sketch, indicating the natural course of drainage as found, which corresponds in all material respects with the contention of plaintiff. This finding was signed by two of the arbitrators only; but four of them testified that the agreement was unanimous, and that the sketch offered in evidence was in accordance therewith. The remaining arbitrator testified that no agreement was reached, and that they were divided three to two in favor of the defendant. The arbitrators, while on the premises, arranged to meet, on the following day, at a designated

2. ARBITRATION
AND AWARD:
oral agree-
ment for
oral award.

place, and go to a near-by village, for the purpose of signing the award, but, due to a misunderstanding, one of them did not appear at the place agreed upon, and nothing further was done about a written award. The arrangement for an award in writing, as stated, was made at the suggestion of one of the arbitrators, and was not based upon the alleged agreement testified to by defendant.

The record is not clear as to how or when the parties were notified of the conclusion of the arbitrators, but it is manifest that they soon learned thereof.

It is true that the proceedings to settle the controversy by arbitration were informal, but they seem to be within our holding in *Skrable v. Pryne*, 93 Iowa 691. The agree-

ment for an award in writing, testified to by plaintiff, is not, we think, sustained by the evidence. The parties had a right to agree orally to submit their differences to others for settlement, and to bind themselves irrevocably thereby, without the formality of a written award. This they apparently did. Some claim is made by counsel for appellant that the alleged oral agreement to arbitrate is void, under the statute of frauds. This contention cannot be sustained. The agreement did not involve a question of title, or interest in real estate, but went no further than to settle a controversy as to the natural course of surface water. The decree of the court required defendant to remove the dam or obstruction referred to, and not to interfere in any way with the natural flowage of surface water. The decree is in harmony with the facts, as disclosed by the record, and we see no reason for interference therewith. It is, therefore,—*Affirmed*.

3. FRAUDS,
STATUTE OF:
oral agree-
ment in re
drainage.

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

JOHN S. MELIN, Appellant, v. ALBERT E. MELIN et al.,
Appellees.

PARTITION: Collusion in Sale. Bidders at referee's sale in partition may band themselves together for a joint purchase of the property, so long as nothing is done to interfere with free competition in the bidding.

RECEIVERS: Validity of Sale to Receiver. A receiver may purchase, at a referee's sale in partition, the property of which he is receiver, when his position as receiver has brought to him no knowledge not readily available to all interested parties, and there is no opportunity for conflict between his individual interest and the interest of such parties.

Appeal from Webster District Court.—R. M. WRIGHT,
Judge.

JULY 6, 1920.

APPEAL from an order confirming the sale of land by referee in partition.—*Affirmed.*

E. H. Johnson and E. Luther Melin, for appellant.

Price & Burnquist, for appellees.

LADD, J.—I. Upon the death of A. L. Melin, title to his farm of 200 acres passed to his five sons and one daughter. The claim of the latter thereto, by virtue of an alleged contract with decedent, was finally rejected in *Melin v. Melin*, (Iowa) 171 N. W. 20 (not officially reported). Thereafter, sale of the land was decreed, and partition of the proceeds. F. A. W. Johnson was appointed referee, and, after qualifying, sold the land at auction, June 21st, at \$236 an acre. The referee filed his report of a sale to

A. J. Challengren, to which was attached the contract entered into by the referee and the purchaser, from which it appeared that \$2,000 was paid down, \$5,000 was to be paid on October 1, 1919, and the remainder on February 1, 1920. The bid of Challengren was no more than an offer or proposition to purchase, until it had been approved by the court. *Harney v. Crowley*, 184 Iowa 1101. To the approval of the report, Eben L. Melin, one of the six children of decedent, and owner of a one-sixth interest in the farm, interposed objections, in substance, as follows: (1) That the proposed purchaser was receiver, in possession of the farm to collect rents and otherwise manage the same, and disqualified, owing to such fiduciary relation, to purchase at the sale; (2) that there were collusive agreements to depress the price in bidding; and (3) that the price for which the farm had been sold was inadequate.

The evidence failed to establish such inadequacy of price as to warrant the court in interfering with the sale on that ground. Nor was the evidence sufficient to war-

1. PARTITION:
collusion
in sale.

rant the inference that there had been any improper competition. Three persons attending the sale appear to have entered into an agreement to share in paying for the land, and bid with that understanding. It also appears that four others had arranged with Challengren, prior to the day of the sale, to do likewise, and that Challengren was to purchase the same, and the five share in such purchase. But in neither instance was there any arrangement to depress the price to be paid, or to interfere in any manner with the auction. Neither group was shown to have had any purpose of interposing obstacles to the freest competition, nor to have designed obtaining the property otherwise than fairly. Aside from these groups, there were several individual bidders and others present, and the sale, for all that appears, was open, and conducted in all respects in lawful manner. The law does not prohibit men from associating themselves together, with a view of pur-

chasing property at public sales, provided this does not involve interference with that free competition contemplated for all judicial sales. We have been referred to no decision to the contrary, and there is every reason for allowing proposed purchasers to make arrangements for themselves, for the purchase price and disposition of the property, if bought.

II. At about the time the sister interposed her claim that she was the owner of the entire farm, by virtue of an alleged contract with decedent, Challengren was appointed

2. RECEIVERS:
validity of
sale to
receiver.

receiver, to rent the farm, collect rents, and generally to manage the same, pending the litigation so initiated, and the final disposition of the land. He qualified as such, and was acting as receiver at the time of bidding at the referee's sale, and entered into the contract of purchase in consequence of being the highest bidder. It is contended that, because of such relation, he was precluded from bidding or becoming a purchaser at the referee's sale. Had the sale been by him, as receiver, it would have been voidable, and could have been confirmed over the objection of anyone interested in the property. As to whether a receiver in a situation like that of Challengren may become a purchaser at the referee's sale, the decisions are in hopeless conflict. On the one hand, it is said that the receiver is in possession for the benefit of all those interested in the property, and that his relation is that of trustee, and that he owes the duty of acting in entire good faith, and in the interest of the *cestuis que trustent*. Nothing is better settled than that a trustee may not purchase at a sale conducted by himself; and the same rule applies to receivers. The author, in *High on Receivers* (4th Ed.), Section 193, lays down the rule that:

"A receiver is regarded as occupying a fiduciary relation, in the sense that he will not be allowed to purchase, for his own benefit, property connected with or forming a part of the subject-matter of his receivership, or in his

possession in that capacity. The courts will not permit him, any more than any other trustee, to subject himself to the temptation arising from a conflict between the interest of a purchaser and the duty of a trustee. And the rule has its foundation in grounds of public policy, and in the peculiar relation sustained by a receiver to the fund or estate in his custody, which resembles in this respect that of a solicitor, trustee, or any other fiduciary relation of a like nature, where the same rule of equity prevails. Unless, therefore, it clearly appears that it would be for the benefit of the parties in interest to hold the receiver to his purchase, he will not be permitted to derive any benefit from a purchase made by himself of property pertaining to his receivership; and whatever purchase he may make will be held to be for the benefit of the real parties interested, whose interests he as receiver represents, and his purchase will be held voidable at their election. And a court of equity will not ordinarily permit a receiver to become a bidder at a sale of lands of which he had had the previous management as receiver, it being regarded as of great importance to the interests of suitors, and to the faithful discharge of their duties by receivers, that they should be beyond the reach of all temptation to compromise those duties."

See, also, Beach on Receivers, Section 282; Alderson on Receivers, Section 238. It is to be observed that this text does not limit the application to sales conducted by the receiver himself. The principle, as thus laid down, is said to be quite as applicable where the sale is by the receiver of premises in his possession, and made by the referee in partition.

In *Anderson v. Anderson*, 9 Ir. Ch. (1846-47) 23, the receiver sought permission to bid at the sale, alleging that he had made advances in payment of head rent of the premises, and that no other was disposed to bid, and that there was considerable loss in operating the mills. The Master of the Rolls, in denying the application, entertained "a strong opinion of the impolicy, upon obvious principles, of

permitting a receiver to bid for the lands of which he has previously had the management. I do not find that this court has ever been in the practice of so doing; on the contrary, the practice has been not to suffer the receiver to bid. It is of great importance to the interests of suitors, and to the due and faithful discharge of their duties by receivers of this court, that they should be beyond the reach of all influence or temptation to neglect or compromise those duties."

The application was denied, unless there was a showing of peculiar circumstances, justifying the departure from what His Honor conceived "should be the general rule of the court,—namely, not to permit the receiver to bid at the sale of the estate." See *Eyre v. M'Donnell*, 15 Ir. Ch. (1863-65) 534, where the sale of an annuity charged on certain lands to a receiver in possession thereof, was set aside, on application of the vendor's representative.

Nugent v. Nugent, 77 L. J. Ch. (N. S.) 271 (1 British Ruling Cases 405), is directly in point. There, in 1905, the defendant in a partition action, and part owner, was appointed receiver of the rents and profits of a house. Later, a mortgagee obtained an order giving her liberty, as such, to take possession and exercise the power of sale by public auction. Though not taking possession, she put the house up for sale at auction, and, in January, 1906, the defendant, without leave of court, instructed an agent to bid at the auction and purchase the property. On hearing, the trial court held that the receiver could not purchase the property without the sanction of the court, even though the sale was made by the mortgagee, with the leave. On appeal, the ruling was affirmed. The Master of the Rolls, after remarking that "the court, in dealing with this class of cases, does not proceed upon the footing that there has been fraud or improper concealment, or any special advantage taken by the receiver," but that it proceeds upon the general rule that, in cases of this kind, the purchase ought not to be allowed at all, because it is a dangerous thing to allow, as in most cases it is impossible to ascer-

tain whether the receiver has or has not taken undue advantage of his position, proceeded:

"What is the position of the receiver towards the beneficiaries in this case? Plainly, a fiduciary one. That cannot be disputed. It makes no difference whatever that the receiver was herself one of the tenants in common. In that character alone, she would not have filled a fiduciary position; but a receiver must be in a fiduciary position to all the tenants in common, and it makes not a farthing difference whether the receiver was herself one of the owners. Then on what ground can this case be taken out of the usual rule? I fail to see any ground. The receiver, being in this fiduciary position, and having special opportunities of knowing the rentals of the property and the other circumstances, was exactly in that position which, in my opinion, brings the case very plainly and strongly within the rule of the court that a person in a fiduciary position, having special means of knowledge, ought not to be allowed to buy or to bid for the property, without the leave of the court. It is said, and there is a great deal of plausibility in the argument, that this, after all, was merely a house in Brighton, of which there would be no special knowledge. I think we ought to decline to go into that, because, when once we arrive at this point, that the doctrine of the court does not depend on the fact of undue knowledge, but merely on the probability of it, and that the person is in a position where duty and interest are in conflict, we ought not to consider whether, under the special circumstances of the particular property, there is any great probability of fraud."

Other justices concurred, Buckley, L. J., saying:

"A person standing in a fiduciary relation cannot be allowed to put himself in a position in which his interest and his duty may conflict. If he does so, it is not necessary to show that he acted contrary to his duty. * * * When the mortgagee is selling, the mortgagor may, no doubt, owe no duty to the mortgagee to assist him in the

sale; but, if he knows something that may improve the price, it would be his interest to put it forward. The receiver, who stands in a fiduciary relation to the mortgagor, or the parties to the action constituting the mortgagor * * * owes to those parties the duty to do what is reasonably necessary to assist the sale. If, for instance, the mortgagee comes to the receiver and asks for information, the receiver owes to the mortgagor the duty of giving true information to the mortgagee, so as to assist the sale. Sir Michael O'Loughlen, M. R., in *Alven v. Bond* [(1841) Flan. & K. 196], puts this case, which, it seems to me, is strictly in point. He says [Flan. & K. 213, 214], it would be very dangerous to allow a receiver who may be 'employed in the preparation of the rental to be used at the sale (which everyone knows to be one of the most important documents used on such an occasion) to become the purchaser of the estate, without the sanction or knowledge of the court. * * * Very great powers are given to, and much confidence placed in, this officer, who is placed in a situation which would enable him, if inclined to act dishonestly, by reducing the rental or lettings under the court, or otherwise, to bring to a sale under very disadvantageous terms, the property confided to his care, and thus become the purchaser at an undervalue.' Suppose the mortgagee had come to the receiver and said, 'For the purposes of my sale, I want to know what the rents are,' the receiver would have owed to the parties to the suit the duty of telling truly what the rents were, and of not undervaluing them; but if he were going to buy, it would be his interest to say they were less than, in point of fact, they were; and if that is so, it is obvious that it is a case in which interest and duty would conflict. Under those circumstances, it seems to me that, upon principles common to all this class of cases, the receiver cannot buy without the leave of the court."

In *Cook v. Martin*, 75 Ark. 40 (5 Am. & Eng. Ann. Cas. 204), a receiver was appointed, at the instance of attach-

ing creditors, to take charge, collect rents, and pay taxes, and do other things necessary for the preservation of the property, and he purchased the property for his wife, at a foreclosure sale of a mortgagee; and the court, in holding that he acted in violation of his trust as receiver, and directing that she be reimbursed for money paid out, and be deemed to hold title as trustee for the creditors, said:

"While a receiver is an officer of the court, he is also a quasi trustee, and occupies a fiduciary relation towards the parties to the action in which he is appointed; and both by reason of the fact that he holds the property as an officer of the court, and also occupies such fiduciary relation, he will not be permitted to deal with the trust estate for his own benefit or advantage. There is no reason why a distinction should be made between a receiver and other persons occupying a relation of that kind, and the decisions make none. It has often been held that a receiver occupies a fiduciary relation to the parties to the action, and is trustee for all of them who are interested in the property intrusted to his charge by the court, and he cannot deal with or purchase such property for his individual benefit, or for that of any third party. 'It is hardly possible,' said the court in *Jewett v. Miller*, speaking of an attempted purchase by a receiver, 'to state the rule of equity too broadly or too strongly. It will not permit a trustee to subject himself to the temptation which arises out of the conflict between the interests of a purchaser and the duty of a trustee. * * * The rule is entirely independent of the question whether, in point of fact, any fraud has intervened. It is to avoid the necessity of any such inquiry, in which justice might be balked, that the rule takes so general a form.'"

See, also, *Herrick v. Miller*, 123 Ind. 304 (24 N. E. 111); *Donahue v. Quackenbush*, 62 Minn. 132 (64 N. W. 141); same case, 75 Minn. 43 (77 N. W. 430); *Shadewald v. White*, 74 Minn. 208 (77 N. W. 42). The entire subject is covered in *Newcomb v. Brooks*, 16 W. Va. 32, where, after noticing the general rule, the court observes that:

"This rule is not confined to trustees and fiduciaries, in the technical meaning of the words, but it extends to every person who is within the reason of the rule,—that is, to every person who, by his connection with another person, or who, by being employed or concerned in his affairs, has acquired a knowledge of his property; and any such person occupying such confidential relation to another, comes within the rule we have laid down. In other words, the rule implies every relation in which there may arise a conflict between the duty which the purchaser owes the person with whom he is dealing, and his own individual interest."

These decisions announce what is often denominated the extreme English rule, and which, though having much in its support, is subject to the criticism of undertaking to shield the trustee from temptation, to the extent of encroaching upon his freedom of contract, in matters not involving his duties as trustee. If concerned in bringing about the sale at which he is purchaser, as in some of the cited decisions, or if he owe some duty with respect thereto, then there is good reason for adjudging such a sale voidable. It is conceded that the relation must be one in which knowledge, by reason of the confidence reposed, might be acquired, or power exist which may affect injuriously the interests of *cestui que trust*, or advance that of the trustee. If, however, no advantage might be gained by reason of the relation, the principle does not apply. See note to *Credle v. Baugham*, (N. C.) 136 Am. St. 787; *Starkweather v. Jenner*, 27 App. Cas. D. C. 348. Here, the receiver was not in the actual occupancy of the land, but leased the same to tenants, collected the rents, paid taxes and interest, and generally looked after the farm. Such relation to the parties cannot well be said to have afforded special means of knowledge, nor to have conferred power to affect injuriously the interests of the tenants in common. Other bidders at the sale had the same opportunities as had he, to examine the land. He owed the tenants in common no duty with respect to the sale by

the referee, even though standing in the relation of trustee toward them as *cestuis que trustent*, in the matter concerning the income from the land. Surely, his position as trustee conferred no power with reference to the sale; and as to farm land, no special opportunities of knowledge not enjoyed by others on examination were enjoyed. It is not necessary to go to the extent of many decisions in upholding the right of trustees to bid at judicial sales not brought about by themselves. No general rule with reference to these can be laid down, save that, to permit of being purchasers, their relation must not be such as to bring into conflict their individual interest with that of the trustee. We think this the true test; for, even though the trustee be in charge or possession of the property, if his duties with respect thereto are not such as that becoming a purchaser would put his individual interests in antagonism with his duties as trustee, there could be no temptation to go wrong, and they ought not to preclude him from bidding at such a sale.

The decisions are too numerous for citation, and we are content with saying that there could not well have been such conflict in the case at bar, and for that reason, we affirm the ruling by which the sale was confirmed.—*Affirmed.*

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

JAMES MORTENSON et al., Appellees, v. GILBERT KNUDSON,
Administrator, Appellant.

LIMITATION OF ACTIONS: Tolling Statute—Oral Promise to Pay

- 1 Existing Matured Debt. An oral promise to pay, at a future date, an already matured claim, does not toll the statute of limitation.

EXECUTORS AND ADMINISTRATORS: Estate Debtor May Not

- 2 Transfer Title to Claim. The oral promise of one who is in-

debted to a decedent's estate that he will pay the claim to decedent's sole surviving heir, is ineffective to transfer title to such promisee,—title still remains in the estate.

CONTRACTS: Existing Matured Debt as Consideration. An existing, matured claim will not, of itself, furnish a consideration for an oral promise to pay such claim *at a future date*.

LIMITATION OF ACTIONS: New Promise to Avoid Bar on Old Promise. An oral promise to pay, *at a future date*, an already matured claim, creates no *new* cause of action.

DESCENT AND DISTRIBUTION: Ownership of Claim—Evidence. Evidence held insufficient to show that a claim did not pass to the surviving husband and heirs.

TRIAL: Instructions—Nonapplicability to Pleadings and Evidence. Instructions are erroneous when wholly without support in the pleadings and evidence.

WITNESSES: Transactions with Deceased—Surviving Husband and Heir. One who, as surviving husband and heir, is part owner of a claim against a deceased, is incompetent to testify to personal transactions and communications with the deceased, touching the validity of the claim.

APPEAL AND ERROR: Appeal by Administrator—Nonconsent of Court. An administrator may, without obtaining the consent of the court, appeal from the allowance of a claim against the estate.

Appeal from Hamilton District Court.—R. M. WRIGHT, Judge.

MARCH 16, 1920.

REHEARING DENIED JULY 6, 1920.

CLAIM for \$3,900 against the estate of the decedent, based upon an account for services rendered by the grandmother of the plaintiffs to the decedent for a period of 26 years. There was a trial to a jury, and a verdict for the plaintiffs for the full amount claimed. The defendant has appealed.—*Reversed and remanded.*

O. J. Henderson, for appellant.

Wesley Martin and *S. S. Smith*, for appellees.

EVANS, J.—I. The account sued on began more than 40 years ago, and had fully accrued more than 14 years ago. The more prominent questions involved in the case are:

(1) The title of the plaintiffs to the alleged cause of action.

(2) The avoidance of the statute of limitations.

(3) The incompetency of the chief witness for the plaintiffs to testify, under the inhibition of Code Section 4604.

Briefly, the case set forth by plaintiffs is that Melinda Jacobson entered the service of the decedent, Nels Jacobson, in 1878, at \$3.00 per week, and continued in such service

1. LIMITATION OF ACTIONS: tolling statute: oral promise to pay existing matured debt. until the day of her death, November 25, 1904; that she left surviving her an only child, Bertha Mortenson, the wife of Ole Mortenson, who is the chief witness for plaintiffs; that, in August, 1913, Bertha Mortenson died, leaving surviving her her husband and six sons; that, in the year 1917, one of these sons, Melinius, died unmarried, leaving his father surviving him as only heir; that the decedent, Nels Jacobson, died March 14, 1918; that the five plaintiffs are the only surviving sons of Bertha Mortenson. These five plaintiffs claim to take, not as heirs of their mother, but under and by virtue of an alleged contract with the decedent. The question when and with whom such contract was made, is to be considered later.

We have first to consider and to construe the petition of the plaintiffs. It avers as follows:

"That, at the time of the death of the said Nels Jacobson, he was indebted to the plaintiffs in the sum of \$3,900, and interest thereon at the rate of 6 per cent per annum since November 28, 1904, by virtue of the following facts, to wit:

"That, on and between June 1, 1878, and November 25, 1904, both dates inclusive, one Melinda Jacobson, the grandmother of the plaintiffs, performed labor and services as housekeeper for the decedent, at his request, of the reasonable and agreed value of \$3,900.

"That, on November 25, 1904, the said Melinda Jacobson died intestate, in Hamilton County, Iowa, leaving her daughter, Bertha Mortenson, her sole heir at law.

"That, on said November 25, 1904, the decedent, in consideration of the debt then due from him to the estate of Melinda Jacobson, did promise to pay the said sum of \$3,900, with legal interest, to the said Bertha Mortenson or her heirs and assigns, payable upon the death of decedent.

"That, on June 6, 1913, the said Bertha Mortenson died intestate, in Hamilton County, Iowa, leaving her heirs at law Ole M. Mortenson, her husband, and these plaintiffs.

"That, at various times subsequent to the death of Bertha Mortenson, the deceased, Nels Jacobson, recognized and affirmed the debt due from him to Melinda and Bertha, as aforesaid; and particularly, on or about October 24, 1917, the said Nels Jacobson, at Hamilton County, Iowa, in consideration of the debt due to Melinda and Bertha, as aforesaid, did promise and agree to pay to these plaintiffs the amount due Melinda at the time of her death, to wit, the sum of \$3,900, with legal interest since November 25, 1904, the same to be payable upon the death of the said Nels Jacobson."

Later, an amendment to the petition was filed, as follows:

"That, on or about November 25, 1904, the decedent, in consideration of the services performed for him by Melinda Jacobson in her lifetime, did promise to pay to the children of Bertha Mortenson who should survive the decedent, the plaintiffs herein, in the event that the said Bertha Mortenson should predecease the said Nels Jacobson, the sum of \$3,900, with legal interest, the same to be payable upon the death of the decedent."

Though this petition pleads alleged promises, made on different dates, it fails to state to whom such promises were made. Apparently for the purpose of correcting this defect, another amendment was filed, which averred that all the alleged promises were made to the "promisees in said claim named." No promisees are, in fact, named in said claim or petition, and this amendment adds nothing to the petition in its original form.

Construing the petition in the light of the evidence offered in support of its allegations, it appears from such evidence that the alleged promise of November 25, 1904, was made two days after the death of Melinda, and was made to Bertha and Ole Mortenson; and that the alleged promise of October 24, 1917, was made to Ole Mortenson, the father of these plaintiffs.

Analyzing the petition, it pleads the following successive contracts:

(1) A contract with Melinda for her services at \$3.00 per week.

(2) A contract with Bertha, after the death of Melinda, whereby the decedent agreed to pay to Bertha and to her heirs and assigns, at the death of decedent, the amount due Melinda.

(3) A contract with Bertha that the decedent would pay such debt to such of the children of Bertha as should survive the decedent.

(4) The contract of October, 1917, with Ole Mortenson, that the decedent would pay such debt to the surviving children of Bertha.

The plaintiffs have rested their claim upon the third and fourth contracts above stated, and not upon the first or second.

The defendant pleaded a general denial and the statute of limitations and a defect of parties, in that Ole Mortenson was a necessary party, as the only heir of Melinius Mortenson, and as the surviving husband of Bertha.

The difficulties confronting the plaintiffs are that, if

they should rely upon the original contract with Melinda, which, under both their pleading and their evidence, was a simple contract for services at \$3.00 per week, then the statute of limitations, unless avoided, would bar recovery. Furthermore, even if such bar could be avoided, Ole Mortenson would be a person in interest, both as surviving husband of Bertha and as the sole heir of Melinius, and would, therefore, be incompetent to testify to the many transactions to which he did testify. To eliminate such evidence would be to eliminate the case.

The theory put forward by the plaintiffs is that the original contract between Nels and Melinda furnished a consideration for the subsequent promises, and that these subsequent promises had the effect to toll the running of the statute of limitations.

Taking the testimony on behalf of plaintiffs, Melinda had been in the service of the decedent up to the time of her last illness. This last illness continued for many months, during which she was in charge of a nurse. It is manifest, therefore, that her cause of action, if any, had accrued either at the time of her death or some months prior thereto. Suppose it be true, therefore, that, after the death of Melinda, Nels promised Bertha that he would pay her the indebtedness at the time of his death. Would such promise toll the statute of limitations which was already running? If yea, then a promise that he would pay it within 10 years would be equally effective. We suspect that counsel would hardly contend for this latter hypothesis, as sufficient to toll the statute. But if not, why not? What reason can be given for saying that an oral promise to pay an accrued debt at the time of promisor's death would toll the statute, and that a like promise to pay at the expiration of 10 years would not toll the same? The statute expressly provides the methods and conditions under which the running of the statute is tolled. Among others, a written promise or a written acknowledgment is provided. No authority is cited to us wherein it has ever been held that an oral promise to pay at a later date will

toll the running of the statute upon an account already accrued. Closely associated with the question of validity and effect of this promise is the question of alleged title of the plaintiffs to the cause of action which accrued to Melinda, and whether there was any consideration for the later promise upon which the plaintiffs rely. We turn to these questions.

II. Suppose it be true that, after the death of Melinda, Nels orally promised Bertha to pay to her the amount due to Melinda. Or suppose that, after the death

2. EXECUTORS
AND ADMIN-
ISTRATORS:
estate debtor
may not
transfer title
to claim.

of Melinda, Nels promised to pay the amount due Melinda to the boys of Bertha. Would either of those promises carry to Bertha or to her boys the title or ownership of such claim? Was Nels any less indebted to the estate of Melinda after such promise than he was before? If the administrator of Melinda's estate had demanded from him the payment of such claim, could he have defended on the ground that he had promised to pay it to Bertha or to her boys at the time of his death? It is only fair to counsel for plaintiff to say that they do not claim that they thereby acquired title to Melinda's claim. Their real claim is that the subsequent promise of Nels to pay to Bertha and her boys was valid and binding, such promise being first made in 1904 and repeated in 1917. The query might well be raised here that, if such promise rendered Nels no less indebted to the estate of Melinda than he was before the promise, what consideration was there for the promise to Bertha and her boys?

If we look upon Bertha as the sole beneficiary of her mother's estate, and if we assume that there were no debts or expenses to absorb any part of such estate, then Bertha

3. CONTRACTS:
existing
matured debt
as consid-
eration.

might, in an equitable sense at least, be deemed the owner of such claim which had accrued to her mother. Then, by the promise of Nels to pay her at a future time, she got nothing more than she had before. This only brings us back to

where we were. We have an oral promise to pay in the future a debt already due. The only consideration for the promise was the existing debt. It was not binding upon her. It could not have been pleaded as a defense against her, if she had brought a suit to recover through the medium of an administrator.

If such subsequent promise could not have been pleaded as a good defense against her, neither is it available as a cause of action in her favor or in favor of her boys.

It is clear, therefore, that the only valid agreement or promise disclosed in the petition is that between the decedent and Melinda, and that whatever title to such cause of action is held by the plaintiffs is so held by them as the heirs of their mother, Bertha, who took the same as sole heir of her mother, Melinda. The alleged subsequent promises may have been properly shown as proof of the existence of the original cause of action, but they added nothing to the cause of action itself, and took nothing away therefrom. What the cause of action was in the life of Melinda, it still is, unless barred by the statute.

4. LIMITATION
OF ACTIONS:
new promise
to avoid bar
on old
promise.

Even if the new promise made by Nels had been in writing, duly signed, it would not constitute a new cause of action. It would be effective, under the statute, only to revive the original cause of action, or to extend its life by tolling the statute of limitations and starting it anew. This is the settled law in this state. *Frisbee v. Seaman*, 49 Iowa 95; *Bayliss v. Street*, 51 Iowa 627.

In *Price v. Price*, 34 Iowa 404, a subsequent oral promise by the debtor was relied on, which deferred the maturity of the debt to a future time, when the creditor "should get married." That is to say, the debtor made a subsequent promise to pay the debt when the creditor "should get married," and the creditor assented thereto. It was held that such alleged new contract was ineffective, and not binding upon either party, in that it lacked consideration, either of benefit to the one or prejudice to the other. To put it in another way, such an agreement does not

amount to a binding contract, because it lacks subject-matter.

Applying the holding in the *Price* case to the alleged agreement first made with Bertha on November 25 (or 27), 1904, whereby Nels agreed to pay the amount due the estate of Melinda at the time of his own death, nothing was gained or lost by either party. Without such promise, the estate of Nels would be liable for the debt, if such, unless it were sooner extinguished, either by payment or by the statute of limitations. With such promise, such liability was neither greater nor less.

The alleged promise of October 24, 1917, was made 4 years after the death of Bertha. But the statute had fully run before the death of Bertha. Such oral promise was not sufficient to revive the original cause of action, as held in the *Price* case, *supra*; nor was it sufficient to constitute a new cause of action, as held in the *Frisbee* and *Bayliss* cases, *supra*.

III. We do not overlook the emphasis laid in the pleading and in the argument of plaintiffs upon the provision in the alleged promise of Nels to Bertha which attached the condition that she should survive him, and provided, as it were, a sort of contingent remainder in her sons who should survive him. Assuming that it were competent in such manner to qualify and distribute the title to the original cause of action, we do not find support in the evidence for this particular feature of the alleged promise. The case for plaintiffs rests wholly upon the testimony of Morten Mortenson, one of the plaintiffs, and Ole Mortenson, the father of the plaintiffs.

In proof of the original contract between Nels and Melinda, Ole Mortenson testified to a conversation held in 1890 or 1891, on the "east side of Nel's house," as follows:

"A. Melinda and I were talking of the way she came to work for Uncle Nels. Uncle Nels came from the house and stopped, and she repeated the conversation. She said, when Uncle Nels bought the farm, he sent for her to come

5. DESCENT
AND DIS-
TRIBUTION:
ownership
of claim:
evidence.

as a housekeeper, and that he would pay her the same as she had worked at. Uncle Nels said, 'That is right.' She said she had \$3.00 a week, and when she came there, Uncle Nels offered her the same, and that is the way she came to work for Uncle Nels; and Nels said, 'That is right.' "

He testified also to a conversation with Nels, "two days after she [Melinda] died," as follows:

"A. Nels says: 'I will take care of Melinda as a sister. I will give her a funeral. She has been working for me 26 years, and I have paid her nothing. What I owe Melinda shall go to Bertha and her boys.' "

He also testified to a conversation overheard by him between Bertha and Nels, as follows:

"A. Bertha asked Uncle Nels how much he owed her mother. Nels said, 'I owe her \$3.00 a week, with interest.' He said in Norwegian, 'Interest and interest interest.' Bertha said she would not be hard on him, and said, 'You can give me a paper.' Nels says, 'No, you—if you live—or your boys shall have it after I die. It can be paid when I die.' "

He testified also to a conversation between him and Nels, had on the evening of the day before Bertha died, as follows:

"He said, 'I would have settled with Bertha, but I didn't, and I am going to settle with the boys.' He says, 'If you will take care of what you have got, you have got enough. I don't want you to have anything, but what little there is, is going to go to her boys.' He said that more than once, that I shouldn't have a cent of his estate."

At this time, the six sons of Bertha were living. The next alleged conversation testified to by him was had in October, 1917, as follows:

"A. He said: 'If anything should happen me between now and then, I will either write you or wire you. I have found out that the court will allow these boys all earnings of my sister that worked for me.' He said, 'Figure her wages \$3.00 a week, with interest and interest interest, and be sure that you get it figured or figure it.' He said, 'You

can get somebody that knows how to figure it.' He told me to take the first year with my given amount, and there will be no interest on it, but you put that out at interest the next year, and you add a little interest to it, 6 per cent, or whatever it may be, and from then on until the time it expires."

He testified also to the next conversation as having been had with Nels on the day of his death, as follows:

"A. He said that I should close the door; he wanted to talk to me alone. He told me that I should go get the key for a little chest he had that he had money in and some papers, a bank certificate, but how much he didn't say, but he said he had \$265 in money. He says, 'You go and get the key and open that chest, and take that money for your expense coming down to see me.' He said: 'I have been worried all night that I have even dreamed about it; and I am sorry that I didn't get this fixed up between me and the boys before now. I dreamed about it that the Jacobsons will tear everything to pieces for the boys.'"

Morten Mortenson, one of the plaintiffs, testified to a conversation between Nels and Bertha in 1904, as follows:

"I remember the conversation between my mother and Nels. I did not take part in the conversation. It was in the kitchen. He was washing the cream cans. He said, 'Melinda is dead, and I paid her nothing for this; but if you live over me, you shall have what is left, and if you don't, and I live over you,' he says, 'I will make it to your boys, and have what is hers.'"

The witness was 8 years of age at the time of such conversation. This witness testified also to a conversation had in January, 1918, between Nels and one Carl, his hired man, as follows:

"A. Carl asked Nels what he would do with the property. He said, 'I ain't got nothing made up. And when you are dead,' he said, 'it will be all torn up.' Nels said he knows where it is going. He says: 'It will all be taken care of. You don't need to worry about that. The agreement between Melinda and I was that, if she lived over I,

she should get it, and if she died and Bertha lived over us, she should get it. Now both of them are dead,' he says, 'and I am left, and the agreement was that Bertha's children should have what is left for her work.' And he paid her nothing for the time she had been there, and she should have \$3.00 a week, with interest, for 26 years. That was between 10 and 11 o'clock at night. * * * 'Now,' he [Carl] said, 'you ain't got no papers made, and it will be all torn up.' 'Don't worry,' he said, 'about that.' He said, 'That is all fixed.' He said: 'The agreement between Melinda and I that, if Melinda lives over me, she is to have it, and if Bertha lives over me, she is to have it; and now they are both gone, and the agreement was between Melinda and I to pay Bertha's children.' "

It will be seen from the foregoing testimony that it disclosed no diminution or qualification of the title of Melinda as sole payee of the debt due her for her services; nor of the later title of Bertha as sole heir of Melinda; nor of the title of Bertha's boys as her only heirs, and of her surviving husband as such. It is clear, therefore, that, if this claim had escaped the bar of limitations, the title thereto would have passed, subject to administration, to the surviving husband and heirs of Bertha.

Some references contained in the foregoing testimony find their explanation in other conceded facts. Nels was an unmarried man. He died intestate, leaving property consisting, in the main, of a farm of 80 acres. His only heirs were the children of his only brother, and these grandchildren of his only sister Melinda. In other words, "Bertha's boys" would take, under the law, one half of the estate. In so far, therefore, as the petition purports to show a deflection of the title of this claim from the legal line of inheritance, it is not sustained by the evidence.

IV. The case was submitted to the jury under instructions that were very general in form. Apart from formal matters and the statement of issues, the whole case was gathered into the second paragraph of Instruction

6. TRIAL: IN-
structions:
nonapplica-
bility to
pleadings
and evi-
dence.

III, on burden of proof, as follows:

"(2) That Nels Jacobson agreed and promised that he would cause compensation to be paid, for such work and labor, to Melinda Jacobson personally, in the event that he should die before she did; but, in the event that he should survive the said Melinda Jacobson, but should die before the death of Bertha Mortenson, then, in such event, on his death, he would cause said compensation to be made personally to Bertha Mortenson; but, in the event that he should survive both Melinda Jacobson and Bertha Mortenson, then, in such event, compensation, on his death, for said services for said work and labor, should be paid to the children of the said Bertha Mortenson."

No question pertaining to the operation of the statute of limitations was submitted to the jury.

It will be noted from an analysis of this instruction that it was predicated upon the hypothesis that the original agreement between Nels and Melinda not only deferred payment of the claim until the death of Nels, but that it qualified the title of Melinda, so that she could not have controlled the disposition of the claim by will or otherwise. The twofold objection to this hypothesis is:

(1) That it has no support in the petition.

(2) That it has none in the evidence.

The submission of the case on this hypothesis doubtless explains why the question of the statute of limitations was not submitted to the jury.

The foregoing is, perhaps, a sufficient discussion of the questions presented by pleading and evidence to indicate the reasons for the conclusions which we reach. By way of recapitulation, these conclusions may be specified as follows:

(1) The title of Melinda Jacobson to the original claim now sued on was unqualified and unconditional, and was fully accrued and payable at the time of her death.

(2) That Bertha succeeded to such title, subject to the rights of administration.

(3) That Ole Mortenson, as surviving husband, and her six sons, as her only heirs, succeeded, subject to administration, to whatever right or title subsisted to Bertha at the time of her death.

(4) That the statute of limitations had fully run against such claim, long before the death of Bertha.

(5) That the alleged promises subsequent to the death of Melinda to make payment at a deferred time were wholly ineffective, either to toll the statute of limitations or to constitute new causes of action.

(6) That, if avoidance of the statute of limitations were disclosed, Ole Mortenson, as a witness, must be deemed to come within the inhibition of Section 4604.

7. WITNESSES :
transactions
with de-
ceased : sur-
viving hus-
band and
heir.

(7) The defendant's objections and his motion to strike should have been sustained, as to much of the evidence of Ole Mortenson.

(8) The defendant's motion for a directed verdict should have been sustained.

V. The appellee has presented a motion to dismiss the appeal, on the general ground that this litigation is over a claim in probate, and that the administrator had no

8. APPEAL AND
ERROR :
appeal by
administra-
tor : non-
consent of
court.

power to ignore the finding of the trial court, or to appeal therefrom without permission of such court. If it be necessary for an administrator, in such case, to ob-

tain the permission of the trial court, in order to prosecute his appeal here, such condition has been met by the granting of such permission by the trial court. We know of no reason, however, why such permission should be essential to the appellate jurisdiction of this court. Where litigation against an estate is contested in good faith by the administrator, the trial court sustains no closer relation to the administrator than he does to the claimant. In such a contest, the rights of the administrator are disposed of by the ruling and judgment of the court, precisely as the rights of any other litigant. If his rights are identical

with those of other litigants in the trial court, we can see no reason for finding that they are any different in this court. The motion to dismiss is, therefore, not well taken. The judgment below must, therefore, be—*Reversed and remanded.*

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

OSKALOOSA SAVINGS BANK, Appellee, v. ELIZABETH MILLER,
Administratrix, Appellant.

APPEAL AND ERROR: Notice of Appeal—Coparties. The appellate court has no constitutional power to consider an appeal, when a reversal would take something substantial from a coparty not served with notice of appeal. So held where a reversal would deprive a nonserved coparty of his declared right to inherit.

Appeal from Mahaska District Court.—K. E. WILLCOCKSON,
Judge.

MARCH 10, 1920.

REHEARING DENIED JULY 6, 1920.

JOHN W. McMILLAN died before his wife, Mary Ann McMillan, and died testate. Mary Ann McMillan and her son, W. H., executed a note to appellee, Oskaloosa Savings Bank. This is a controversy over whether Mary A. McMillan has an interest in the estate of her predeceased husband which may be subjected to the payment of said note. In effect, the trial court held that she had such an interest, and the administratrix appeals.—*Dismissed.*

W. H. Keating, for appellant.

Burrell & Devitt, for appellee.

SALINGER, J.—I. Appellee moves a dismissal because no notice of appeal was served on W. H. McMillan. Section 4111, Code, 1897, which requires service on coparties, creates no substantive law. Before the passage of that statute, this court lacked the power to settle controversies where there was a fatal defect in parties. That is still so. It is a denial of due process of law to act, if necessary parties are not before the court. This statute merely declares how a fatal defect of parties may be avoided. It takes the place of summons awarded at common law, on motion of the plaintiff in error, that other parties join in the appeal, and of the severance granted on refusal which permitted that plaintiff to prosecute the appeal alone.

No appellate court may take anything from one over whom it has not acquired jurisdiction. This statute provides the means for obtaining that jurisdiction. While it is in partition suits that refusals to entertain appeals for lack of parties have most frequently occurred, such refusal is not, as appellant seems to urge, partition law. The limitation upon judicial action is, in essence, that no reversal shall take away anything from one who is not brought into court.

The failure to serve the notice required by this statute is, strictly speaking, not a failure to obtain jurisdiction for the appellate court. It may decide the appeal, provided it is unnecessary to pass upon any issue that affects the party not brought into court. The notice, in strictness, does not more than give power to consider matters involving the interest of the party notified. *Clayton v. Sievertsen*, 115 Iowa 687, at 688. But it is the text of Elliott's Appellate Procedure, Section 144, approved in the *Sievertsen* case, that such notice, "certainly is jurisdictional wherever the nature of the case is such as to render it necessary to have all the parties before the court, in order to fully determine their rights." And, if there may not be a reversal without prejudicing parties who have not been served, the appeal must be dismissed. *Clayton v. Sievertsen*, 115 Iowa 687, at 689. As was said in *In Re Will*

of *Downs*, 141 Iowa 268, a contested proceeding to probate a will:

"While the failure to serve coparties does not prevent this court from acquiring jurisdiction if there is a notice of appeal which is sufficient as to adverse parties, nevertheless, the court will, on proper objection being made, refuse to entertain the appeal, if the coparties not served might be prejudicially affected by a reversal of the judgment from which the appeal is taken."

We held, in *Clayton v. Sievertsen*, 115 Iowa 687, at 689, that appeal must be dismissed if any modification would help the appellant at the expense of the coparties who were not served. We may act only if reversal will not materially disturb the rights which one not served with notice has obtained in the court below. *Dillavou v. Dillavou*, 130 Iowa 405. To the same effect is *McCarty v. Campbell*, 166 Iowa 129, and *Laprell v. Jarosh*, 83 Iowa 753, and *Ash v. Ash*, 90 Iowa 229, which adds that, if the notice of appeal be not served, it will not give jurisdiction that the one not served makes voluntary appearance in the Supreme Court. To like effect is *Hunt v. Hawley*, 70 Iowa 183, wherein we said that:

"It is, therefore, useless to go through the idle form and ceremony of considering the merits of this action, when we are powerless to render any judgment other or different from that entered in the court below."

The cases relied on by the appellant do not aid her. On the contrary, their reasoning militates against her appeal. In *Capital Food Co. v. Globe Coal Co.*, 142 Iowa 134, 136, we found affirmatively that a reversal could not affect the party who was not served, if, indeed, he were a party at all. In *Douglass v. Agne*, 125 Iowa 65, at 69, it is found affirmatively that a reversal could not affect the liability of the person not served, even if he were deemed a coparty. And in *Padden v. Clark*, 124 Iowa 94, it was held that service of notice of appeal on the members of a partnership was unnecessary, where, though the suit was originally

against the partnership, it was so changed as to be a suit against one partner in his individual capacity, and he had notice.

II. It follows there is but one question to be determined on this motion, to wit: May we reverse the order of the trial court on the appeal of this administratrix without of necessity taking something substantial from W. H. McMillan which he was given in the trial court?

In view of the disposition made of the appeal, it becomes unnecessary to speak fully of what was done below. For the purposes of the decision here, it suffices to say that, if the order appealed from stands, W. H. McMillan will inherit something over \$600, which sum, plus over \$1,800, will be used to pay a note made to appellee, which was signed by McMillan and his mother. On the other hand, if the order appealed from be reversed, roughly speaking, something over \$2,400, which would be, as said, applied on said note, would instead be taken by appellant and her sister, Margaret White. Conditions were such as to impel the appellant, on the hearing below, to say, in an answer and cross-petition, that, because of these conditions, "she asks that the said W. H. McMillan be made a party to this proceeding, in order that the interest of all parties may be fully determined." What we have said demonstrates that it is still necessary to have W. H. McMillan in court, "in order that the interest of all parties may be fully determined." It is manifest there can be no reversal without materially affecting the interest of W. H. McMillan. As seen, the law declares that, in such situation, we have no power to reverse.

It is urged upon us that the action in favor of W. H. McMillan has no support in the evidence; that no evidence was adduced on his claims. We have examined the record, and think that this is an erroneous contention. But suppose it be not. Surely, W. H. McMillan, who is not in this court, cannot be concluded by any argument made to obtain a reversal. If the rights he has under the order below cannot be interfered with because he was not served,

neither can any argument for disturbing these rights be considered, where he has not been given an opportunity to respond to it.

We are constrained to dismiss this appeal.—*Dismissed.*

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

PEDELTY THRESHER COMPANY, Appellee, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

NEGLIGENCE: Willful Failure to Exercise Customary Caution.

One who deliberately refuses to do a feasible and accustomed thing, which would have avoided the accident, may not recover of another for the resulting injury. So held where one ran an engine from a loading platform upon a flat car, without equalizing, *with accessible blocks*, the difference in height of the platform and car.

Appeal from Cerro Gordo District Court.—J. J. CLARK, Judge.

MARCH 10, 1920.

REHEARING DENIED JULY 6, 1920.

DURING an attempt on part of the employees of plaintiff to unload an engine belonging to plaintiff on a car belonging to defendant, the engine fell from that car. Plaintiff has verdict and judgment for the damage resulting. Defendant appeals.—*Reversed and remanded.*

Hughes, Sutherland & O'Brien, and Blythe, Markley, Rule & Smith, for appellant.

Senneff, Bliss & Witwer, for appellee.

SALINGER, J.—I. Defendant maintained a loading plat-

form. For the purpose of receiving shipments, a flat car was placed along the edge of this platform. Except for sagging alleged by plaintiff, the height of this platform was stationary. The height of the cars differed. It follows there were occasions when the top of the flat car was lower than the top of the loading platform. The employees of plaintiff drove a traction engine, with tender attached, upon the platform. They found a "drop," because the top of the flat car was lower than the top of the platform. There is a conflict as to how much of a drop there was. Witnesses who actually measured testify that, at its west side, the platform was two inches higher than the car, and that, at the east side, it was four inches higher. Appellee contends that the right drive wheel of the engine passed from the platform to the car substantially on a level, but its left drive wheel went upon the car over a drop of from four to eight inches. We will assume that this was the difference in the levels. Whatever complaint plaintiff makes in pleading, it finally concedes that "the accident must have been caused by the drop." It is admitted by the employees of plaintiff that they saw the drop, and discussed what to do about it. It appears without dispute that one of these employees, Grant, the driver, had encountered such drops before, and had dealt with them by using blocking. He testifies that, on the occasion in question, the platform was so much higher than the top of the car that he looked around for some blocks to use, and intended to use them. His fellow employee, Tibbits, suggested that Grant had better get some blocks. Grant says he is not sure whether Tibbits was able to get a little block to put up, and that there was nothing they could get. He admits there might have been some small blocks on the platform, but says he didn't look. On pressure, he testifies that there were always a few blocks lying around there. He testified further that, when Tibbits suggested that they had better get some blocks, he, Grant, expressed the opinion that he didn't think there were any blocks strong enough, and that he thought they would drop onto the flat car all right. In

effect, he concludes his testimony with the statement that he thought they could proceed safely without using blocks, and so went ahead and drove on. The appellee contends that here is the ordinary case of claimed contributory negligence, and that the evidence was in such state that the court was right in submitting contributory negligence to the jury. Its citations make its theory clear. They are cases of which *Templin v. Incorporated City of Boone*, 127 Iowa 91, and *Cook v. Incorporated Town of Hedrick*, 135 Iowa 23, are typical. They are to the effect that contributory negligence is not necessarily made out because one goes upon a dangerous and unsafe place, unless it further is made to appear that he should have known, in the exercise of ordinary care, that it was imprudent for him to pass over such place. And appellee cites *Kambour v. Boston & M. Railroad*, 77 N. H. 33 (86 Atl. 624, at 632), wherein it is held that in rare cases only may the court hold, as a matter of law, that there was contributory negligence. If it could be granted that here is nothing to be considered except the question whether there was or was not contributory negligence, we should affirm. But, in our opinion, the defense here is contributory negligence, mingled with willful assumption of known and appreciated danger. We think defendant may invoke the rule of *Parkhill v. Town of Brighton*, 61 Iowa 103, to the effect that no one may be excused for knowingly and consciously incurring danger which there is no necessity for incurring, and that, in a way, there is room for the rule that a claimant of damages is under duty to do all he reasonably may, to the end of minimizing his injury. We are further of opinion that the case is squarely ruled by *Holzer v. McManus*, 179 Iowa 1206, and *Kancevich v. Cudahy Pack. Co.*, 184 Iowa 799. In the *Holzer* case, we released the master from liability for an injury caused by using an insufficient scaffold, when there was material at hand wherewith to make the scaffold safe, and the servant chose to use one that was insufficient, without any effort to improve its visible condition. In the *Kancevich*

case, an employee was denied recovery where he fell off of a platform because a railroad car had been withdrawn from the edge thereof. It would have greatly inconvenienced operation to place a rail on the edge of this platform, but there was a board at hand which the employee could have put up, and doing so would have kept him harmless though no car remained at the edge of the platform.

The judgment appealed from must be reversed, because the defense presents and proves more than reasonable mistake on whether a dangerous thing is dangerous,—more than the reasonable use of judgment on whether a thing may safely be done. It is proved that there was a deliberate refusal to do a feasible, accustomed thing, the use of which would have avoided the accident.—*Reversed and remanded.*

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

A. S. PETERSEN, Appellant, v. LARS JENSEN, Appellee.

VENDOR AND PURCHASER: Agreement on Price Not Completed

1 **Sale.** An accepted offer to sell land at a specified *price* (especially when the offer and acceptance are by telegrams) does not constitute a complete contract of sale, regardless of agreement as to all other details necessarily, and *known and contemplated by the parties* to be, incident to the completed transaction. So held where the agreement embraced all details of the price, but did not cover the matters of an existing lease and easement.

EVIDENCE: Judicial Notice—Nature of Contract of Sale of Real

2 **Estate.** Judicial notice will be taken of the fact that a contract of sale of real estate is usually an instrument of various details which are essential to a complete understanding and agreement. So held where there was an agreement as to price, but no agreement as to an outstanding lease and an existing easement.

*Appeal from Shelby District Court.—J. B. ROCKAFELLOW,
Judge.*

APRIL 13, 1920.

REHEARING DENIED JULY 6, 1920.

SUIT in equity for specific performance of an alleged contract of sale of a farm. The contract, if such, consisted of telegrams and letters. The answer of defendant denied that a contract had been consummated, and pleaded also that the plaintiff was guilty of fraud, in that he was acting as agent for defendant in the sale of said farm, and that he withheld from the defendant the fact that he had offers for said farm substantially greater than the price to which he obtained the defendant's consent. After trial upon the merits, the trial court dismissed the plaintiff's petition, and he appeals.—*Affirmed.*

Edward S. White, for appellant.

J. B. Whitney and Cullison & Cullison, for appellee.

EVANS, J.—The defendant was the owner of a farm in Shelby County, upon which he had lived for many years, and from which he moved to California about three years

1. **VENDOR AND** prior to the transactions herein involved.
PURCHASER: The plaintiff was a real estate agent in the
agreement near vicinity, and became agent for the de-
on price not fendant, in a somewhat indefinite sense.
completed
sale.

The parties had been acquainted for a long time. No price was fixed by the defendant upon his farm, nor was any authority given to the plaintiff to sell the same. It fairly appears that it was understood between them that the plaintiff would report to the defendant offers or opportunities for sale, and that, in the event of a sale, the defendant would negotiate through the agency of the plaintiff.

On June 23, 1917, the plaintiff telegraphed the defendant as follows:

"Have offer thirty-two thousand cash for your quarter. One thousand down, balance March 1, 1918."

Before the sending of such telegram, he had an offer from Therkildsen of \$210 per acre. The telegram was not answered by defendant. On June 26th, the plaintiff telegraphed the following:

"What is your best price 160 acres farm less my commission. Wire my expense."

On June 27th, the defendant replied as follows:

"Will take two hundred ten dollars cash or two hundred twenty dollars per acre on terms. Twenty thousand cash balance payable March first, 1923, interest 5 per cent payable annually, commission included. Do your best. Wire answer."

On June 28th, the plaintiff replied as follows, by wire:

"Cash offer for farm accepted. Draft and contracts mailed less one hundred sixty dollars commission."

On the same date, he replied also by letter, as follows:

"As per your message I accept your cash terms for the sale of your land in Shelby County, and enclose herewith contracts made in duplicate which please sign and return one to me. I also enclose a draft for \$840.00 being the amount of the cash payment less the commission of \$1.00 per acre, total \$160.00 the balance \$32,600.00 due March 1, 1918, at which time you clear the land of all incumbrances. I would suggest that you prepare a warranty deed at once and execute the same together with your wife and forward to any bank in Harlan, Iowa, for their keeping until March 1st, next, then there will be no delay in final settlement in case of death. Please give this your early attention and oblige."

Between June 23d and June 28th, Therkildsen had raised his offer to \$215 per acre. On June 28th, he raised it to \$217.50 per acre. On June 29th, the plaintiff entered into contract of sale with Therkildsen, as purported owner of the land, for the consideration of \$217.50 per acre.

His alleged acceptance of defendant's offer under date of June 28th was rejected by the defendant, and the enclosures in plaintiff's letters were returned to plaintiff by defendant. In the return of such enclosures, the defendant wrote, under date of July 5th, the following letter:

"I am sending back to you the land contract and the draft for \$840.00.

"In my telegram I stated that I would be willing to sell the property in question at \$210.00 per acre cash, or \$220.00 per acre part cash balance 5 years.

"You telegraphed accepting my cash offer and later I received from you the enclosed draft and contract, which is far from being the cash offer you accepted.

"Kindly write fully what you want, as to whether you will pay \$33,600.00 cash, as per your telegram.

"If you prefer to buy on terms I will take \$20,000.00 cash and allow five years for the balance at 5 per cent per annum, at the price above quoted, viz. \$220.00 per acre.

"On receipt of answer I will send to Farmer's & Merchant's Savings Bank in Harlan the papers covering the transaction you decide to make, and will leave the matter of collection and closing the deal entirely in their hands.

"If I do not hear from you within ten days from date I will understand that you do not care to go further in the matter, and you may consider my price as quoted in my last telegram as void.

"P. S. I will give you six months option at \$210.00 per acre for the sum of \$1,000.00, this to be above full purchase price i. e. I will take \$33,600.00 above this \$1,000.00 any time during the next six months."

On July 11th, the plaintiff replied by wire and by letter as follows:

"I hereby accept your offer of sale of your Center Township farm at two hundred and ten dollars per acre cash."

"Replying to your telegram of June 28th, and to your letter of July 5th I do hereby accept your offer of \$210.00

cash per acre for your farm in Center Township, Shelby County, Iowa, or a total of \$33,600.00 cash for the said farm."

On July 18th, the defendant sent a warranty deed, duly executed by himself and wife to the plaintiff as grantee, to a bank at Harlan, to be delivered to the plaintiff, provided he agreed to certain details required by the defendant as a condition to the consummation of the sale. The plaintiff rejected all such details or conditions, and served upon the bank a written demand and tender. He also served the same upon the defendant by letter. Such demand and tender was as follows:

"I do hereby offer to tender and pay to you the sum of \$33,600.00 together with six per cent interest thereon from July 11, 1917, the date of closing a contract for the purchase by me of your Center Township, Shelby County, Iowa, farm, to this date, upon your readiness to deliver to me as per said agreement a warranty deed to said premises, upon and after the immediate payment by you of all tax and mortgage liens and all other liens against said real estate, and upon compliance or readiness to comply, by you with all other terms of the said deal, expressed or implied. I therefore request that you notify me when, where and to whom I shall pay the said consideration.

"Dated at Harlan, Iowa, on this 28th day of July, 1917."

The first question presented is whether the telegrams and letters constituted a complete contract of sale between the parties, or whether they constituted simply an agreement upon the important question of price, as the first step toward a complete agreement of sale. Construing the language of these communications in the light of the circumstances surrounding the parties, is it to be implied that an agreement upon the price would constitute a complete contract of sale, regardless of all other details or conditions which would be necessarily involved in the performance of such a contract?

Clearly, a contract of sale of land must involve pre-

liminary negotiations. In such negotiations, the minds of the parties may meet upon some things and fail to meet on others. The first negotiations may be concentrated wholly upon the question of price, as the thing of first importance. Does this fact imply a waiver of all other considerations? If an agreement is reached as to price, may either party then, at his own election, declare the contract completed, and, in effect, spring a trap, and put the other party at his mercy as to all other details and conditions that become necessarily incident to the completed transaction? In this case, the defendant held his title as subject to an easement, whereby another party had a right to the use of a well. His farm was also in the possession of a tenant, whose tenancy would continue until March 1st following. These facts were well known to the plaintiff at the time he was carrying on his communication. He knew that the defendant could not convey to him free from the easement, nor free from the tenant's right of possession until March 1st. It was essential to the complete meeting of the minds of the parties that they should have some understanding as to the reservation of such easement, and some understanding as to the rights of the tenant. In *Kinman v. Botts*, 147 Iowa 474, we had occasion to consider a similar question.

"The correspondence between Leach and defendant was solely as to the price which defendant would take for his farm, and no terms of sale other than as to the price were specifically referred to, although Leach advised defendant that the farm had depreciated during his absence from it, in that the improvements had been allowed to become in bad condition. * * * Now, the sole question to be determined in this case is whether these telegrams concluded a binding contract of sale, in view of the circumstances, so far as they were known to both parties, between plaintiff, the undisclosed prospective purchaser, and defendant. It is a matter of common knowledge that executory contracts for the sale of real property usually contain terms

as to the time of payment of the consideration in a lump sum or by installments, the time of surrender of possession, the payment of the expense of furnishing an abstract, and similar matters. While it is true that an unequivocal present agreement of sale of specific property for a definite price would be valid without statement as to other conditions, all of which would, in such event, be determined by recognized rules of law, nevertheless we think the universally known usage to state such terms in a written contract may be taken into account, where the language of the writings relied upon to constitute a contract leaves room for doubt as to whether the parties intended and understood that such writings should constitute a complete and binding contract of sale."

Looking at the language of the communications and of the circumstances surrounding the parties, we think that a mere agreement on the price did not complete the sale, so as to preclude either party from insisting upon other conditions which were necessarily incident to the sale. This was the theory on which the defendant acted, in sending on a deed to the bank at Harlan. He insisted upon a reservation of the easement, and upon an acceptance by the plaintiff of the lease and rent notes without recourse, reserving to himself the pro rata part of the rent earned up to the 11th day of July. If the parties had been personally in each other's presence at the time that Petersen agreed to the defendant's price, it would hardly be claimed but that the defendant could thereupon bring forward these other details, as matters to be agreed upon, or that a failure of agreement thereon would not defeat a consummation of the sale. Can it be said that the defendant's rights in that regard are any less because he was hundreds of miles distant, and could not communicate except by wire or letter?

No subject except the price was considered in the telegrams and letters. No attempt was made therein to deal with other provisos. It would be a futile expenditure to

2. EVIDENCE: deal with other provisos by telegram, before
judicial no- it was known whether or not the parties
tice: nature could agree upon a price. An agreement
of contract upon a price was all that was attempted by
of sale of telegram.
real estate. Would such agreement close the door, as a mat-
ter of law, against further negotiations as to other details?
We cannot close our eyes to the fact, universally known
to the profession, that a complete contract of sale of land
is usually an instrument of many provisos. It usually
contains a plurality of details, which are material and
essential to a complete understanding between the parties.
To incorporate all these in a telegram presents practical
difficulties. Though such contracts are often initiated by
telegrams, and the basic agreement as to price is frequently
reached by that method, it is seldom that a completed
contract is arrived at in such manner. We should not
strain a point, therefore, to find that an agreement upon
the price made a complete contract, and precluded a con-
sideration by the parties of any other proviso or detail
essential to a good and fair understanding. The negotia-
tions leading up to such contract, through successive agree-
ments, should be deemed open, until it can be said that the
parties themselves, either by language or conduct, mutually
closed them. A completed sale is not attained by the mere
snapping of the finger by one of the parties, after an agree-
ment upon the price.

There was another condition than these we have spe-
cified, made by the defendant. It was that the grantee
should pay all the taxes falling due after July 11th. This
would include the last half of the taxes payable in 1917,
which were already a lien upon the land. It may be that
this condition was not justified. In any event, the defend-
ant promptly waived it, and agreed to pay such taxes. As
to the conditions first specified, it rested upon the plaintiff
to say whether he would accede to them or not. If he
would not, he was not bound. Neither was the defendant.
The plaintiff chose to avoid all specifications in his ob-
jection. His tender casts upon the defendant the burden

of discovering the grounds of plaintiff's own objections. The tender *added* nothing to his rights. In order to accomplish a completed purchase, it was incumbent upon him to arrive at an agreement with the defendant upon such material details as were fairly involved in the sale, so far, at least, as he had knowledge of the existence of the facts which rendered such details material. There was nothing in the telegram from which it should be implied that the later consideration of such facts was to be waived by either party. We are clear that the defendant was not bound to regard the acceptance of his price as a termination of the negotiations as to other provisos. The defendant did nothing thereafter from which such waiver could be implied. On the contrary, he brought them forward in his next communication, and presented them with his tender of the deed. If the plaintiff had then acceded to these, he could have brought about a completed sale. If he had continued the negotiations, he could doubtless have done the same thing. He chose a course, however, that was clearly oppressive to the defendant, and as clearly repugnant to a court of equity in considering a prayer for specific performance thereon.

We reach the conclusion that the plaintiff closed the door too soon, and that his acceptance of the price did not attain a completed sale. This conclusion renders it unnecessary that we consider the question of fraud, or examine the cleanness of plaintiff's hands. The decree dismissing the petition is—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

JAMES T. RHODES et al., Appellees, v. STEPHEN L. UHL et al., Appellants.

FRAUD: Rescission Notwithstanding Examination. Rescission of
1 a contract of exchange is fully justified when the one rescind-

ing, being wholly inexperienced in land deals, exchanges land of large value for land of materially less value, on the strength of willfully false representations as to the value and quality of the latter land, and after an examination thereof which was manifestly so engineered as to prevent the examination from revealing the real truth.

MORTGAGES: Pre-existing Debt—Validity Against Defrauded
2 Grantor. A mortgage given to secure a pre-existing debt, without release of the debtor from personal liability, is of no validity against the plea of rescission by the victim of a fraud-induced contract of exchange.

ESTOPPEL: Wrongful Act of Escrow Holder. An owner of land
3 who places deeds, with grantee in blank, in the hands of a party to hold pending the final closing of an exchange, is not thereby estopped to dispute the validity of a mortgage arising out of the unauthorized act of said party in filling in his own name as grantee, and mortgaging the property.

Appeal from Linn District Court.—MILO P. SMITH, Judge.

JULY 6, 1920.

ACTION in equity to rescind a land trade. Opinion states the facts. Decree for the plaintiffs in the court below. Certain of the defendants appeal.—*Affirmed.*

H. J. Maurer, Cook, Hughes, Sutherland & Taylor, Crissman & Linville, Voris & Haas, Clark & Clark, and O. N. Elliott, for appellants.

Trewin, Simmons & Trewin, for appellees.

GAYNOR, J.—This action is in equity. It is brought to rescind and set aside a certain contract for the exchange of land. Involved in the exchange are the plaintiff's homestead and 320 acres of Texas land owned
 1. FRAUD: re- by the plaintiffs, and 126 acres of farm land
 scission not- owned by the defendant Miller. Plaintiffs
 withstanding examination. base their right to rescind and have the contract and deeds canceled on the claim that the exchange

was procured by fraud. The prayer of the petition is:

"That the contract entered into between the parties which evidenced the exchange and the deeds made in pursuance of the contract be canceled and set aside and held for naught, and that two certain mortgages placed by Miller upon the plaintiffs' homestead, in favor of the defendants Hedges and Kacena, be set aside and held for naught."

The court found in favor of the plaintiffs, canceled the contract and deeds evidencing the exchange, set aside the mortgage held by Kacena, and sustained the mortgage held by the defendant Hedges. Upon the trial of the case, the action as to Biggs, Cooper, and Cook was dismissed. The defendants Uhl, Miller, and Kacena alone appeal. Argument, however, has only been filed for Miller and Kacena, and the case here is narrowed to the issues between the plaintiffs and Miller and Kacena. Though Uhl appealed, he has filed no argument, and his appeal is not considered.

It appears that, prior to the 2d day of October, 1915, the plaintiffs were the owners of a certain house and lot in Cedar Rapids, owned, held, and occupied by them as a homestead, and also the owners of 320 acres of Texas land. The defendant was not then the owner of the 126 acres of land which he undertook to exchange for this property, but had some agreement by which he was to become the owner. The title to the land on the 2d of October was in Biggs. Biggs had made some arrangement to pass the title to the defendant Cooper, and Cooper had made some arrangement to transfer the title to the defendant Miller, but the title had not been transferred at that time. Though this fact is not material to this controversy, we state it because it has some bearing upon some phases of this case, as will be apparent hereafter. Prior to the 2d day of October, 1915, the plaintiffs seemed to have entertained a desire to exchange their homestead and their Texas land for farm land in Iowa. The defendant Uhl was a land agent. He discovered plaintiffs' desire, and came to them, in his capacity as real estate agent, and made some inquiry to

ascertain whether or not they were in the mind to exchange their properties for lands in Iowa, and found that they were. He took Mrs. Rhodes, one of the plaintiffs, to certain land which he had for exchange, and showed it to her. At that time she took her son-in-law along with her. The land was examined, but no exchange was made. We take it that, in the meantime, he had seen the defendant Miller, had discovered that Miller had 126 acres of land in question, and desired to sell or exchange the same. He gave to Miller a description of plaintiffs' property, and asked him whether or not he would be willing to exchange his property for plaintiffs' property, and was advised that, if a satisfactory exchange could be made, he would be willing to do so. Uhl then came to the plaintiffs, and arranged with them to go to see this Miller land, and arranged with Miller to accompany them. On the 2d day of October, these four parties took the interurban train to North Liberty, and from there they proceeded in an automobile to the land in controversy, and, on arrival, a partial examination of the Miller or Johnson County land was made. Before stating what was done on this visit, and before setting out to what extent the land was examined by these plaintiffs, we have to say that Rhodes, one of the plaintiffs, was, at that time, a man about 64 years of age, had never been engaged in farming, and knew practically nothing about the value of farm land. He was a conductor on the Rock Island Railroad, and had been with the railroad for about 45 years. This deal was his first experience. His wife was without experience in matters of this kind. They were then occupying the homestead in question, and had occupied it for about 14 years. The lot was 30 feet wide, fronting on First Avenue, and 117 feet deep. The defendant Miller was about 36 years old. Miller and Uhl were both men of large experience in matters of this kind. Both had been traders, Miller for himself, and Uhl for others. Miller seems to have had quite large experience in trading, both in stocks and lands. Just prior to this deal, he was in the merchandise business at Vancleve. Uhl's

business was to look out for deals, though it does not appear that he ever dealt for himself. Prior to this time, he had served Miller as agent. Miller testifies:

"The first time I ever saw Mr. Uhl was the time he had a man who had 320 acres of land south of Perry on trade for a stock of goods I had at Hedrick, Iowa. This was somewhere in the year previous to this deal."

Mrs. Rhodes testifies that Uhl represented this Miller property as a wonderful deal; told her that he knew the property; had seen it about three times. She details this introductory conversation in this way:

"He called me up, and said he had a most wonderful deal. He said, if I turned it down, he would never have anything more to do with me. He came to the house to see me, a short time before the second of October. He claimed that he had a farm in Johnson County, belonging to a man by the name of Miller, who had recently disposed of a large business in his home town, I think for \$26,000, and that he wanted to come to Cedar Rapids to educate his children. He was looking for a home handy to school, and he thought that our place would suit him. I remarked that I thought it strange that, if he wanted our place, he didn't come and look at it. He replied, 'I have seen it, and he will take my word for it.' He told me that the Johnson County farm was a nice place, a nice piece of good land; that it was incumbered by a \$9,000 mortgage. I had never heard of this man Miller until he was mentioned in the deal. I first met him on the morning of the 2d of October, when Mr. Rhodes and myself went with him to look at the land. We met Miller for the first time in front of the interurban station. Uhl was with him, and introduced him to me. We all went together to North Liberty on the interurban, secured an automobile, and drove to the land. On the way to the farm, Mr. Uhl, in the presence of Miller, repeatedly called attention to the farms along the road, and said that the Miller land was of the same character. As we drove in the automobile along the road on the south side of the land in controversy, he pointed to the land

across the road [this is known in the record as the Cochran land], and said that the land in controversy was of the same character as the Cochran land. [The Cochran land, it appears, was newly plowed, and showed a rich soil, and could be plainly seen from the road.] On the way, Mr. Uhl kept repeating what a wonderfully good opportunity this was, and what good land it was, and so on. He pointed to one piece of land, and said it had been sold for \$168 an acre; that the land he was about to show us was equally as good. He made repeated comparisons. He placed the value of the land in controversy at \$150 an acre. When we reached the farm, they drove us along the south side of this land [the road runs between this land and the Cochran land] to the southwest corner, and back then to the buildings, which were situated on the southeast corner. We approached the land from the east, along the south road. After we got out of the automobile, we went from 20 to 30 rods north of the house, a very short distance into the corn. The ground was soft, and it was not easy to get around. Uhl discouraged us from going north, saying that it was too bad and muddy,—not exactly muddy, but not good walking to go any further. He said the land north was all like the land around the buildings. The land around the buildings was fairly good land, and had corn on it. He kept telling us it was all like the land which we saw around the buildings along the road and to the south of the road; that it was all good land. He said the land was all capable of cultivation, and was good for raising crops.”

It appears that the plaintiffs did not visit or examine the land to the north and northwest of the buildings. All the examination they made of it was of the land around the buildings at the southeast corner, and such examination as they were able to make by driving along the public highway on the south. The more reliable testimony tends to show that, from this point, the land north could not be seen,—at least could not be seen sufficiently to form any

judgment of its character or quality. It seems that there was a ridge that obscured the view from the road, and also corn along this road that prevented one from seeing fully the land to the north. It appears, also, that from the road there was a lane leading up into the land; that the plaintiffs suggested that the automobile be driven up there, so that they could see the land more fully, and were informed that it was impossible to drive up this lane, because it was so narrow that they could not turn around and get back. We have no hesitancy in saying that this record discloses that the plaintiffs, in their examination of this land, were, through the artifices of the defendants, confined in their examination to those portions of the land which presented its most favorable aspect. The plaintiffs made but a very casual examination of it, and were clearly led into believing that all the land was practically the same as the Cochran land to the south, and the land as it was found around the buildings.

As to the character of the land, there is some conflict in the evidence; but we have no hesitancy in saying that these representations, made by Uhl in the presence of Miller, and not contradicted by him, had no foundation in fact; that the land was not as represented, was not all tillable, was not like the land across the road, owned by Cochran, but most of it was wholly inferior to that shown to them on the south side and around the buildings. This being practically a fact case, we have set out somewhat at length the testimony of the witnesses touching its character, and a careful review of the whole record satisfies us that this testimony brings to the mind a fairly clear and accurate knowledge of the actual condition of the land. It is as follows:

One Leonard testified:

"A few days after the transaction involved in this suit, I visited the farm in controversy, with Mrs. Rhodes and daughter and J. H. Trewin. I was there at another time. The character of the land immediately around the buildings is the better part of the farm. It is all sandy soil,

but there is a good deal of dark loam in the soil. The soil is richer sand around the buildings than it is further back. As you go northwest of the buildings, you get into kind of a low marsh. Going north the first 30 rods, it is fair corn land. Then you drop into a lake bed, which is fairly rich soil, but undrained, and has water in it. The lake bed runs pretty near up to a ditch. You come then to the ditch. There are sand burrs on certain portions. Certain portions were so poor that it wouldn't grow sand burrs. The east half of the next 40, except right on the north line, is all barren sand. There was a marsh lying a little south of the northwest corner of the northeast 40, and that was wet, and had water on it. No drain through it. Bull grass growing in the marsh. South of the bull grass patch, there is a very poor quality of sandy land,—some corn on it, but very poor. The west side of the southeast 40 is outside the marsh land, excepting the south extreme part of it. Along the road there is a little marsh land, but the balance is better quality of corn land than on the north part or the west part. The patch of land immediately west of the buildings is medium corn land. The land along the south side is much better quality than as you get back 20 rods, except a little portion of marsh about where the ditch crosses over the field, and a few rods back, along the road. The land across the road is practically the same quality of land as the south part of this land, until you get back quite a way in the field on this land, coming north towards the ridge. The land across the road from this farm has just been plowed, at the time I was there. The soil turned up good corn soil. It was dark sandy loam. To walk over the sand ridge on the farm in controversy is to walk in sand burrs. There was a very little stand of corn. There was drift sand, or what you call blow sand. There was a ridge along this land, and on this ridge was absolutely no vegetation of any kind. When you walked on it, you were walking in sand, half way to your shoe tops. Over on the northwest corner of the same 40 there is another marsh, with just hay on it. One of the days I was there [this

was soon after plaintiffs' first visit], you couldn't walk through it, on account of its being wet and spongy. When you go east of the marsh along the north corner, or such a matter, you find nothing but sand. There was some grass on it, but mostly sand. There would be in the neighborhood of from 30 to 40 acres of that entire tract which would be reasonable farm land, if it were kept in shape. It would need drainage, and that ditch would need to be opened."

We may say, however, that there is some attempt on the part of the defendants to discredit this testimony; but we accept it as a fair basis for the conclusion that we reach in this case.

As to the value of the Miller land, the testimony is substantially as follows:

F. J. Cochran testified for the plaintiffs:

"I owned land in Johnson County at one time. I know where the land in controversy is. I own 426 acres of land across the road from this farm. I owned this land between 8 and 10 years, and operated it during that time. I know the farm in question. I have known it for about 12 years. This land lies on the north side of the highway, and mine was on the other side. The road runs east and west. The land in controversy lies on the north side. The buildings on the land in controversy are in the southeast corner. I know what lands are bought and sold for in that vicinity in years gone by. I would think the land in controversy was worth from \$90 to \$100 an acre."

W. F. Bickell testified that he examined the land in controversy. He testified:

"I am familiar with the value of lands generally. I would say a fair price for this land was \$70 to \$80 an acre."

L. C. Leonard, for the plaintiff, testified:

"I went over every part of the land in controversy. I spent the greater part of 3 days on the farm. The buildings are located on the southeast 40, along the highway on the south line, and within 15 or 20 rods of the east line. The land immediately around the buildings is the better part of the farm. The soil is rich and sandy around the

buildings. As you go northwest of the buildings, you get into kind of a low, marshy land. Going north from the buildings for the first 30 rods is fair corn land. Then you drop off into a lake bed. Then you come from that to a ditch. Then you come to the poorest, sandiest land I have ever seen in Iowa, with few exceptions. The land along the road on the south side of the farm is much better quality than it is when you get back 20 rods. The land along the road is practically the same quality as the land south of it, and this is so until you get back quite a way north in the field, going towards the ridge. There is in the neighborhood of 30 to 40 acres on the entire tract that would be reasonably fair farm land, if it was kept in shape. The north and east part of the 40 won't produce the ordinary crops of this country. I am familiar with the value of lands in Iowa. I have owned lands in several counties. I made inquiry as to the value of lands in this neighborhood, and talked with neighbors, and found what lands were sold for in that vicinity."

He was asked this question:

"Now, from your investigation and your knowledge of the soil and of farming, what would you say as to the fair value of this tract of land per acre, including the improvements? A. About \$80 to \$85 an acre. My examination of this land was made soon after this transaction occurred."

Henry Lonvar testified for the defendants:

"My farm was across the road on the south side from this 120 acres. I bought it from Mr. Cochran, and paid \$130 an acre. The farm was 386 acres."

He testified that the value of the land in controversy was \$130 an acre. He said:

"I never walked over the north 40. I don't know anything about it at all. I never have been over where the scrub brush is. Never walked over this sand ridge. I don't know whether there is a sand ridge there or not. I just drove around the road. I didn't see any sand blow there. I looked, and I didn't see any sand blow."

Albert Kochyaka, called for the defendants, testified:

"My house is right across the road from the southwest corner of the land in controversy. I have lived there 5 years. I have been renting the farm for 5 years. I went across the corner of the southwest part, a couple of times, then I crossed the middle of the farm, and helped thresh. I have been back across the north 40. I have been on the 40 on which the house is located. The Cochran farm is right east of me."

He was asked:

"Are you familiar with the value of the farm on which you live and have lived for the last 5 years,—how much per acre is it worth? A. \$135. I never bought or sold land in that vicinity. I don't know the values of land there. The soil on the land in controversy is about the same as the soil on the land that I occupied."

Joseph Novak, called for the defendants, testified:

"I have been all over the land in controversy. My land is on the north side of the ridge, as is this land, and the west boundary of my farm is the east boundary of the farm in controversy. The two farms join. I have owned land there for the last 18 years. I have an opinion as to the value of the land in that vicinity. I think the land in controversy was worth \$125 to \$130 an acre in October, 1915."

C. H. Cherry testified that he was associated with the Cherry Realty Company, real estate agents. He said:

"I am familiar with the land in controversy. Have been over it, and was acting in connection with the trade between Biggs and Cooper. I have been engaged in handling land in that vicinity for 4 years. I made an examination of the land in controversy. Know the character of the soil. Its value in October, 1915, was \$120 or \$125 an acre."

After this casual examination of the land, the plaintiffs returned, with Miller and Uhl, to North Liberty, there to take an interurban car for Cedar Rapids. They were there for some little time. During this time, Miller separated himself from the party, assumed an attitude of in-

difference to the matter in hand, and began playing horse-shoes. We assume that this gave to Uhl a pretext for saying to the plaintiffs that Miller was indifferent to the exchange; that he was not anxious to make the trade; that, unless they secured him now, he might not later be willing to make the trade. They then took the interurban car to Cedar Rapids. That evening, Uhl gathered the plaintiffs and Miller in his office, and there, by impressing upon the minds of these plaintiffs the desirability of consummating the trade, induced them to enter into a written contract, by which they undertook to exchange their home and their Texas land for Miller's 126 acres in Johnson County. At that time, in order to make it appear that the matter was binding, Miller executed a check for \$500, to be forfeited in the event he failed to perform, and the plaintiffs executed their check for \$500, conditioned the same way. These papers were then placed in an envelope, sealed up, and taken to a bank, and deposited there for safe-keeping. We take it, although it is not in controversy here, that the plaintiffs did not, at that time, fully make up their minds that the deal would be consummated, although they were strongly impressed with the representations of Uhl, made in the presence of Miller, that the deal would be very advantageous to them.

As said before, this contract and these checks were placed for safe-keeping in a bank. The second of October was on Saturday. Miller immediately proceeded then to consummate his deal with Biggs and Cooper, and got evidence from them of his interest in the Johnson County land. Early the next week, Uhl came to the plaintiffs, presented a deed executed by Cooper, covering the 126 acres in Johnson County, and induced plaintiffs to make deeds in blank to their homestead and their Texas land. These deeds were taken by Uhl, though the plaintiffs understood that they were taken simply for safe-keeping, until the deal was consummated. Under some arrangement between Uhl and Miller, Uhl's name was entered in plaintiffs' deeds as grantee. Thereupon, Uhl proceeded at once to mortgage

the homestead in his own name. He obtained \$1,000 on one mortgage and \$2,000 on another mortgage. These are the mortgages under which Hedges and Kacena are making claim. Plaintiffs' deeds had not then been recorded. Uhl secured the money on these mortgages through the defendant Cook. It seems that Cook negotiated the mortgages for Uhl, who was acting under some arrangement with Miller. Hedges parted with the money on his mortgage. Kacena simply canceled an old debt which he owed Cook, or rather, surrendered the evidence of an old debt. He parted with no money. He still holds Cook upon the old debt. These are the mortgages which plaintiff seeks to cancel. The court canceled the Kacena mortgage, in so far as it was a lien upon plaintiffs' homestead. A portion of the money that was obtained on the Hedges mortgage was returned by Cook and deposited with the clerk, and the plaintiffs were given credit on the Hedges mortgage for the amount so paid, and the plaintiffs were given judgment against Miller and Uhl for the balance of the mortgage which this money did not cancel, and title quieted in the plaintiffs against all the defendants, except as to the Hedges mortgage. Plaintiff has not appealed; so that matter is not in controversy here.

This presents practically the situation of the parties and the controversy at the time the cause was finally submitted to the court.

We have not set out in detail the transactions between Miller and Uhl which tend to show very strongly to our minds that, in all this deal, Uhl and Miller were walking hand in hand, although this is positively denied by both Miller and Uhl. The rights of these parties are not to be judged by the technical relations existing between them, but rather by the real relationship to each other and to the subject-matter, as made manifest by their conduct. Their conduct and the circumstances that attended the whole transaction convince us that Uhl was more the servant of Miller than he was the servant of the plaintiffs in the whole transaction, and that Uhl was seeking Miller's

advantage, rather than the advantage of these plaintiffs, in what he did. We are satisfied that both Uhl and Miller took an unfair advantage of these plaintiffs. Through their conduct, they led these plaintiffs to believe that the land was other and different from what it was. The haste with which they sought to consummate the deal, after the slight examination that was permitted to these plaintiffs, suggests that they had in mind that further examination and further consideration on the part of these plaintiffs might lead them away from the consummation of the deal. Miller knew this land, yet permitted Uhl in his presence to make these statements touching the character and quality of the land which he must have known at the time were absolutely false. If Uhl had visited this land, as he told the plaintiffs he had, he, too, knew that they were false. If he did not know, then he willfully stated that to be true which he did not know to be true, and stated this in the presence of Miller. That plaintiffs will be wronged and defrauded, if held to this contract, is apparent. Giving the best consideration that can be given to the testimony as to the value of these respective properties, we find the homestead to be worth \$4,000. The fair valuation of the land in Texas would be \$7.00 an acre. This valuation is fair to the defendants, and we fix it at \$2,240. Adding \$4,000 for the house to this, we have the consideration to be paid by the plaintiffs for this Johnson County land to be \$6,240. The Johnson County land, at the best figures for the defendants, would not exceed \$100 an acre. This would make \$12,600. On this there was a mortgage of \$9,000, leaving a balance of defendants' equity of \$3,600. If we should assume defendants' figures as a basis for computation, we would be marveling here at their eagerness to force the contract upon the plaintiffs; for, if defendants' figures and the estimates placed by their witnesses should control, plaintiffs would have somewhat the better of the bargain. We think the court was justified in setting aside the conveyance as to Miller and Uhl, and in canceling the \$500 checks given

by each of the parties at the time the contract was entered into.

The general rule is that the fraud which justifies a setting aside of a contract may be evidenced by acts, as well as by speech. Omission to act, when honesty and good faith would require action, and concealment, when such concealment is a breach of either a legal or an equitable duty to expose, may constitute fraud. A misrepresentation which justifies the setting aside of a contract is a representation of a fact which, if accepted, leads the mind to a comprehension of a condition other and different from the one which exists. Colloquially, it is understood to mean a statement made to deceive or mislead. Any statement made of a substantive fact, or any conduct which leads to a belief of a substantive fact material to the proper understanding of the matter in hand, made with intent to deceive or mislead, and thereby secure undue advantage, involves in it the elements of fraud; and fraud vitiates all contracts. A contract will be set aside, even though the fraudulent statements were innocently made, if they are, in fact, fraudulent, and acted upon, when it is made to appear that the other party relied upon them as true, and acted upon the belief that they were true, and the other party had reason to believe that he was so relying, at the time the transaction occurred. It would hardly seem necessary to cite authorities in support of these propositions; but see *Severson v. Kock*, 159 Iowa 343, and cases therein cited. The general rule is that gross inadequacy of consideration is evidence of fraud. It tends at least to show that the party relied upon the statements made in the transaction. It has been said:

“Ordinarily, equity has jurisdiction to rescind a contract, where an unconscientious advantage has been taken by one of the parties of the condition or circumstances of the other party, especially where there is gross inadequacy of consideration, or where there has been imposition or oppression practiced upon a person reposing confidence in the party who has abused it. * * * While it is not the

function of the courts to make contracts for parties, or to relieve them from the effects of bad bargains, nevertheless, where the simplicity and credulity of people are taken advantage of by the shrewdness, overreaching, and misrepresentation of those with whom they are dealing, and they are thereby induced to do, unwittingly, something the effect of which they do not intend, foresee, or comprehend, and which, if permitted to culminate, would be shocking to equity and good conscience, a court of equity may with propriety interpose." See 4 Ruling Case Law 502; *Herron v. Herron*, 71 Iowa 428.

People do not part with their property, ordinarily, for a grossly inadequate consideration; and, while inadequacy of consideration is not a ground always for setting aside a conveyance, it has its probative force in corroboration of testimony tending to show that fraud was, in fact, practiced to induce them to do so. See *Nagel v. Davis*, 162 Iowa 349; *Fulton v. Fisher*, 151 Iowa 429. As a general proposition, we find the rule stated in 12 Ruling Case Law 235, 236, as follows:

"The relative circumstances and conditions of parties to an alleged fraudulent contract should be considered in determining the question of fraud; as, where one of the parties is an artful, shrewd, business man, and the other aged, ignorant, and imbecile. * * * But the mere fact that a person is unlearned and ignorant * * * affords no ground of relief in equity, unless it also appears that he relied for information upon the person against whom relief is sought, and that the latter misrepresented the state of the facts."

It has been said that:

"The trail of fraud is not always easily followed; and, while the law charitably prefers to sustain all business transactions which are reasonably explainable on the theory of fairness and honesty of all parties concerned, yet courts are not at liberty to ignore clear and convincing indicia of bad faith, or refuse to draw inferences of fraud from cir-

cumstances which irresistibly point to that result." *Johnson v. Carter*, 143 Iowa 95.

As bearing upon this question, see *Vaupel v. Mulhall*, 141 Iowa 365; *Hibbets v. Threlkeld*, 137 Iowa 164. As was said in *Castle v. Bullard*, 23 Howard (64 U. S.) 172:

"Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof."

As bearing upon this question, see, also, *First Cong. Church v. Terry*, 130 Iowa 513; *Connors v. Chingren*, 111 Iowa 437; *McCreary v. Skinner*, 75 Iowa 411; *Bixby v. Carskaddon*, 55 Iowa 533.

This brings us to a consideration of the contention of the defendants that the plaintiffs had a fair opportunity to examine the land before they made their contract, and, therefore, ought not to be heard to say that they did not know the character of the land, and were deceived by the representations made by the defendants.

Against this contention, the law says:

"Although the purchaser may have available means of ascertaining the truth, yet, if the vendor, by any misrepresentations or by any trick or artifice, induces him to forbear inquiry or investigation which he would otherwise make, and thus to rely solely on the vendor's false statements, the rule of *caveat emptor* does not apply, and the purchaser may hold the vendor liable. And since such practices are obviously calculated only to mislead the purchaser by producing an erroneous impression upon the mind, and thus lulling him into a false security, they may, of themselves, well be deemed to amount to actionable fraud, where they succeed in producing the desired result [as they did in this case]. The very representations relied upon may have caused the purchasers [plaintiffs] to forbear making inquiry, and in such a case the vendor [defendants] will not be heard to say that the falsity of his statement might have been ascertained."

The mere fact of investigation or opportunity to in-

investigate does not necessarily deprive one of the right to rely upon representations, and this is especially true where the one making the representations is assumed to have knowledge that is not possessed by the other, and which could not be obtained except by actual investigation, and he makes these representations to induce the other not to make investigation, and succeeds by such representations in restraining him from making investigation, knowing that he is relying upon the statements made by the party sought to be charged. See 20 Cyc. 61, 62; *Mattauch v. Walsh Bros.*, 136 Iowa 225; *Brett v. Van Auken*, 99 Iowa 553; *Franke v. Kelsheimer*, 180 Iowa 251, 256. So we say that, under the law as written, the plaintiffs were entitled to the relief prayed for against the defendants Miller and Uhl.

This brings us to a consideration of the Kacena mortgage; and, without elaboration on this point, we think the court was right, that the Kacena mortgage could not be

2. MORTGAGES: pre-existing debt: validity against defrauded grantor. sustained, against the rights of the plaintiffs in this suit. As bearing upon this question, see *Lillibridge v. Allen*, 100 Iowa 582; *Phelps v. Fockler*, 61 Iowa 340; *Senneff v. Brackey*, 165 Iowa 525; *Smith v. Moore*, 112 Iowa 60; *Port v. Embrce*, 54 Iowa 14; *Rea v. Wilson*, 112 Iowa 517.

Plaintiffs were not estopped to assert their rights, as against this mortgage, by anything that they did. They had no knowledge of the purpose to which Uhl was putting the mortgage. The deeds were in blank,

3. ESTOPPEL: wrongful act of escrow holder. left with Uhl for safe-keeping. Uhl wrongfully inserted his own name, without the knowledge and consent of these plaintiffs,

and proceeded immediately, and before any abstract was secured, and before plaintiffs had consented to the final consummation of the deal, to negotiate these mortgages through Cook, for the use and benefit of Miller. There is no element of an estoppel in this case. Plaintiffs had no chance to speak, and their silence cannot be held against them. They had no notice of what Uhl was doing, and did nothing to induce the mortgagees to act, either by silence

or overt act. This rule of estoppel applies only to cases where the person charged has made a third party his real or apparent agent, or where he provides the means of committing a fraud intentionally, or for dishonest purposes, or where he derives and retains the benefit of the fraud of a third person. Estoppel cannot be invoked to do fraud. Its purpose is to prevent fraud. Mouths will be shut only when necessary to do justice, and never where it would operate as a fraud or effectuate injustice. Further, one of the essential elements of estoppel is that the person invoking it has been influenced by a reliance upon the representations or conduct of the person sought to be estopped. These deeds were not made to Uhl by the plaintiffs. They were delivered to him for safe-keeping. They had no notice that Uhl had inserted his name. They had no notice that he intended to use them for the purpose of securing money upon this property. The deeds were not shown to Kacena, at the time the money was loaned. The deeds were not on record. Kacena simply took the statements of Cook or Uhl, whichever it may be, and relied upon them, and these statements, under this record, if shown to be made by them, are wholly false. Uhl did not have the title to this property, nor was it ever the intention of these plaintiffs to put the title in Uhl.

We are satisfied with the conclusion reached by the court in this case, and its action is, therefore,—*Affirmed.*

WEAVER, C. J., LADD and STEVENS, JJ., concur.

GAIL R. RICHARDSON, Appellee, v. CITY OF DENISON et al.,
Appellants.

MUNICIPAL CORPORATIONS: Paving Contract—Substantial Compliance With Resolution. The construction of a concrete pavement 6 inches in thickness is a substantial compliance with a resolution of necessity fixing the thickness at 7 inches, in the

absence of evidence showing that the reduction will materially impair the durability of the pavement.

Appeal from Crawford District Court.—E. G. ALBERT,
Judge.

JULY 6, 1920.

Suit to enjoin the performance of a contract to lay pavement in the city of Denison. On hearing, the decree was entered, as prayed. The defendants appeal.—*Reversed.*

Conner & Powers, T. V. Walker, and Stipp, Perry, Bannister & Starzinger, for appellants.

K. R. Cook and Sims & Kuehnle, for appellee.

LADD, J.—Section 810 of the Code Supplement, 1913, among other things requires that the proposed resolution of necessity shall state “the one or more kinds of material proposed to be used and method of construction.” The resolution adopted by the council of the city of Denison, June 9, 1919, recited that “a cement concrete pavement (7) seven inches in thickness” was to be laid. The city council, through its clerk, advertised for bids for the construction of the improvement in accordance with the plans and specifications on file when the resolution was adopted, which exacted that, “upon the subgrade prepared in accordance with these specifications shall be laid the concrete pavement (6) six or (7) seven inches in thickness.” The resolution also exacted that said advertisement “shall include the detailed plans and specifications,” and that, upon the receipt of satisfactory proposals, pursuant to the resolution and notice, “the city council shall, by resolution, accept the same, and authorize and direct the mayor, with the city clerk, to enter into contract in behalf of the city with the successful bidder, for the construction of said grading, curbing, guttering, and paving, in accordance with

the detailed plans and specifications of said engineer, and ordinances and resolution passed and adopted by the city council and the laws of the state of Iowa pertaining thereto." Blank forms for bids were furnished proposed bidders, in which each was required to state for what he would put in pavement 6 inches in thickness per square yard, and also pavement 7 inches in thickness per square yard. The firm of Aiken & Flutter was found to be the lowest and best bidder, and, as it offered to lay pavement according to the plans and specifications, 6 inches in thickness, for \$23,453 less than the 7-inch pavement, the city council concluded to accept the offer to lay the 6-inch pavement, and entered into contract with that firm accordingly. Thereupon, the plaintiff instituted this action to enjoin the performance of said contract, on the ground, as is alleged, that the defendant city was without authority or jurisdiction to enter into said contract for the construction of 6-inch concrete pavement instead of 7-inch pavement, as stipulated in the resolution of necessity. Others in like situation joined plaintiff in seeking the same relief. The defendants do not challenge the facts as recited, but contend that these do not indicate the city council omitted to do or did do anything illegal, or which deprived the city of jurisdiction to make and perform the contract. It will be observed that neither the proposed resolution of necessity nor the notice of hearing thereon is claimed to have been defective. By the adoption thereof, then, the city acquired jurisdiction to make the improvement proposed. *Shaver v. Turner Imp. Co.*, 155 Iowa 492; *Ellyson v. City of Des Moines*, 179 Iowa 882. Such resolution constituted the sole authority of the officers of the city to take bids and enter into the contract. The latter, then, must substantially conform with the requirements of the resolution.

"If it does not so conform, there is, on the one hand, no authority for entering into such contract, and, on the other hand, it is impossible to tell who is lowest bidder, to whom the contract should have been awarded. Accordingly, if the contract does not conform substantially to

the resolution or ordinance, it is invalid, and cannot be the basis of a valid assessment." Section 510 of 1 Page & Jones on Assessments.

The improvement must be the one the resolution calls for, and not something different. See *City of Chicago v. Ayers*, 212 Ill. 59 (72 N. E. 32); *Heman v. Gerardi*, 96 Mo. App. 231 (69 S. W. 1069); *Bay Rock Co. v. Bell*, 133 Cal. 150 (65 Pac. 299). See Section 532 of 1 Page & Jones on Assessments. Our sole inquiry, then, is whether the construction of concrete pavement 6 inches thick is in substantial compliance with a resolution fixing the thickness at 7 inches. It is well known that the depth of concrete required for durability depends largely upon climatic condition, the kind of soil, the extent and character of the traffic, and the like; and, in the absence of any showing, we are not able to say that 6-inch pavement will not serve the purposes of this improvement as well as though it were 7 inches in thickness. If it will prove as durable and efficient in use as would a 7-inch pavement, we are inclined to the opinion that the little reduction in thickness of 1 inch, or 1/7, would not be a material departure from the "method of construction, prescribed in the resolution." Such a resolution need not describe the material or materials of construction with technical nicety. All that is essential is that it state these in a general way, leaving the details to be wrought out in the plans and specifications. *Niron v. City of Burlington*, 141 Iowa 316; *City of Bloomfield v. Standley*, 174 Iowa 114; *In re Appeal of Apple*, 161 Iowa 314. These were referred to in the resolution and the bidding, and the contract required to be "in accordance with the detailed plans and specifications * * * and resolution." In the absence of evidence indicating that the reduction of 1 inch in the thickness of the proposed cement concrete pavement would materially affect its durability or its adaptability for the purposes proposed, we are not ready to say that there was a material departure by such reduction from the requirements of the resolution of neces-

sity. Surely, such a change, unless materially impairing the efficiency of the pavement or its durability, cannot be said to have produced a different pavement from that authorized by the resolution; and it would seem that, as the city council was authorized to make the pavement, equity ought not to intervene to enjoin the performance of the contract, unless that body should undertake to construct a different pavement from that authorized by the resolution of necessity. *Hamilton on Special Assessments*, Sections 391, 392; *Wells v. People*, 201 Ill. 435 (66 N. E. 210). The trial court erred in holding otherwise, and its judgment is—*Reversed*.

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

MATHIAS RODENKIRCH et al., Appellants, v. J. D. LAYTON et al., Appellees.

APPEAL AND ERROR: Certified Report of Trial—Stenographic

1 Notes in Lieu of Evidence. Basis for appellate review *de novo* is properly laid by filing a certified stenographic report of the trial within six months after entry of decree, and by filing the certified transcript of said notes *after* said six months.

FRAUD: Gross Deception and Inadequacy of Price. Equity may

2 grant relief, even though a scheme be so cunningly planned and ingeniously executed as to enmesh the victim in a net of intrigue, without disclosing any actionable misrepresentation. Evidence reviewed, and held to show such deception and gross inadequacy of price as to demand the cancellation of a deed.

PRINCIPAL AND AGENT: Agent Serving Two Masters—Avoid-

3 ance of Contract. When a contract is the result of services rendered by an agent serving both parties to the contract, it is voidable at the instance of the party who did not know that the agent was acting in a dual capacity.

Appeal from Winneshiek District Court.—C. N. HOUCK, Judge.

MARCH 23, 1920.

REHEARING DENIED JULY 6, 1920.

SUIT to cancel deed purporting to convey certain lots of plaintiffs' to J. D. Layton, and to quiet title therein. Layton alleged title in the property, and prayed that it be quieted. On hearing, the petition was dismissed, and the relief prayed by Layton granted. The plaintiffs appeal.—*Reversed.*

William S. Hart, for appellants.

E. R. Acres, Carter & Sullivan, and Burling & Burling, for appellees.

LADD, J.—I. No certified transcript of the evidence was filed within the time allowed for appeal. But a duly certified shorthand report of the evidence was. Under the original Section 3652 of the Code of 1897, appellant was, therefore, not entitled to review *de novo*. But he contends that, under an amendment to that statute, said filing of shorthand report gives the right to such review. Appellees insist that the amendment has not changed the law, and that the timely filing of certified transcript is still essential. The amendment to the statute is:

“But this section shall be so construed as to include the evidence taken in shorthand, when the reporter’s notes of such evidence have been certified to by the judge and reporter within the time herein provided.”

Appellees argue that public records must be in the English language, and in such form as that the layman who is able to read English can read such record, and that it is a mere form to have a trial judge certify a shorthand report which he is unable to read. But does that prove the deduction that the legislature lacks the power to add to that requirement of the original statute which demands

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port of trial:
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of evidence.

that the evidence must be taken down in writing a modification that a duly certified shorthand report shall be considered writing? Grant that it was impolitic or unwise to treat a shorthand report as written evidence, yet that does not affect the power to make such provision. The legislature had power to permit appellate review, though the evidence were not taken down in writing at all. On the law side, it has been held that the appellant may prepare his abstract from his own private memorandum. The legislature had power to permit such to be the basis of review *de novo*. It had power to make the basis for such review whatever it pleased, provided this fell short of denying a trial *de novo*. It was under no compulsion to enact that the evidence should be certified, and had power to say within what time it should be certified, and when, if at all, it need be filed. It follows that it had power, after providing as a basis for review that the evidence must be taken down in writing, to define what should constitute writing. If it could dispense with all certifying, it could make a merely formal certificate a sufficient basis for review. The only question is whether it *has* made a qualification that makes the certified stenographic report the equivalent of a taking down in writing. If it did not intend to do that, the amendment was utterly idle; and we must not presume it was framed to accomplish nothing. We think it was intended to enact that the filing of such report might be the basis for appellate review. And, granting that certifying of the shorthand notes by the judge is a mere ceremony, there does come a time when he certifies the transcribed evidence, and at that time, his certification will not be a mere ceremony. The only real difference effected by the statute change is that the old-fashioned written evidence, the certified transcript, may be filed later than within the period allowed for appeal. So that the mischief that might be done, if there were no basis but the stenographic report, is but an imaginary mischief. What it all comes to is that it is a sufficient basis for appellate

review to file the shorthand report, duly certified, and within the six months, and that, the basis being laid, a longhand transcript is later to be furnished, if required to settle conflict in the abstracts.

While the question now before us was not, in strictness, decided by *Richardson v. Fitzgerald*, 132 Iowa 253, that which was said on the point now here in consideration lay in the pathway of the decision, and gives some support to our holding.

The cause was heard on depositions, and the recital in shorthand was merely of the offering of these in evidence, the objections thereto, and the reading of the same. The transcript, therefore, could be of little service in the preparation of the abstracts, but was duly certified and filed, when its omission was called to the attention of counsel for appellant. This was in time, though more than six months subsequent to filing of the decree.

II. One of the plaintiffs, Mathias Rodenkirch, acquired certain lots with a double, two-story building and dwelling house thereon, in Castalia. Their value was estimated to be \$12,800. He desired to exchange this

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tion and
inadequacy
of price.

property for a small farm, near a church and school of his own faith, and employed A. J. Schuler as agent, with the understanding that the latter should have a commission of 5 per cent, if a deal were effected. Schuler returned, shortly after this talk, and told Rodenkirch that he had met a man on the train, whom he did not know, who had 240 acres of land near Arlington, for which he could trade his property, and that he (Schuler) could exchange the 240 acres for 80 acres in Minnesota, at \$75 to \$78 per acre. No mention was made of the then owner D. D. Layton; for one of the Laytons had shown Rodenkirch an 80-acre tract south of Lime Springs, several months before, at \$175 per acre, worth less than half that amount, and he had informed Schuler that he would have nothing further to do with them. It was arranged that they meet at Postville, the Monday morning following, which they did, and, accompanied by Long, the

three proceeded to the farm. Layton reached the farm earlier, and had offered Culver, who was in possession as receiver under foreclosure proceedings, "\$50 to help put the farm onto the man they were going to bring out," and told Fox, son-in-law of White, who was foreclosing, that, "if he said a good word for the place, he would slip him \$50." Fox, with his wife and Mrs. White, was then in charge of the buildings during the haying season. On the arrival of the parties previously mentioned, Layton, who was about 29 years of age, posed as a Scandinavian, and was introduced to Rodenkirch by Schuler as "Gullickson." The latter told Rodenkirch, in broken English, that the farm was worth \$150 per acre and could be sold for that, and Schuler intervened with the statement that he had an uncle, living a mile and a half distant on the other road, of whom he could inquire. "Gullickson" explained that the people there were in bad shape; that they formerly owned the farm; went to Dakota, where the young man wrecked his father financially; and that the latter was then in the hospital for the insane in that state; that they wanted to buy the farm back, but were not financially able, and he allowed them to live there (all of which was false, save that White had owned the land); that, when he bought the farm, he thought he would be exempted from the war, as he had a wife and child, but found out that he would not be exempted, and was selling on that account. On their return to Arlington, Schuler called Rodenkirch to one side, and advised him to inquire of the banker the price of land; and, on asking a person in the bank, he was informed that it was \$150 per acre "around here." While at the farm, Schuler inquired of Culver "what farms were selling for about the country," to which Culver responded, "\$85 or \$90 per acre." Schuler also cautioned Culver not to let Rodenkirch know Layton's name, and gave another by which to designate him. The parties then proceeded to Castalia, to examine the lots with buildings thereon, and, these being satisfactory to "Gullickson," Schuler and Rodenkirch went

to consult the latter's wife, who appears to have considered the farm, as well as the incumbrance against it, too large. Schuler assured her that the farm could be sold right away, and, after Long came up and warned her that, if they didn't get rid of their property, there would be likely to be trouble, as cards were being played in the back room, she finally told her husband to do as he thought best. The several parties then proceeded to Postville, and procured an attorney to prepare the contract of exchange. Erwin testified that Layton and Schuler cautioned the attorney that Layton's name was not to be mentioned until after the deal was closed, and Rodenkirch swore that the attorney, in reading the contract, explained that he was the first party and "Gullickson" the second party, and did not read the names inserted in the contract, and that he was not aware that "Gullickson" was really D. D. Layton. He asked for "Gullickson's" address, however, before they parted, whereupon the latter wrote his true name and address on a slip of paper, handed it to Rodenkirch, and the latter put it into his pocket without reading it. While he was walking down the street with "Gullickson," a person said, "How do you do, Mr. Layton?" whereupon, in response to inquiries, "Gullickson" assured Rodenkirch that he was not related to Layton. Rodenkirch examined the slip of paper the next day, and discovered thereon, "D. D. Layton, Aurora, Illinois," and expressed dissatisfaction with the deal to Long, and, on the morning following, took the train for Postville. Long was on the same train. Rodenkirch met Schuler, on leaving the train at Postville, and told him that he would call the deal off, explaining that D. D. Layton had been passed off as "Gullickson." At first, Schuler assured him that he did not know Layton, but finally admitted having known him, and explained that he knew plaintiff would not look at the land, if he knew the owner was Layton. Long came up, about this time, and to him Schuler remarked, with an oath, that someone had "put him (Rodenkirch) up against." J. D. Layton, father and partner of D. D.

Layton, had dropped off the train that morning, and, coming up, said he would go over to the post office for his mail, and, upon returning, remarked that "he had two buyers for that farm already," and that he had just opened two letters, the envelope to one of them lying in the street, and, after reading both, he placed them in one envelope, and gave them to plaintiff to show to his wife. One of these letters purported to have been written by H. Goodhile, Manchester, Iowa, and read:

"Emil Zenft & Son of Oelwein, Iowa, was down to see Mr. Rhines on this last Saturday, and said they had a man that wanted to trade in a $\frac{1}{4}$ section of land in Canada on the farm that you got of Mr. Rhines and wanted \$35 per acre for his Canada land and give you \$150 per acre for the Rhines farm so better see them if you have not already made the deal on the farm let me know what day you will be down to fix up contract with E. S. Cowles as you wrote yesterday about this deal."

The other letter purported to be signed by Rhines, and read:

"There was a man in my store and he said that he came to buy the place that I sold you and that he would buy the place. I told him I had sold it and that he must buy it from you. If you would take in a quarter that he had in Canada that he wanted 35 an acre for it and he said that he would give you one hundred and fifty at once so you had better come at once."

After some parley, it was arranged that Rodenkirch should have the benefit of the proposed exchange for Canada land, and he and Layton proceeded to Oelwein, where they met Zenft. The latter had no authority to act for Smith, the party handling Canada land, who was absent. Layton prepared a contract, however, which Rodenkirch signed, and it was left for Smith to execute. They returned by way of Ossian, where Rodenkirch had an attorney prepare a conveyance of the Castalia property to Layton, and took it with him to that place, where he and his wife signed and

acknowledged it before the cashier of the local bank, as notary public; and the deed, with the abstract to the property, was turned over to Layton, who treated it as delivered, and swore, in substance, that it was delivered to him unconditionally. Rodenkirch testified that it was handed to Layton to be deposited with the deed from Rhines, with blank for grantee's name, in the bank at Postville, and that the deal was to be there closed, August 7, 1917, as provided in the contract. That instrument did so provide, and also that each party should furnish abstract of title to their respective properties to date, showing merchantable title. The abstract of title to the farm had not been brought to date, and, when subsequently mailed to Rodenkirch, disclosed the condition of the record to September 18, 1915, only. Immediately after signing the deed, he paid Schuler \$600 as commission, which the latter divided with Long. Layton, on the day after receiving the deed, mortgaged the Castalia property to secure \$5,330 owed to McEwen, who forwarded the deed for record, and then sought to obtain from the cashier of the Castalia bank the insurance policies covering the buildings on the lots in controversy. On being informed of this, Rodenkirch consulted his attorney, and this suit was begun.

Such is the outline of the story of the several transactions through which Rodenkirch was induced to agree to the exchange of his property fairly worth from \$6,000 to \$12,000, for a farm incumbered for more than its actual value. There is always something about such a transaction which, though difficult to express, speaks louder than words. The very atmosphere seems charged with the spirit of deceit. It works out too perfectly not to have been carefully planned in advance. Through it all is evidenced the carefully laid scheme to entrap the unwary, suggesting the web woven by the spider for the fly. Ordinarily, the victim is one who, like Rodenkirch, has dealt somewhat in realty, but has never come in touch or been associated with experts in the art of deception. He treats the person em-

ployed as agent, even though he be secretly in the employment of the party with whom he is dealing, or though, to effect conditions on which his commission depends, he is ready to sacrifice the interests of his principal. The victim pays no heed to the presence of a third person, apparently disinterested, along for the sole purpose of putting the deal through, nor is he likely to appreciate the psychological influence of a carefully planned reception on the premises being shown, or of the delicate flattery of being assured that he knows more about land than anyone can tell him. In the case at bar, the plan had been worked out with marked ingenuity, and carried out with a degree of skill which, if exerted in a worthy cause, must have excited sincere admiration. Layton, with whom Schuler had been associated in handling land ventures several months, put the land near Arlington in his (Schuler's) hands for sale, and assured him that, if he procured a deal, he would make it right. Schuler found Rodenkirch, and arranged that he would find a deal for him, and that, if he succeeded, he should have a commission of 5 per cent. This latter is undisputed, and that he was acting for Layton appears from his own testimony, when called by defendants as a witness:

"Q. Were you acting as agent for D. D. Layton or J. D. Layton in that matter in any way? A. I wouldn't know how to answer that. Mr. Layton told me he had that property down there, and told me to find him a deal on it, and I done so. Q. Were you to get any compensation from D. D. Layton? A. If I was, I never did get any."

On cross-examination, he swore that:

"Layton and I have been working together, handling land ventures, for about five months. Layton said that, if I got any land deals for him, he would make it right. Rodenkirch's trade was the first deal I closed for Layton. * * * Layton put this Fayette County farm in my hands for sale, a week or two before I took Rodenkirch down. * * * First solicited Rodenkirch for another tract of Layton's land."

On redirect examination, he explained that he "didn't consider himself agent for either of the Laytons in this deal." He testified later that he "was not acting as agent for D. D. Layton or J. D. Layton in any way. I had no deal made with Mr. Layton at all, and I claimed no interest in the property whatever." This is merely the witness's conclusion, but, as observed, is entirely inconsistent with his testimony as previously detailed, which his conduct tended strongly to confirm. In the first place, he took Long with him, and, according to his testimony, had employed him to sell hail insurance, agreeing that, if they made "any land deals, he would divide fifty-fifty with him; and that is how he came to be in this deal. Rodenkirch didn't know that Long was in on this deal. Nothing was said to Rodenkirch or in his presence as to what Long was doing, along on the trip to Arlington. So far as anything was said, Long was a perfect stranger to the transaction." And Long played his part of indifference. Schuler knew that Layton was playing the innocent part as a Swede, speaking broken English, and promoted, if he did not originate, the scheme, by introducing him to Rodenkirch as "Gullickson," and cautioning Culver not to mention Layton's name in Rodenkirch's presence. Later, when informed by Culver that the land did not exceed in value \$85 or \$90 per acre, Schuler not only withheld this information from Rodenkirch, but acquiesced in Layton's misrepresentation to him that it was worth \$150 per acre. There is no escape from the conclusion that Schuler was employed by Layton to find a deal for this farm, and actively assisted in consummating it, and that, while so employed, he engaged to act for Rodenkirch in finding a deal for his lots for a farm, without disclosing to the latter his relations with Layton. As Layton knew that Schuler was pretending to serve Rodenkirch, and was aware, from the circumstances recited, that Rodenkirch did not know he was in Layton's service, any contract procured by the latter under these conditions was tainted with fraud.

An agent cannot serve two principals without the in-

telligent consent of both. The law will not permit an agent to place himself in a situation in which he may be

3. PRINCIPAL AND AGENT: agent serving two masters: avoidance of contract. tempted by his private interest to disregard that of his principal. "A man cannot serve two masters" is an infallible truth, and, where a contract is the result of services rendered

by an agent serving both parties thereto, one of whom is aware of such double agency and the other is without knowledge that the agent is serving the other party, the contract is voidable, because the one party with full knowledge joined in the deception. *O'Meara v. Lawrence*, 159 Iowa 448; *Lister v. La Plant*, 183 Iowa 1363. See, also, *Montgomery County v. American Emigrant Co.*, 47 Iowa 91; *Wilson v. Webster*, 88 Iowa 514; *Casady v. Carraher*, 119 Iowa 500; *Mayer v. Hamre*, 162 Iowa 662; *Stapp v. Godfrey*, 158 Iowa 376; *Rasmussen v. Hansen*, 176 Iowa 26.

Deception also was practiced as to the value of the land. The record disclosed that W. J. White purchased it in 1900 for \$33 per acre, and that he sold it to Rhines in 1915 for \$24,700, all but \$18,000 being paid, and that secured by a mortgage on the premises. The grantee proceeded, on August 26th of the same year, to load it with a second mortgage, securing an indebtedness of \$3,071.87 to the Lamont Savings Bank. No attention seems to have been given to the land by Rhines until he exchanged it to D. D. Layton for a section of land in Deaf Smith County, Texas. In the meantime, White foreclosed the first mortgage, buying the land in at the sheriff's sale, June 9, 1917, for \$20,664.35. The incumbrances then on the land, August 1, 1917, amounted to \$24,470.60, plus about \$200 in taxes, levied in 1916. White testified that, in his opinion, the farm was hardly worth what he had against it, or \$20,644.35, with interest from June 9, 1917. Culver, who was appointed receiver in the foreclosure proceedings, thought \$85 or \$90 per acre would be a good price for the farm. Sibel, whose land joined it, estimated its value at \$80 to \$90 per acre, and Zenft thought it could be sold for \$100 to \$110 per acre. This evidence was not controverted, and there is no

room for saying that its value was more than the incumbrances against it. Rodenkirch was getting nothing out of his property at Castalia, and must have relied on Layton's misrepresentation of value. He testified that he had confidence in Gullickson, and believed him when he told him that the land was worth \$150 an acre and over, and also believed him when he told him he bought the land so that he could escape military service, and was selling only because he found out it wouldn't keep him out of the army; that he believed him to be what he represented. Having walked over the land, he was not in a situation to claim any deception as to quality of the soil; but he had never been in the vicinity of this land before, and had no information concerning its market value save through "Gullickson" and the person at the bank to which Schuler led him to inquire. The transaction reminds one of *Lister v. La Plant*, 183 Iowa 1363. There, the party was little past majority; here he was an Americanized Luxembourger, who knew so much that Layton touched his vanity by wondering at his recognition of the different kind of weed seeds, and told Schuler in his presence that there was no use telling him anything about the farm, for he knew more than they. There, the plaintiff had parted with property worth \$14,800; here, with property worth about \$10,000. There, it is said that inadequacy of price is evidence, slight or powerful, according to its relative amount and other circumstances, and that, as "opinions of value differ greatly, we are not inclined to give the disparity between the value of plaintiff's property and what he received, greater significance than that of a strong and persuasive circumstance tending to show that he was in some manner influenced and deceived." In that case, there was controversy as to the value of defendant's farm; here, there was none; and, according to the undisputed evidence, the plaintiff's property was being obtained without valuable consideration.

Another matter should not pass without attention, and that is the remarkable combination of circumstances.

After entering into the contract at Postville, D. D. Layton dropped out of sight. Long appeared in Castalia, the following day, and learned of Rodenkirch's dissatisfaction, and, of course, took the train for Postville the next morning. Whether he got in touch with Schuler the night before does not appear, but it does appear that Schuler was there to meet Rodenkirch; that J. D. Layton happened to drop off the train that very morning; and that the letters from the stranger, Goodhile, and from Rhines were awaiting Layton at the postoffice! Did all this happen by chance? Hardly! One thing is to make such a deal, and quite another to close it; and these experts were not the men to overlook that! They were there, ready to meet an emergency, and the letters were quickly made use of to induce Rodenkirch to confirm the contract by holding up the possibility of exchanging the farm for Canada land. He snapped the bait, the deed was turned over to Layton for some purpose; Schuler was paid \$600, as the commission agreed upon, which he divided with Long; and, but for McEwen's inquiring of the cashier at the Castalia bank for the insurance policies, the prompt notice thereof given Rodenkirch, and his equally prompt action in consulting an attorney, the fraud perpetrated must have succeeded.

We have pointed out at least two specific deceptions practiced in this case, to obtain the Castalia property; but, in doing so, it is not to be inferred that a scheme may not be so planned and ingeniously carried out as to enmesh the victim in a net of intrigue, without disclosing any misrepresentation that is actionable, and yet the transaction, as a whole, be so fraught with deceit and permeated with dishonesty as that the courts will grant relief. Though the scheme of the defendants was shrewd, and the finesse of its execution incomparable, the courts should be astute enough to analyze the facts and discover fraud, if perpetrated, and thereby protect the unwary against fraudulent devices, however seductive.

A decree should have been entered as prayed.—*Reversed.*

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

ELIZABETH SAUNDRY, Appellee, v. JOHN SAUNDRY et al.,
Appellants.

DEEDS: Undue Influence. Evidence held insufficient to show that
a deed from mother to son was obtained by undue influence.

Appeal from Fayette District Court.—H. E. TAYLOR, Judge.

JULY 6, 1920.

PLAINTIFF is a widow, about 80 years of age, and the defendant John Saundry is her son, and his codefendant, his wife. Plaintiff brings this action to set aside a deed conveying a farm of 120 acres to her son, and to recover \$5,000 alleged to be due her as rent. There was a decree and a judgment for \$2,000 in favor of the plaintiff in the court below. Defendants appeal.—*Reversed.*

E. R. O'Brien and D. D. Murphy, for appellants.

W. W. Comstock, for appellee.

STEVENS, J.—The questions involved in this case are largely questions of fact. Counsel differ widely in their interpretation of the evidence and its probative effect, and consequently in the application of legal principles thereto.

The grounds upon which plaintiff asks the cancellation of the deed are that same was procured by fraud and undue influence, without adequate consideration; and that, at the time, the parties stood in a confidential or fiduciary relationship. The defendant denies these claims by the plaintiff, and avers that the deed was executed for an adequate consideration, in pursuance of a prior, oral agreement; that he expended large sums of money in the improvement of the land, with the knowledge and consent of plaintiff; and

that she subsequently ratified and confirmed the conveyance thereof to him.

Plaintiff was twice married; the first time in England, to John Quintrell, and the second time to John W. Saundry, the father of the defendant, at Hazel Green, Wisconsin. At the time of her marriage to Saundry, she had two children, J. H. and Percival Quintrell; and her husband had a daughter, about 14 years of age. The children of her second marriage are the defendant, Alberta Edwards, and William Saundry, all of whom were born before the family moved to Fayette County, which was in the early 80's. Defendant's father, shortly after his arrival in Iowa, purchased 160 acres of land, of which the farm in controversy is a part. The defendant was married in 1891, and, in accordance with a previous understanding between them, went with his wife to reside with his parents on the farm. In 1892, defendant's father and mother moved to Oelwein, and orally leased the farm to him for a cash rental of \$2 per acre; defendant to keep up the improvements thereon. John Saundry, Sr., died in 1897, but the defendant continued to reside on the farm and pay rent to his mother, as he had previously done to his father, until 1911, when the deed in question was executed. Shortly prior to the execution of the deed, plaintiff became involved in a controversy with a Mrs. Porter, a neighbor woman, resulting in the arrest of both of them, each filing complaint against the other. The cause of the trouble was charges made by plaintiff against the character of Mrs. Porter. After plaintiff's arrest, she notified the defendant, who came to town, and by his efforts procured a dismissal of both prosecutions. Plaintiff learned in some way, either from her son-in-law or from the defendant,—and upon this point the evidence is in dispute, the defendant claiming he did not tell her,—that Mrs. Porter was threatening to sue her for \$10,000 damages. On August 8, 1911, the deeds conveying the farm and the home in Oelwein to the defendant were executed. Later, Mrs. Porter brought an action against plaintiff for \$10,000 damages, which was finally compromised and

settled by the payment by the defendant John Saundry of \$100, for his mother, for that purpose. Following this settlement, he reconveyed the Oelwein property to plaintiff; but she claims he refused to reconvey the farm, giving as a reason that his wife declined to sign a deed.

There is a dispute in the evidence as to these transactions, the plaintiff testifying that, when she made the deed, the defendant specifically agreed to reconvey it to her as soon as the damage case was disposed of, and that she made the conveyance upon his representations that it was the best thing to do, in view of the threatened suit for damages. The defendant, however, testified that, while the immediate cause of the execution of the deed was the threatened action for damages, the real consideration was an oral agreement that he should have the farm, upon certain conditions to be performed by him, entered into between them in 1901. Concerning this alleged oral agreement, the defendant testified that, the year following his marriage, he concluded to leave home, and rent another farm; that his parents, learning of his intention, remonstrated, and agreed with him that, if he would remain, he might occupy and cultivate the land, for a cash rental of \$2 per acre, that they would move to town, and that ultimately the farm would belong to him; that, in 1901, he had an opportunity to purchase a tract of 119 acres, at \$40 per acre, and informed his mother that he intended to buy the same; that she objected, and urged him to remain upon the farm, promising that it should be his, that he could have it at a valuation of \$50 per acre, the consideration to be paid in different amounts to her children, and that she would fix it so he would get it; that he finally decided to remain on the farm, and continue to pay rent to his mother at \$2 per acre.

Mrs. Edwards, called on behalf of the plaintiff, testified that she and her brother John Quintrell had an interview with defendant at the home of her mother, in her presence, in which the mother stated that defendant refused to reconvey the farm, because his wife would not join in the conveyance. The defendant, however, gives an entirely dif-

ferent version of this meeting, insisting that, when he entered the house, Mrs. Edwards was angry, and demanding something of her mother, and he denies that the mother at any time requested a reconveyance of the farm.

It appears without conflict in the evidence that plaintiff, on the 23d day of April, 1901, went alone to the office of an attorney, and executed a will, devising the farm to the defendant, but requiring him to pay \$1,000 each to Percy Quintrell, J. H. Quintrell, and Alberta Edwards, and the sum of \$2,000 to William Saundry, and \$200 to another party named. This was shortly after the alleged oral agreement was made, and after she had informed the defendant of the amount to be paid to each of the children. The defendant testified that his mother gave the will to him, saying, "This is yours, and keep it, and the farm is yours." When questioned, upon cross-examination, plaintiff sought to deny any knowledge of the first will, and professed to be ignorant of the provisions of the second will; but she later modified or explained this testimony. Her family physician, Dr. Pattison, testified that, a few days before the execution of the second will, he called at her home, in response to her request, at which time she informed him that she desired to make a will, stating the disposition she desired to make of her property, and asked him to recommend a suitable attorney to prepare the instrument for her. A day or two later, she sent for the defendant, who went to town, and according to his testimony, plaintiff told him that she desired to make a new will, and that she had concluded to leave her son William, who is a mute, \$4,000, and to Mrs. Edwards \$1,500, instead of \$1,000, as provided in her former will; and requested that, as J. H. Quintrell was getting old, he be paid his \$1,000 at once. Percy Quintrell was deceased, at the time the second will was made. The defendant took plaintiff in his surrey to the office of Dr. Pattison, where she met an attorney, and a will was drawn up and executed by her. About the same time, the defendants executed a note, payable to plaintiff, for \$5,500, together with a mortgage upon the farm, to secure the payment

thereof. The mortgage represented the aggregate of cash bequests made by the will. This mortgage was recorded, and the note delivered to plaintiff. Several interest payments are endorsed on the note. After the execution of these papers, the defendant expended considerable sums of money in improvements on the farm, \$2,600 of which, he claims, was used in rebuilding the house.

Defendant ceased to pay rent, after he received the deed, but paid plaintiff \$250 per year, as interest on the note. For a period of four years after the meeting at her mother's, referred to above, Mrs. Edwards had been estranged from her mother. The reason given by her therefor is that her mother refused to do right by her in the division or distribution of her property. During about three years of this time, she resided across the street from plaintiff, who was, upon one or more occasions, seriously ill; but she did not go to see her. She was taken care of by defendants, or by others employed and paid by John Saundry, defendant.

Upon the question of confidential relationship and undue influence, there is little evidence. Plaintiff concedes that her son was, until recently, kind to her, and it appears from the evidence that she resided in his home, from time to time, and for one year before she went to live with Mrs. Edwards; and that, when requested by her, he looked after her welfare. She does, however, complain of her treatment by his wife, while she last lived with him; but this is generally denied by defendant. It is claimed that he was her sole business confidant and adviser; but, if so, she had little business to be transacted. She was paid \$240 per year rent for the farm, and it does not appear that the defendant had anything to do with the expenditure thereof. She did not consult him, before she filed the complaint against Mrs. Porter, and, when she concluded to execute a second will, first consulted her family physician, and not the defendant. Some claim is made by her that defendant dictated the terms of the will. In this, however, she is not supported by the evidence. Dr. Pattison was present when the will was prepared, and signed it as a witness, at her request. He

testified that the attorney made a memorandum, before preparing the will, from statements and information given him by plaintiff. The defendant took plaintiff to the office, but went away, and was not present when the will was prepared and executed. As stated, she requested defendant to pay her son J. H. Quintrell \$1,000 at once. This, the evidence shows, the defendant did, and the will recites that he has received his full share of her estate.

It is suggested in argument that the \$1,000 paid by the defendant to Quintrell was not at the request of plaintiff, but for another purpose. The defendant denies that he induced his mother to make the deeds to him by representing to her that Mrs. Porter was going to bring an action for damages, but avers that she had concluded to deed the land to him. Upon this point, he testified:

"I saw my mother again after that, within a few days. I saw her pretty often, most of the time. She again mentioned the Porter matter, and said that Shorty Edwards—that is my sister's husband—said that Mr. Porter was going to sue her for \$10,000. I said: 'I don't know as he is going to or not. There is no use in getting excited over that until you find out for sure.' I guess that is all that was said that day. I saw her a day or so after that, and she said, 'Well, Porter is going to sue me for \$10,000,' and she says, 'Well, I will fix that.' She said, 'That farm is yours, and you have got your life's work in it, and I sold you the farm, away back, years ago, and I will just deed that farm to you.' That is the words she told me. She said she wanted me to get a deed made, and have it signed and recorded. I had Mr. Jamison do that, I think the next day or so. I am not positive as to that. The next day, she told me, when I come up, that somebody had told her she better deed her house and lot off to me, and I said, 'Mother, that is not necessary,—they can't take your house and lot;' but she said she wanted to deed that, too. She wanted to be sure that Willie had that, when she was through with it, and she says, 'John, I want you to promise that, when this deed is given to you and recorded, you will abide by my settlement

with you in 1901, and live up to what my will calls for.' I says, 'Mother, I will do it.' And the deed was made and recorded."

The court below held that the conveyance was procured by fraud, and that the defendant held the property in trust for the plaintiff; set aside the conveyance; and awarded judgment against defendant for \$2,000 rent. We are unable to agree with this conclusion. That the deed would not have been executed by the plaintiff in the absence of the threatened damage suit may be conceded, as it may also be conceded that plaintiff had always desired to retain the title so long as she lived; but it seems to us that the existence of a prior agreement and understanding between the parties is fully established by the evidence. The testimony of the defendant upon this point is in harmony with the conduct of the plaintiff and the entire course of dealing between them. The second will, which was executed after the conveyance, differs but little from the first one. She does not claim that the first will was not executed voluntarily, or that she did not understand or intend the disposition of her property, as therein set forth. The amount bequeathed to her son William is doubled, and \$500 is added to the bequest in favor of her daughter. In the first will, she devised the farm to the defendant; and in the second, specifically acknowledged that she had conveyed the same to him. In the first will, she bequeathed her son J. H. Quintrell \$1,000, and in the second, recited that he had already received his full share of her estate. This was in accordance with the facts.

Prominence is given, in the argument of counsel, to a few circumstances which appear to us of little importance. The defendant testified that he took some flowers to his mother on Mother's Day. In this connection, he testified that this was in accordance with his custom. This is not denied. The circumstance hardly shows a desire to take advantage of his mother. The second will contained a provision reducing the bequest to Mrs. Edwards to \$5, if she contested the probate of the will. It is suggested that this

clause could hardly have originated with the plaintiff, and that it was probably inserted at the suggestion of defendant; but the record contains no evidence to that effect, but does show that Mrs. Edwards, a few days before the execution of the will, left her mother's home in a fit of anger, and never thereafter visited her mother, although the latter continued to reside across the street for about three years, when she went to reside with the defendant.

The will was prepared by a competent attorney, from information received from the plaintiff. She did not testify that the defendant requested the execution of the second will, or that she conversed with him about the matter until the day before its execution, which was after the talk with Dr. Pattison. So far as is disclosed by the record, the defendant opposed, rather than suggested, its terms. It conferred no benefit upon him, except that he was named as the executor thereof, without bond. The mortgage given to secure the payment of the \$5,500 note was promptly recorded, and the note delivered to plaintiff. It was in her possession when she left defendant's home, where she had resided for a year. This was after the execution of all of the instruments referred to. She went to live with Mrs. Edwards, after receiving word from her that she was welcome to do so, if she desired; since which time she has executed another will, the contents of which were not revealed upon the trial. Some claim is also made that plaintiff had little education, and was wholly without business experience. According to her testimony, she quit school when very young; but, according to all of the testimony, defendant's father, who had been a miner all his life, and knew little or nothing about farming, promptly turned all money received by him over to plaintiff, who retained it until it was necessary to spend it. It is not claimed that she was mentally incompetent. Her testimony shows that she was alert, and clearly comprehended and understood the effect of the several instruments executed by her. She knew that her will could be revoked and changed whenever she desired. Most of the improvements were placed on the

farm by defendant after the deed was executed, but this was manifestly done with the full knowledge of plaintiff. She could not have forgotten or overlooked that defendant retained the deed; that she had possession of the note; that he was paying her interest in the sum of \$250, instead of rent in the sum of \$240 per year; that she had executed a will, in which she had specifically recognized the conveyance, and the settlement by the defendant with her son J. H. Quintrell; that he was paying the taxes on the land, and claiming absolutely to be the owner thereof. The claim of the defendant that he expended \$6,000 in improvements is, perhaps, an exaggeration, but that he spent considerable is conceded. It makes little difference whether the burden of proof rests upon the defendant, as claimed by counsel for appellee, or not, as the evidence leaves no doubt that plaintiff and defendant at all times dealt fairly with each other, and with a full and complete understanding of the effect of the several instruments executed. She changed her mind after she went to reside with Mrs. Edwards. It is true that the land at the time the deed was executed was much more valuable than it was in 1901, but that was the time when the parties agreed upon the terms upon which the defendant was to have the farm. Its market value at that time did not exceed \$40 to \$60 per acre. The disposition of her property by each of the two wills is in harmony with the testimony of defendant, and shows that plaintiff had changed her mind, when she came to make the second will, only regarding the amounts she desired to give to her mute son and to her daughter. The large increase in the value of the land results in a much greater advantage to the defendant than she contemplated at the time the wills and deed were executed, but this affords no ground for setting it aside.

It will serve no good purpose to discuss the various legal propositions referred to by counsel, or to review the cases cited. The principles applicable to the facts of this case are familiar, and do not call for extensive statement or consideration. It is our conclusion that plaintiff has failed

to make out a case. The proof does not sustain the allegations of the petition. It follows that the decree and judgment of the court below must be and are—*Reversed*.

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

LENA SCHLEUTER et al., Appellants, v. LOUISE REINKING et al., Appellees.

DESCENT AND DISTRIBUTION: Distributive Share—Evidence.

- 1 Evidence held to show that, in the division of an estate, the widow took certain real estate as part of her distributive share.

WITNESSES: Competency—Transaction With Deceased.

- 2 In order to exclude the evidence of an interested party as to a transaction with a deceased person, the objection must be to the incompetency of the *witness*, not to the incompetency of the *evidence*.

Appeal from Cedar District Court.—JOHN T. MOFFIT, Judge.

JULY 6, 1920.

SUIT to partition 18 lots resulted in a decree quieting title in defendants. The plaintiffs appeal.—*Affirmed*.

J. C. France, for appellants.

C. J. Lynch, for appellees.

LADD, J.—August C. Reinking died intestate, October 9, 1891, seized of 18 lots in the town of Clarence and 160 acres of land. A widow, Caroline T. Reinking, and six daughters, who are the plaintiffs, and one son, Henry F. Reinking, survived him. The son married Louise Reinking, June 24, 1896, and died March 25, 1914, leaving him surviving his widow, said Louise Reinking, and four children, all of

1. DESCENT
AND DIS-
TRIBUTION:
distributive
share:
evidence.

whom are defendants herein. The farm was sold to the son in 1893, at \$52.50 per acre. Two of the daughters were married, and, with their husbands, joined the two other daughters who had attained their majority, in the execution of a deed conveying their interest in the land; and the widow, as guardian of the two minor daughters, conveyed their interest, under proper order of the court. The widow made a separate conveyance, reciting a consideration of \$1,885, and conveyed "my one-third interest in and to the N W $\frac{1}{4}$ section of Section 18," etc. The decedent, August C. Reinking, acquired the 18 lots, about 11 months prior to his death, and, with his family, immediately took possession thereof as his homestead. His widow, with such of the children as were unmarried, continued in the occupancy of the premises until the marriage of all but one of them, Alma, who remained single, and made her home with her mother until the latter died, testate, on July 3, 1911. Her will was duly admitted to probate, and, after bequeathing to two of the daughters \$100 each and the household goods, and to the other four \$50 each, gave to her "son Henry F. Reinking all the remainder and residue of my estate both real and personal." Alma Reinking continued in possession after her mother's death until some time in 1913, when Henry F. Reinking and his family went into possession of the premises, though Alma occupied two rooms for a while, and left some things there until some time in 1916. This suit was begun October 8th of that year. The plaintiffs alleged that each of them was the absolute owner of an undivided one seventh of the premises, and that the defendants owned one seventh thereof, and prayed that a decree be entered, establishing their respective interests, as alleged, and that the premises be sold and the proceeds be divided accordingly. The defendants pleaded: (1) That the widow took the lots in controversy as a part of her distributive share; (2) that the defendants have been in adverse possession for more than ten years; (3) that the plaintiffs are estopped by their conduct from claiming any interest in the property. Only the first of these need be considered.

Upon the death of the father, the widow took an undivided one-third interest in all the realty, consisting of a farm of 160 acres and the 18 lots in Clarence, which they had occupied as a homestead. Each of the children took one sixth of the remaining two thirds, or two twenty-firsts of these properties. This is on the theory that the widow did not elect to take the homestead in lieu of a distributive share. That she did not do so conclusively appears from her execution of the deed to an undivided one-third interest in the farm, and receipt for the consideration named in the deed. Her continued occupancy of the lots, then, must have been as tenant in common, as contended by appellants, or as owner, as argued by appellees. As no deed to her was executed by any of her six daughters, the burden is on the wife and heirs of her son, Henry F. Reinking, to whom said lots were willed, to show that the widow died seized of the property. On final settlement, in 1893, she received, as her share of the personal estate, \$1,757.05, and each of the children received \$532.05. In the same year, the farm of 160 acres was sold to the son Henry, at \$52.50 per acre, or \$8,400. Properly apportioned, \$2,800 of this should have gone to the widow and \$800 to each of the children. Instead, the widow received but \$1,885, and each of the children \$930.71: that is, the widow received \$915 less than her share, and each of the children, \$130.71 more. One explanation of this is that the \$915 was taken from the mother's share and distributed to the children, as the total of the latter is but three cents less than the former. It seems hardly probable, however, that, in making such gifts, she would have computed to a cent, or have fixed on the particular amount given. The other explanation, in view of subsequent events, seems the more reasonable. The decedent had paid \$1,250 for the lots, within a year prior to his death, and had moved a barn on the premises, at a cost of about \$125. If the widow took these lots at cost, or \$1,372.50, as part of her distributive share, the several payments would harmonize precisely with values distributed. Add this sum to the price of the land, and divide the

amount by three, and the quotient will be the above amount, plus \$1,885, received by the widow; and two twenty-firsts thereof will be \$930.71, the amount paid each child. As the personal property was distributed through the administrators as per the final report, there was no other source from which to have paid the extra \$130.71 to each of the children. That the lots probably were included in the adjustment is strongly confirmed by the circumstance that no claim to any interest in the premises has been asserted by any of the children, until shortly before the commencement of this action, in October, 1916, or more than 23 years after the transaction. In the meantime, I. P. Ferguson, the attorney who prepared the papers, and before whom these were signed, had passed on, as had the son Henry, and the widow. Mrs. Bergmann, one of the daughters, testified that Ferguson, the widow, and Henry, "figured all of the items that went into the settlement, and made a division, and figured out what was due each of us six girls, all alike. They figured out what mother's legal share was, and paid the share, the same as was going to the other girls, and I signed the receipt." Schleuter, husband of another of the daughters, confirmed this testimony by saying that Ferguson, the widow, and Henry, only, were present when the computation and division were made, though he was there when the value of the land to be conveyed to Henry was agreed to. The witness, over an objection to his competency under Section 4604 of the Code, swore that nothing was then said about selling other property. This must be sustained; for he, as well as his wife, was a party to the suit, and the latter claimed under the widow. Moreover, the answer, if permitted to stand, was not conclusive, as discussion concerning the widow's taking the lots might have occurred at a different time. **The only parties to the making of the computation and division subsequently accepted had departed this life before suit was brought, and reliance must necessarily be had on circumstances bearing on whether the widow took the lots as a portion of her distributive share.** Of course, no conveyance of the lots was

made. This may have been omitted, owing to the fact that the property must have passed to the children, in the absence of a will, precisely as though a conveyance were executed. On the other hand, if a consideration for the lots passed, she became owner of the lots, as absolutely as though a deed had been executed. Mrs. Bergmann, one of the daughters, was asked:

"Q. Do you remember of signing Exhibit No. 6 [deed] that Mr. Ferguson drew up? A. Yes, sir. Q. At that time, you also signed a receipt for your interest in the real estate of which your father died seized? A. Yes, sir."

She testified further that her husband joined with her in signing the receipt, and was asked whether it was "for your full share and interest in all the real estate of which your father died seized," and answered, "Yes, sir." On cross-examination, however, she explained that she had forgotten what was in the receipt, and was asked, "When you signed the receipt that day, it was for money that Henry was to pay you for the land, wasn't it? A. Yes, sir." She testified further that nothing else than the 160 acres was sold Henry that day, and that that was all that he paid. But no inquiry was made as to whether the lots were included in the computation. Lena Frazee, another daughter, was asked "if, figuring it up at \$52.50 per acre, and adding to it thirteen hundred and some odd dollars, as the value of the town property, then taking out $\frac{1}{3}$ for your mother and $\frac{1}{7}$ of $\frac{2}{3}$ figured \$930.71 you got paid for your interests, didn't you? A. Well, I suppose."

This excerpt from the testimony indicates that the witnesses were without recollection as to what was included in the settlement, as were the other heirs, and plainly indicates that we must rely on the circumstances of the case, in ascertaining precisely what was included in the adjustment made. Subsequent events were in harmony with the theory that the children were paid for their interest in the lots. In the first place, none of the daughters ever asserted any claim thereto, or interest therein, during the mother's lifetime. Of course, a child may well, owing to affection,

waive the enjoyment of her interest in the home of a parent; but, if so, this is unlikely to continue for 17 or 18 years, without the slightest reference thereto. More improbable still is it that they should continue silent another 5 years after her death, notwithstanding the claims of others, openly asserted, to the premises under her. True, Alma Reinking was then but 17 years of age, and Emma Frazee, née Reinking, only 16 years old, when the widow, as guardian, conveyed the land; but they acquiesced for more than 20 years after having attained their majority, and settled with their guardian. The circumstances happening in the meantime emphasize the significance of this long delay. The widow of Henry F. Reinking testified that, in 1898, she heard a conversation between her husband and his mother, in which she took no part, and in which it was said that her daughter Lena wanted her to allow her husband to oversee the building of the house; whereupon Henry said: "If you want to do that, all right: I haven't much time, and I'm short of money. He can do it if you want," and that she replied that she did not want to do that; and that, if he "would build there and do as you always have done and look after things, the property is yours, after I get through with it." The evidence conclusively shows that Henry hauled the material and took entire charge of constructing the house, which cost \$1,600 or \$1,800. The old part was pushed back, and an eight-room house constructed in front.

The widow of Henry was asked if he paid for the house. This evidence was objected to as incompetent. The objection was rightly overruled. The witness may have been

2. WITNESSES :
competency :
transaction
with de-
ceased.

incompetent, under Section 4604 of the Code, but that objection was not interposed. As a note of \$1,885, the amount named in the deed from the widow to Henry, bearing date

August 15, 1893, executed by him to her, was found in her papers; upon her death in 1911, probably this was given in consideration of the deed. If so, it had not been made use of in building the house. What may have been done with

her share of the proceeds of the personal property does not appear. Conrad testified that Henry purchased the lumber for the house from him, and paid him for it, in all \$633. The testimony of the daughters as to what their mother said about paying for the house cannot be considered, because of their incompetency as witnesses, under Section 4604 of the Code. Regardless of who paid, Henry or his mother, an improvement costing about \$1,800 was put on the property, without contribution on the part of the daughters now claiming to have been tenants in common, with their knowledge, and without objection. Moreover, the widow of Henry was asked: "Did she [Henry's mother] claim it as having only a life use or absolutely?" and answered: "She claimed to own it." An objection that the evidence was incompetent under Section 4604 of the Code should be overruled. That section does not relate to the competency of evidence. It prohibits witnesses from testifying to defined transactions or communications, thereby rendering them incompetent to speak with reference thereto. The objection was insufficient, and her answer is to be considered. Again, the widow willed her personal effects to her two youngest daughters, with \$50 each, and \$50 each to two others, and to the remaining two, \$100 each. Henry was named as executor, and as such caused the will to be admitted to probate, and settled the estate by paying all legacies, together with a \$1,000 claim for the care of decedent, filed by Alma Reinking. This left \$251.35, which was retained by Henry, under the residuary clause leaving all else to him. No objection thereto was interposed, nor to his occupancy of the premises from March 1, 1913, until his death, March 25th of the following year, under claim of ownership; nor to the occupancy of his widow and four children during the four years following, under a like claim, nor to sale of two of the lots by his widow, and as guardian of the estate of her children; nor to the erection of a house on one of the lots so sold to Rev. Hanson, at a cost of \$3,600, although all were fully aware of the purchase of the lot, and of the building. Alma Reinking told Mrs.

Ralston that "this town property was to go to Henry at the time of his mother's death." Mrs. Bergmann told Henry's widow that the daughters knew, and had always known, that Henry was to have the house, because he built it. Mrs. Conrad admitted that it was understood that Henry was to have the town property. Everything done subsequent to the settlement in 1893 was inconsistent with the retention of any interest in the 18 lots by the daughters, and entirely consistent with the ownership by their mother. She paid each of the children the fair value of a 2/21 interest in the property, and there is no escape from the conclusion that this payment was for such interest, or was a gift. Her claim that she owned the lots tended strongly to confirm the theory of having purchased them. Her agreement with Henry that he was to have the property if he would construct the house was another assertion of ownership which the daughters must have known of, for they admitted an understanding that the premises were to go to Henry after their mother's death. The daughters acted in harmony with the conclusion that the mother acquired the children's interest in the lots at the settlement, during 23 years thereafter. That conclusion is consistent with all the circumstances of the case, and the latter are inconsistent with any other conclusion. We are not inclined to interfere with the finding of the district court that the widow of the intestate acquired by purchase of the heirs their interest in the lots, and that the petition was rightly dismissed.—*Affirmed.*

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

J. B. SCHOTT MANUFACTURING COMPANY, Appellant, v. J. M. CLEVINGER, Appellee.

APPEAL AND ERROR: Failure to Enter Exception. Instructions passed by appellant in the trial court without objection or exception of any kind will not be reviewed on appeal.

Appeal from Clarke District Court.—H. A. FULLER, Judge.

JULY 6, 1920.

ACTION at law to recover \$141.23, for goods alleged to have been sold by plaintiff to the defendant. Trial to a jury, and verdict and judgment for the defendant. The plaintiff appeals.—*Affirmed.*

W. S. Hedrick, for appellant.

O. M. Slaymaker, for appellee.

PRESTON, J.—Plaintiff alleges that, about June 18, 1917, defendant gave to a traveling representative of plaintiff an order for goods and merchandise, and that plaintiff, relying upon such order, made shipment of the goods, and that the same were received by the defendant, and that he assumed the ownership and control of said goods, without objection. The order follows:

“J. B. Schott Mfg. Co.

“Quincy, Ill.

“Ship to J. M. Clevenger, Place, Osceola, Iowa; via. C. B. & Q. Date rec'd. June 18, 1917. Date Billed.....
Salesman, Schott 20 Date Sold, June 12, 1917. Time Ship, Nov.-Dec. Terms: Mar. 1—60 da. 2% Cash Disct. 10 da.
F. O. B. Quincy.

“Customers will please examine duplicate order and no-

tify us of error, if any, before shipment is made."

The order was not in writing, nor is it signed by defendant. It was simply the order which the salesman filled out and sent to the plaintiff. Defendant's claim is that, about the date stated in the order, one of plaintiff's salesmen called on defendant; that it was verbally agreed that the harness would not be shipped until the last of December, 1917, or the first of January, 1918; that, if they were shipped before that time, and loss occurred, it would fall on the plaintiff, and that the title was retained by the plaintiff until the time they were to be shipped; that the goods were shipped during the latter part of August, 1917, and, on the 22d. day of November, 1917, were destroyed by fire, without fault or negligence on defendant's part, which fire was of unknown origin; that, at the time the goods were so destroyed, they were plaintiff's property, and defendant had not purchased them, and had no interest therein. He denies that he ever purchased the goods, and says that they were only to be shipped upon the conditions stated. The goods were sent to defendant at Osceola, and arrived there, as we understand it, some time in the fore part of August, 1917; and it seems they were delivered to defendant's place of business in his absence. They were not opened. The trial court instructed in accordance with the theory of the pleadings and the evidence. The only errors relied upon for reversal are that the court, in its instructions, erred in instructing the jury that the burden of proof is upon plaintiff to prove and establish his claim and cause of action, by a preponderance of the evidence. It is thought by appellant that the instructions on this point are erroneous, for that it is claimed that the defense is an affirmative one, and the burden is upon the defendant. There is very little argument, even on the errors assigned,—not more than a dozen lines; and no cases are cited. The argument is broader than the assignment, and the principal contention is that a sale was established by the plaintiff, and that they were accepted by the defendant, and that, therefore, the title was in him at the time of the fire. The appellee does

not answer any of appellant's propositions, but argues and cites numerous cases to support the argument that there is nothing here for this court to pass upon, for that, as he says:

"Not one objection is to be found to the evidence. Plaintiff did not move for a directed verdict at the end of all of the testimony, or at any other time. He did not object to any instructions before they were given to the jury; did not ask the court to give the jury any instructions; or did not object or except to the instructions after they were given. No motion for a new trial was filed. In fact, no ruling of the trial court is presented here for review. The only errors relied upon for reversal is the error of the trial court in giving to the jury Instructions 3, 4, 5, 6, and 7, which are found on page 3 of appellant's brief and argument. The argument takes a wider range, and complains of the insufficiency of the evidence to support the verdict; but this matter was not presented in the lower court, and is not presented in any brief point."

The abstract discloses that the foregoing statements are correct. Appellant has not filed any reply argument, and does not attempt to meet appellee's propositions. Appellee's position is well taken. It might not be out of place to say that, as to the merits as to whether there was a sale, even though it may be thought the arrangement was unusual, still, it seems to us it is not improbable, under the circumstances. Some of the circumstances are that defendant testifies that he told plaintiffs that he did not wish to buy the goods at that time; that the order itself shows that the goods were not to be shipped until November or December; that they were shipped long before that—some four months; that they were not opened; that they were destroyed by fire in November, before the date for shipment. At any rate, the defendant and other witnesses testify to the contract as alleged. Though denied by the plaintiff's agent, there is a conflict for the jury, and they have decided. But, for the reasons pointed out, there is nothing before us for determination. The judgment is—*Affirmed*.

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

SECURITY SAVINGS BANK, Appellant, v. BOARD OF REVIEW
OF THE CITY OF WATERLOO, Appellee.

TAXATION: Shares of Bank Stock—Real Estate Deduction. The
1 method provided by Sec. 1322, Code Supp., 1913, for the assessment of the shares of stock of national, state, and savings banks and loan and trust companies is, in view of its legislative history, and purpose to render absolutely uniform the method of assessing taxes on banking capital, exclusive of anything in the prior section of the Code of 1897, known as Sec. 1324. It follows that from the total amount of capital, surplus, and undivided profits there should be deducted the amount of capital *actually* invested in real estate, and not the amount which the assessor has seen fit to place on such real estate for taxation purposes.

TAXATION: Double Taxation on National Banks. Principle recognized that there can be no double taxation on the shares
2 of stock of national banks.

Appeal from Blackhawk District Court.—H. B. BOIES,
Judge.

JULY 6, 1920.

IN the district court, this was an appeal from the board of review of the city of Waterloo. The question involved pertained to the assessment of the shares of stock of the plaintiff bank. Such question is whether, in fixing the value of the shares of stock of plaintiff's bank for the purpose of assessment, the assessor should deduct from the amount of the moneyed capital, including surplus and undivided earnings, the amount of such capital actually invested by the bank in real estate, as provided by Section 1322 of the Supplement to the Code, 1913, or whether such deduction for the purpose of valuation of the shares should be confined to the assessed value of such real estate, as pro-

vided by Code Section 1324. The trial court held that the measure of reduction should be the assessed value, and affirmed the action of the board of review accordingly. The plaintiff has appealed.—*Reversed.*

Pike, Sias & Zimmerman and Pickett, Swisher & Farwell, for appellant.

Burr A. Brown, for appellee.

EVANS, J.—To put the question concretely, the plaintiff bank had a total moneyed capital, including capital stock, surplus, and undivided earnings, of \$127,720. The amount of this moneyed capital actually invested in real estate (mostly in Waterloo) was \$67,886. The assessed value of this real estate was \$40,260. These facts are not in dispute. The plaintiff bank furnished to the assessor the verified statement required by Section 1322, which showed a total actual value of capital, over and above the amount invested in real estate, of approximately \$60,000. That is to say, the sum of \$67,886 was deducted from \$127,720. To the total actual value thus disclosed by such verified statement, the assessor added the sum of \$27,626, being the difference between the amount actually invested in real estate (\$67,886) and the amount of value at which such real estate was assessed (\$40,260). The whole issue is involved in this item of \$27,626 thus added by the assessor.

The plaintiff claims that, in the valuation of shares for the purpose of taxation, the sum of \$67,886 should be deducted from the sum total of the capital stock, surplus, and undivided earnings; whereas the defendant contends that such deduction should be \$40,260, and no more. If, in the valuation of shares for the purpose of taxation, it is requisite, under the statute, to deduct from the total capital the amount “actually invested,” then plaintiff should prevail. If, on the other hand, the amount of such deduction should be the “assessed value” of the real estate, then

the defendant should prevail, and the order of the trial court should be affirmed. The question thus presented is controlled primarily by Section 1322 of the Supplement to the Code, 1913, which is as follows:

"Shares of stock of national banks and state and savings banks, and loan and trust companies, located in this state, shall be assessed to the individual stockholders at the place where the bank or loan and trust company is located. At the time the assessment is made the officers of national banks and state and savings banks and loan and trust companies shall furnish the assessor with lists of all the stockholders and the number of shares owned by each, and the assessor shall list to each stockholder under the head of corporation stock the total value of such shares. To aid the assessor in fixing the value of such shares, the said corporation shall furnish him a verified statement of all the matter provided in Section 1321 of the Supplement to the Code, 1907, which shall also show separately the amount of the capital stock and the surplus and undivided earnings, and the assessor from such statement shall fix the value of such stock based upon the capital, surplus, and undivided earnings. In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them and in the shares of stock of corporations owning only the real estate (inclusive of leasehold interests, if any) on or in which the bank or trust company is located, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporation shall not be otherwise assessed.
* * *

Looking to this section of the statute alone, there could be little room for argument. It unequivocally requires a deduction of the amount of "capital actually invested in real estate." We need not enter here into an analysis of the provisions of this particular section, because the contention of the defendant, appellee, is made to rest, not upon the terms of this section, but upon the provisions of

Section 1324, which reads as follows:

"If the assessor is not satisfied with the appraisement and valuation furnished as provided in the preceding sections, he may make a valuation of the shares of stock based upon the facts contained in the statements above required, or upon any information within his possession, or that shall come to him, and shall, in either case, assess to the owners the stock at the valuation made by him. If the officers of any corporation refuse or neglect to make the statement required, the assessor shall make a valuation of the capital stock of the defaulting corporation from the best information obtainable. In deducting, under the provisions of this chapter, the value of real estate from the actual value of the properties, shares or capital stock of any person, firm, association or corporation, the actual value at which said real estate is valued by the assessor or other taxing officer or body where the same is assessed shall be the value thereof."

It will be noted that the foregoing section presents a different yardstick for the measure of the amount of deduction than is presented in Section 1322. The contention for appellee is that this section has the effect to qualify or to interpret Section 1322. It is further contended that we so construed the effect of Section 1324 in *In re Appeal of Valley Investment Co.*, 152 Iowa 84. A perusal of the two sections above quoted will clearly disclose that, if the two sections are to be deemed operative upon the same subject-matter, they present conflicting standards of measure. The first question, then, which arises, is: Does Section 1324 control or qualify the provisions of Section 1322 at the point of conflict? In the *Valley Investment Co.* case, 152 Iowa 84, a somewhat similar conflict was presented, as between Code Sections 1323 and 1324. We held that Section 1324 was controlling, in that it was more definite and mandatory than was Section 1323. The argument for appellee at this point is that the same reasoning adopted in the cited case would be likewise applicable to the point of conflict between Sections 1324 and 1322. The argument is

legitimate, so far as it goes, and would be very cogent, were it not for the legislative history of Section 1322. To this history we turn.

Sections 1321, 1322, 1323, and 1324, as originally enacted, and as they appeared in the Code of 1897, were parts of the same act, and carried the same legislative history. Section 1321 provided a method of assessment for private banks, or individuals doing a banking business. Section 1322 dealt with corporate banks, including national, state, and savings. Sections 1323 and 1324, dealt with the assessments of corporations generally, excepting, however, such as were "otherwise provided for in this act." Under Section 1322, a different method was provided for assessing the shares of a national bank from that provided for assessing the shares of a state bank. In the first, they were assessed to the shareholder, and in the second, assessed to the bank. The only right which the state had to tax national banks at all was by the legislative permission of Congress, as expressed in the Federal statute, Rev. Stat., Section 5219 (U. S. Comp. St., Sec. 9784), as follows:

"Section 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

In *Home Savings Bank v. City of Des Moines*, 205 U. S. 503, the Supreme Court of the United States held that our Section 1322 was discriminatory as to national banks, and violative of Federal statute, Section 5219, and therefore inoperative as to national banks. The assessment involved in that case was set aside. The consequential result of that holding was that it left the state without any adequate statute for the assessment of the shares of national bank stock, even within the permission of the Federal statute, Section 5219. We were compelled to so hold in the case of *First Nat. Bank v. City Council*, 150 Iowa 95. In our opinion in that case, we invited the attention of the legislature, then sitting, to the subject. The immediate result was new legislation on the subject, being Chapter 63 of the Acts of the Thirty-fourth General Assembly. By this enactment, Section 1322 was repealed. In lieu thereof, the present Section 1322 was enacted, as Section 4 of such Chapter 63. Section 1321 was also amended. Such legislation contained no reference to the existing Sections 1323 and 1324. The clear purpose of this new legislation was to render uniform the statutory method of assessment for taxes on banking capital, whether corporate or private, and thereby to conform to the requirement of the Federal statute, Section 5219. Under the new Section 1322, the method of assessment for taxation of national bank stock is precisely the same as that of other bank stock. The plaintiff in this case is not a national bank. But we must construe the statute as to it to precisely the same effect as if it were such. If we were to adopt a construction herein, as to this plaintiff, which, if applied to a national bank, would be violative of the Federal statute, Section 5219, we should thereby set a precedent which we could not follow, in the event that a national bank were the litigant. We should thereby destroy the very uniformity aimed at by the statute, as being essential to its operative power upon national banks. Therefore, though the plaintiff is not a national bank, it is entitled to insist upon a uniform construction of the statute, which shall be operative as against *all* banks. For this

reason, we must, in construing our own statute, take account of the construction by the United States Supreme Court of the Federal statute. The significance of this feature of the case we shall note later.

Turning, now, to our present Section 1322, Are its specific provisions to be nullified, qualified, or controlled by Section 1324? It is urged that Section 1324 is *in pari materia* with Section 1322. That it was *in pari materia* with the original Section 1322 may be conceded. That the present Section 1322 is legislation subsequent to Section 1324 must also be conceded. By reason of their conflicting terms, one of these sections must be deemed dominant, and controlling of the other. Though it be true that later legislation must be construed in the light of existing statutes, it is also ordinarily true that, where a conflict is disclosed, the later legislation is deemed to such extent to qualify the earlier.

In order to insure unquestionable uniformity of method, the present Section 1322 specified the very manner of computation, for the purpose of assessment. It laid this method of computation as a mandate upon the assessor, and deprived him of his quasi judicial power in the matter of such assessment of bank stock. This was our holding in *First National Bank of Remsen v. Hayes*, 186 Iowa 892. In that case, we sustained the action of the county auditor, who doubled a certain assessment of bank stock, as returned by the assessor and board of review, by applying thereto the computation provided for in this section. We held, in terms, that the duty of the assessor was one of computation and obedience to the specifications of this section, and that it was ministerial only. The assessor having failed to follow the mandate of such section, the auditor was permitted to correct such assessment, as for a mistake in computation, and to enter the assessment of the shares accordingly. In that case, we said:

"This statement is furnished to aid the assessor, but the assessor from such statement shall fix the value of such stock, based upon the capital, surplus, and undivided earn-

ings.' This language is mandatory, and defines precisely what shall be considered by the assessor in ascertaining the actual value of the shares of the capital stock. He is not to resort to 'other information,' or such as may be obtained from the auditor of state, as formerly. If the language employed is to be accorded its ordinary meaning, the assessor is not to go beyond the statement sworn to by the officers of the bank. Reports exacted from the bank to the comptroller of the currency, and published, together with the penalty prescribed in the section quoted, and the aspiration for a good financial standing, furnish ample assurance of an accurate statement from the bank, and the function of an assessor is merely that of correct computation. The capital (not capital stock), to be computed from the statement furnished under Section 1321, Code Supplement, 1913, added to the surplus and undivided earnings, constitutes the value of all the shares; and from this amount is to be deducted the portion of the capital actually invested in real estate owned by the bank, and the shares of stock, such as specified. The remainder, divided by the whole number of shares issued, will be the value at which each share should be assessed. * * * There is little room for error in computing values of money or its equivalent, while the judgment of men greatly varies in fixing upon what property generally is worth, and such property usually is undervalued; and there would seem to have been ample room for this apparent, rather than real, discrimination between reaching the taxable value of shares of bank stock, and in reaching that of other kinds of property. Enough has been said to indicate that the duty performed by the assessor in ascertaining the value of bank stock is merely ministerial in its nature. All exacted of him is accurate computation."

To adopt the position contended for by appellee would require an overruling of the cited case. Further consideration of the question, in the light of present arguments, confirms our confidence in the soundness of the cited case. The language of the statute is specific. The rule laid down appeals to the sense of justice. If it be true (and the fact

is stipulated) that the bank had invested \$67,000 of its moneyed capital in real estate, why should that part of its capital not be regarded as bearing its full share of taxation in the form of real estate? If such real estate was assessed too low, there were power and duty in the assessor to increase it by direct method. The purport of the action of the assessor herein was not to increase the assessment of the real estate, but to add a deficiency as an asset to the moneyed capital. If \$40,260 was the full value of the real estate, then the bank had lost \$27,000 by its investment. It was its privilege and its duty to charge off such loss against its resources. This would have made a *reduction* of \$27,000 in its totals. What equitable reason could there be for *adding* \$27,000 to such totals, for the purpose of taxation?

If, on the other hand, the property was worth the full amount invested in it, as presumably it was, and if, nevertheless, \$40,260 was a just assessment of it, it was because such assessment represented the proportion of value at which other real estate was assessed. Presumably, the assessment was just; otherwise, the assessor would have increased it. The bank could have resisted an increase, if it could show that its assessment at \$40,260 was in the proportion at which other real estate was assessed. The net effect of the action actually taken by the assessor was that, whereas the real estate was justly assessed, so that no increase of assessment thereon could have been justly made, nevertheless, an increase was indirectly effected, by adding to the moneyed capital an item of \$27,000 which did not, in fact, exist anywhere.

Now, suppose that this assessment had been attempted under Section 1321, against a private individual engaged in the banking business. Section 1324 does not purport to reach Section 1321, nor to apply to it in any way. If the private individual, having \$100,000, had invested \$67,000 in real estate, he could be assessed for moneyed capital only for the \$33,000 remaining. This would be in accord with Section 1321. This is beyond debate. If this disputed item

of \$27,000 herein could not have been assessed against a private banker, under Section 1321, then, under the Federal statute Section 5219, it could not be assessed against the shares of a national bank. If it could not be assessed against the shares of a national bank, uniformity in the application of the statute would require the same rule to operate in favor of the plaintiff bank.

There is a further objection to the position of appellee. To assess \$67,000 worth of real estate at the full rate at which other real estate is assessed, and then to add to the

assessment roll, as an item of moneyed capital, the full difference between assessed value and actual value, is an attempt to assess the real estate of a bank at full value.

2. TAXATION: double taxation on national banks.

even though all other real estate be assessed on a lower basis. It savors of double taxation. It is in the power of the legislature to make double taxation, but the courts are slow to construe a statute to that end. Furthermore, there can be no double taxation upon the shares of national bank stock, because of the limitations provided in the Federal statute, Section 5219. The United States Supreme Court has held that this section limits the power of the state as to such stock to "one taxation." *Bank of California v. Richardson*, 248 U. S. 476 (39 Sup. Ct. Rep. 165). It has held that, under such section of the Federal statute, the "stock interest" is *one*, whether assessed against the stockholder or the bank, and that such interest is "subject to one taxation, by the methods which it provided." In that case, the National Bank of California was a stockholder in the Mills National Bank. As such stockholder, it was assessed under the statute of California. The shares of the stockholders in the National Bank of California were valued, for the purpose of assessment, against the shareholders, without any deduction of the amount invested by the Bank of California in the stock of the Mills National Bank. It was held by the Supreme Court that this was double taxation, and in violation of Section 5219, notwithstanding that the tax upon the stock of the Mills National

Bank was charged against the Bank of California, and not against its stockholders, and that the tax upon the shares of the Bank of California was charged, not against the bank, but against its shareholders. It was said that to tax these shares first to the Bank of California, as the stockholder, and afterward to include the same in fixing the value of its own shares, for the purpose of taxing its shareholders, was "to overthrow the very fundamental ground upon which the taxation of stockholders must rest."

To quote further:

"To say that the two taxes, the one levied on the bank, as a stockholder in the Mills National Bank, and the other levied on the stockholders of the California Bank, were valid because a taxation of different persons, the California Bank, on the one hand, and the stockholders of the California Bank, on the other, serves only to emphasize the plain disregard of the statute which would result from the enforcement of the taxes in question. * * * We do not stop to point out the double burden resulting from the taxation of the same value twice, which the assessment manifested, as to do so could add no cogency to the violation of the one power to tax by the one prescribed method conferred by the statute, and which was the sole measure of the state authority."

The final holding was that the tax on the shares of the Mills National Bank, to the Bank of California as a stockholder, was proper, but that the same value could not be again taxed to the stockholders, in the guise of including the same in the valuation of their shares.

The construction put by the high court upon the Federal statute is, of course, binding upon us. It is clear therefrom that, if the plaintiff were a national bank, the \$67,000 of its moneyed capital being actually invested in real estate, and such real estate being fully taxed against the bank, as other real estate, such investment could not again be included in the valuation of the shares for the purpose of taxing the shareholders.

Our conclusion is that, if Section 1324 could originally

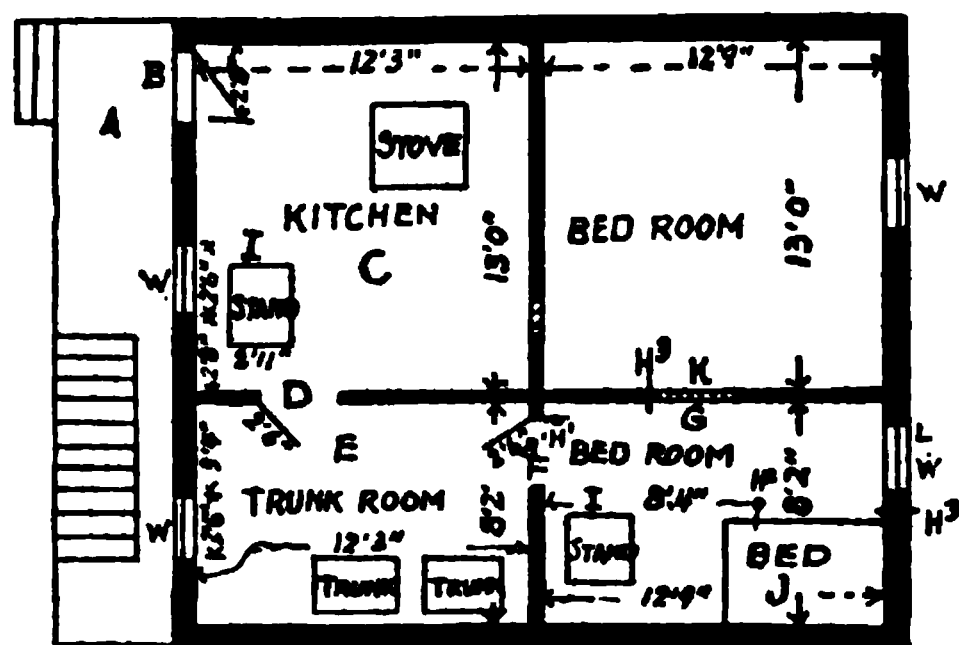
H. M. Havner, Attorney General, *B. J. Powers*, Assistant Attorney General, and *E. H. Willging*, County Attorney, for appellee.

PRESTON, J.—Defendant was accused of causing the death of one George Parlos, on September 30, 1918, by shooting. There were three bullet wounds in the body of deceased, in front and to the left: one near the collar bone, another an inch below the left nipple, and the third in the abdomen. No question is made but that the wounds were the cause of his death. The shooting occurred between 7 and 8 o'clock in the morning. We take it from the arguments that the principal ground relied upon for a reversal is the alleged insufficiency of the evidence to sustain the verdict, though other questions are argued. The question as to the sufficiency of the evidence was raised by motions for a directed verdict, at the close of the State's evidence and all the evidence; also by motion for new trial. There are 29 assignments of error. Some of them are wholly without merit. All have been considered, and those which seem to be the more important will be discussed.

1. HOMICIDE:
nonpositive
identifica-
tion of
accused.

1. The State's evidence is not denied by witnesses for the defendant. The only witnesses for defendant were a photographer who testified as to photographs taken by him and measurements of the upstairs rooms where the shooting took place and the distance from the building to the alley, which was 67 feet, and four witnesses under and with whom defendant worked in the roundhouse and shops, who testified as to his character for peaceableness.

At the outset, it may be well to describe the premises and the surroundings, in view of some of the questions argued. This may be more conveniently done by the plat, which is as follows:



SECOND FLOOR PLAN

As we understand the evidence, Maple Street is to the east, and the alley to the west. Mrs. Enos lived a short distance south. She was the mother of the wife of deceased. Evidently, the shooting took place in the southeast bedroom, "G." Such is the claim. The rooms are small. After the shooting, Parlos was seen hanging to the banister, and Mrs. Enos went to him, and soon after, he was helped by his wife to the Enos yard, where he died. It is not shown who was in possession of or who occupied the rooms where the trouble occurred. Deceased and his wife at one time lived in the basement of the Enos place, but, at the time of the killing, they had been living in a box car. As we understand it, the railroad yards are not far from this property. There is a board fence between the Enos residence and the premises where the shooting took place, so that, to go to the deceased, Mrs. Enos had to go by the street or the alley. She went by the alley. In the plat, "A" is the platform upon which Parlos stood when first seen by Mrs. Enos. "B" represents the door with glass panels, through which Mrs. Enos says she heard Parlos talking in Greek to someone on the inside. The nature of the conversation is not disclosed. There were not many words spoken. The kitchen, "C," is connected with the trunk room, "E," by the door, "D." The trunk room, "E," was connected with the bedroom, "G," by the door, "F," which swung east, as indicated. There was no lock on this

door. The floor showed evidences of scuffling of feet. "H1" is a bullet hole, near the north wall and the door, which went straight into the floor. "H2" is a bullet hole 8 feet and 4 inches from the doorway. It is a glancing shot into the floor, and deflected towards the east. "H3" marks bullet holes, one in the east wall and one in the north wall. Seven empty cartridges were found on the floor in the room "G." These empty shells belonged to a 32-caliber automatic gun. The four shots in the floor and walls, together with the three wounds inflicted on the body of Parlos, account for the seven shells. The evidence is that bullets taken from body of deceased were such as were used in a 32-caliber automatic revolver, and were of the same caliber as a box of bullets found in one of the rooms where the shooting occurred. "K" is a door between room "G" and the bedroom to the north. This door was nailed shut. "L" is the only window in room "G," and is 12 feet from the ground on Maple Street.

At about 7 o'clock on the morning of September 30th, Eluis Parlos, wife of deceased, came into the home of her mother, Mrs. Enos, and left a small package, supposed to contain a lunch, on the cupboard, and left the room. Some time after this, within the next 45 minutes, as appellant contends,—though the time is not definitely fixed,—Mrs. Enos went outdoors to get water to use in combing her little girl's hair. She was getting her child ready for school. While she was in the back yard, deceased called to Mrs. Enos from the top of the stairs shown in the plat, and said, "Ma, come up here, and see for yourself." This was the first time deceased was seen that morning by any of the witnesses. Whether he came out of this upstairs apartment, or from some other place, does not appear. Mrs. Enos went to the stairway by way of the alley. At about the time she started from her home, or while on the way, she heard a sound like the crashing of glass. On reaching the top of the stairs, she saw deceased with a chair in his hand. He had smashed the door "B." When Mrs. Enos arrived at the landing, or at about that time, she heard the talking be-

fore referred to. Deceased forced his way into the kitchen by battering down the door, which, it is claimed, had been locked against him. After entering the kitchen, he proceeded to the door "D," which he broke through with the chair. After deceased had broken through the door "D," he dropped the chair, and Mrs. Enos says she then saw her daughter, Mrs. Parlos, in the trunk room. Her testimony is:

"I saw her in the second room when he broke the second door open. I saw Mrs. Parlos in front of the second door; it was from the kitchen side in front of it."

She testifies she did not see the defendant there at that time, or anybody except Parlos and the girl. After deceased entered the trunk room, he passed from Mrs. Enos' sight; for she says she then turned and started to go out and downstairs. She went directly down the stairs, and went right along till she got to her own yard. The shooting took place after she started to go down the stairway. She testifies that, when she got to the bottom of the stairs, Mrs. Parlos was there with her, and Mrs. Enos went on around to her own yard, she says, to look after her little sick girl in the house. She came out of the house, and saw Parlos hanging to the stairway, the bannister. He said for her to bring him water. She took the wash dish, and went out with it, full of water, to bathe his face. Mrs. Parlos had assisted deceased from the stairway to Mrs. Enos' yard. Mrs. Enos says that she saw deceased lying in the yard; that she saw no other person in the yard at that time, except Mr. and Mrs. Parlos and the folks that lived next door; that she was excited. She was looking at his, Parlos', features, when he was lying in the yard. At that time, she says she saw a man running, with a gun in his hands.

"Q. Who was the man? A. Nick Christ. Q. Is this the man you saw, that is sitting here in the court room? A. Yes, sir. Q. Where did he go? A. He went between the two buildings, and that is the last I seen of him."

She did not see him come down the stairs. When she first saw him, he was running, running in the yard. With

reference to the railroad tracks, he was running west. When she first saw him, he was running in a westerly direction, then turned north between the buildings. After she brought Parlos the basin of water, he died. As near as she could tell, she heard three or four shots fired that morning; may have been more or less; she did not stop to count them; they were fired rapidly. The police came just before Parlos died. On cross-examination, she says:

"I think it was this defendant. Q. But you are not certain, are you, Mrs. Enos? You only think so, isn't that it? Isn't it a fact that you only think so? A. Well, I don't remember, but I think it was."

On re-examination, she was asked whether defendant was the man, and she said, "Yes, sir, I saw him running, with a gun in his hand." A search was made for Nick Christ by the police. On the second day of October, in company with Judge Bonson and an attorney from Chicago, he appeared at the police station, and gave himself into the custody of the police. The coroner examined the premises at about 8 o'clock. He seems to have been the first one, after the death of Parlos. He says there was a table in the kitchen, which showed that somebody had recently been having breakfast. There were cups and saucers, a fork, and a common kitchen knife on the table, and some chairs in the room. The cook stove was still warm. He did not see a butcher knife or a pocket knife. There were some trunks and clothes in the trunk room. He then went into the bedroom, "G." The bed looked as though it had been occupied that night. He noticed a wet spot in the bed. On the table in this room were two glasses. One had some beer in it. There was also a pint bottle, partly filled with whisky, and some empty beer bottles. He says he made a careful examination. The chief of police visited the rooms about 8:30 o'clock that morning. He testifies that, when he went there, he saw a butcher knife, a pocket knife, and a table knife on the table. It is argued by appellant that there is no evidence which connects the defendant with the offense, except the testimony of Mrs. Enos, and that her identification of

the person she says she saw running from the scene was not sufficient, because, at one point in her cross-examination, she said, "I think he is the one." She had testified in chief with more positiveness, and the answer just referred to was brought out on cross-examination, and in answer to a leading and persuasive question. In *State v. Porter*, 34 Iowa 131, 133, witnesses introduced their statements with similar expressions, and the court said:

"There is no rule of law which requires a witness to be absolutely positive in his statement of fact. The positive witness is often entitled to less consideration than the more cautious."

See, also, *Abbott v. Church*, 288 Ill. 91 (123 N. E. 306, 4 A. L. R. 975, and note).

The weight of the evidence of this witness was for the jury, and sufficient, if they believed her. In addition to this, the defendant's fleeing hurriedly from the scene, with a gun in his hand, and passing near the deceased lying on the ground in a helpless condition, and defendant's concealment, were proper circumstances, with others, to be considered by the jury as indicating guilt. It may be true that no person directly charged defendant with the commission of the crime as a reason for flight, but the circumstances just related, and all the circumstances in the case, were such as to charge him therewith: that is, from them, he had reason to believe he would be apprehended as the perpetrator of the crime. Flight has been held to be *prima facie* indicative of guilt. *State v. O'Callaghan*, 157 Iowa 545, 554. We do not understand appellant to complain of the law as laid down by the court in regard to flight, except that they contend that there is no evidence of flight. It is further contended by appellant that the witness Mrs. Enos was not asked by the State to describe the kind of a gun she saw defendant have. The argument is that it may have been a shotgun, and that it should be shown that the gun was such a one as the bullets indicated was used. It could readily have been shown what kind of a gun it was, by simply asking the witness. Under defendant's theory, it

would have been a circumstance in his favor to have asked and shown that it was a shotgun, if such is the fact. But a pistol or revolver is quite commonly called a gun. Furthermore, if the jury believed that the defendant was the person who was seen in flight by Mrs. Enos, they must have found that defendant was the party who did the shooting, and was in the room where revolver bullets and cartridges were found. Under these, and all the circumstances, it would be a proper inference for the jury to believe that the gun was a pistol. Considering all the evidence and circumstances, we think there was a jury question, and that the verdict is sustained by the evidence.

2. It is contended by appellant that the evidence conclusively shows that the defendant, if it was the defendant, or whoever it was who did the shooting, was acting in self-defense. To this we cannot agree. The

2. HOMICIDE:
negating
self-defense.

circumstances before set out, as to the breaking in of the door by deceased, and the position of the bullet holes, and so on, are relied upon to sustain the contention. At the most, it would be a jury question. The trial court submitted the question of self-defense to the jury. This is an affirmative defense, in a sense. The jury could have found that deceased, at the time of the shooting, was not armed. The evidence shows that he had dropped the chair in the trunk room; but whether defendant was in danger, or whether to his apprehension he was, and whether defendant was justified in using a deadly weapon in a deadly manner when his assailant was not armed, and the other elements going to make up the defense of self-defense, were questions for the jury. There was evidence that deceased, in breaking the door, was angry, and there was evidence tending to show a scuffle in the room where the shooting occurred. These matters were doubtless taken into consideration by the jury in arriving at a verdict of manslaughter.

3. It seems to have been the desire of defendant that the State should have put the wife of deceased on the stand as a witness. It appears that she was a witness before the

3. CRIMINAL
LAW: failure
to call all
witnesses.

grand jury. It was shown that she was present at the trial. Appellant cites authority from other jurisdictions, holding that a prosecuting attorney may not select and call only such witnesses as are most favorable to the prosecution, where there are others who are in a position to know, and do, in fact, know, as much about the transaction, etc.; but these cases recognize that there are times when the State is not required to produce at the trial those who may be intimately acquainted with the facts. The authorities hold that the State is required to introduce proof of the whole transaction, but that it is not necessary to use all the witnesses, and that the State may have good reason to question the truthfulness of some of the witnesses. It is claimed by the State that there were improper relations between the wife of the deceased and the defendant, or whoever the party was in the rooms before this trouble began, and they had reason to believe that she would shield herself from such an embarrassing situation, and would be unlikely to tell the truth about it. There is nothing to indicate that the State designedly omitted to prove any fact in regard to the killing. Under the evidence, Mrs. Parlos was not in the room where the shooting occurred, at the time it took place. The evidence before set out shows that, when last seen, she was in the trunk room, and that was before the shooting; and further, that she must have been on the stairway outside, when the shooting occurred. She had reached the foot of the stairway at the time her mother did; so it would appear that everything she could have testified to in regard to the shooting was testified to by her mother. We think the ruling is sustained by our own cases. *State v. Middleham*, 62 Iowa 150, 153; *State v. Dillon*, 74 Iowa 653, 655. It was said in the *Middleham* case, quoted in the *Dillon* case, that:

"The failure of the State to produce all witnesses who testified before the grand jury is not a wrong, and creates no presumption of wrong."

4. In connection with the last proposition, the defend-

ant asked an instruction which was refused, to the effect, in substance, that, if the State had proved that a witness was present, and in a position to have knowledge of the perpetrator of the act, and the name of such party was on the indictment, it should be considered by the jury as tending to show that her testimony would be adverse to the State. The discussion in Paragraph 3 of the opinion, and the holding that there is no presumption of wrong, dispose of the assignment of error in regard to the refusal to give such an instruction. But, for the other reasons given, we think there was no error at this point.

5. The indictment charged murder in the first degree. The trial court said, in one of its instructions:

“That, by reason of a former trial, the defendant in this case cannot be tried or convicted for the crime of murder in the first degree, and you should in no manner consider the offense of murder in the first degree.”

4. CRIMINAL
LAW: sug-
gesting con-
viction on
former trial.

The court instructed in regard to murder in the second degree and manslaughter. Appellant contends that this instruction was error, because it indirectly and inferentially told the jury that, on the former trial, defendant had been convicted of murder in the second degree. The facts in regard to the former trial and the alleged conviction are not pointed out in argument, and we do not find that there is any evidence in regard to this. We assume, from the arguments, that there was a prior conviction for second-degree murder, and a new trial granted for some reason. From the language used, a jury would not be likely to infer that defendant had been convicted of second-degree murder. We are unable to determine from the record just how the attention of the court was called to the matter, or whether he took notice of it himself. No complaint is made, of course, that the court did not submit the question of first-degree murder to the jury. It is possible that the court could have used some other language, such as that, under the record, the jury should not consider first-degree murder. But, after all, it was a matter of defense for the defendant

to show that he had been acquitted of the charge of murder in the first degree, and, had the court not instructed as he did, it would have been necessary for the defendant to prove that he had been acquitted of murder in the first degree. This he could only do by proving the former verdict; so that, had he done so, it would have called the attention of the jury more directly to the fact than did the court in its instruction. Furthermore, had the jurors had sufficient legal learning to reason the matter out, it is not likely that they would so lightly regard their own oaths that they would convict or be influenced because some other jury had rendered a certain verdict; and this is especially so when the verdict was not allowed to stand.

6. Error is assigned because of the ruling of the court in permitting Mrs. Enos to state that deceased called to her from the stairway landing, and that deceased said:

5. EVIDENCE:
res gestae. "Ma, come up here and see for yourself." It is argued that the statement was not made in the presence of the defendant, and is not binding upon him, and that it is not a part of the *res gestae*. There is no testimony in the record, unless it be by inference, as to what deceased wanted his mother-in-law to see. The record is:

"There was nothing else that occurred that attracted my attention particularly on that morning, after she [Mrs. Parlos] left, only her husband calling me up. Q. Just tell us how that was, and what was done at that time. A. Well, he says, 'Ma, come up here and see for yourself,' and I went up.

"Mr. Gilloon: We move that the answer be stricken out, unless it was in the presence of the defendant, as not binding on him,—I mean, in the presence and hearing of the defendant. We object to the question for the same reason.

"Court: Overruled. (Exception.)"

It will be observed that there was no objection to the question. It was as apparent when the question was asked, and before the answer, that the question was objectionable,

6. TRIAL:
gambling on
result of
answers.

if it was objectionable, as later; because the witness had stated, before this question was put, that deceased was calling her up, and she was then asked to state how it was. We have often ruled that a party may not wait and take his chances, and, if the answer is unfavorable, then object. The objection was not timely. But can it be said that the statement was not in the presence and hearing of the defendant? At most, the deceased was not then more than about 20 feet from the party who did the shooting, who, the jury has found, was this defendant. They were much closer than was Mrs. Enos. Naturally, deceased would speak louder in calling to Mrs. Enos at a greater distance than he would to the party in the room closer. The evidence shows that deceased, from the same position on the landing, was, at about the same time, talking through the door to the party inside. We think the circumstances were such that it was for the jury to say whether, under the conditions, the defendant was in a position to hear. We think, too, that it was a part of the transaction, and *res gestae*. It was not the relation of a past event, with opportunity for fabrication. It was before the shooting, and was the first thing to call Mrs. Enos' attention to matters that immediately led up to the shooting, and which were detailed by her. He called to her to call her attention, and she then went over. It showed the presence of deceased at that point, as the evidence of Mrs. Parlos' leaving the lunch, nearly an hour before, showed her presence in the vicinity of the transaction. The whole tragedy occurred in the space of a few minutes. His calling to Mrs. Enos was the cause of her going to him. We said in *State v. Peffers*, 80 Iowa 580, 582:

"We think the testimony was properly admitted as a part of the transaction which led to the killing of Cathers. It explained, to some extent, his reason for being with Mrs. Peffers when the affray occurred, and was so far a part of the *res gestae* as to be competent. *State v. Cross*, 68 Iowa 186. It may be, as claimed, that it would naturally be inferred from the remark of Cathers that he had been

invited by Mrs. Peffers to follow her, but the jury had before them all the facts upon which the remark was based, and knew whether it was well founded."

We think there was no error at this point.

7. It is contended by appellant that there was misconduct on the part of the assistant county attorney in his closing argument to the jury, in that he said that defendant

7. CRIMINAL
LAW : mis-
conduct in
argument.

was as guilty as hell, and that he shot to kill. We think it was not improper for counsel to draw his conclusion, from all the circumstances, that he shot to kill. It may be we ought not to take the time or space to discuss this question at any length, because there was no objection or exception to the remark, and it appears that an affidavit, or perhaps two, were filed by the State in resistance; but the record as to the affidavits is not clear as to just when they were filed, or whether they are a part of the record. The trial court had the advantage in knowing what the real situation was in this respect. Doubtless, counsel for defendant insisted to the jury, and gave their opinion, that defendant was not guilty, and tried to convince the jury that he was not. There is no direct showing of that fact. The trial court heard all the arguments, and, so far as we know, may have concluded that the statement by the county attorney was in answer to argument for defendant. We held, in *State v. Cameron*, 177 Iowa 379, 381, opinion by Salinger, J., that it will be presumed, nothing appearing to the contrary, that argument by a public prosecutor was a legitimate response to an argument for the defendant. At any rate, the court was on the ground, and, in overruling the motion for new trial, held that there was no prejudice. *State v. Burns*, 119 Iowa 663. In *State v. Shultz*, 177 Iowa 321, 326, it was held not erroneous for the prosecutor to state that he had no doubt of defendant's guilt, which is equivalent to saying that he believes, or is of opinion, that defendant is guilty. See, also, *State v. Peirce*, 178 Iowa 417, 440. Appellant cites the *Peirce* case, at pages 443 and 444, as holding that, where the argument is clearly improper

and naturally prejudicial, no failure to object, nor act of the court, can be held to effectuate either waiver or cure. But, for the reasons given, that principle does not apply to the statement made in this case.

8. In describing conditions in the room, some of the witnesses referred to a wet spot on a sheet on the bed, saying that it was about a foot across, and that, after it was dry, it was of a yellowish color. It is thought by appellant that this was prejudicial, for that it created an undue prejudice in the minds of the jury. Much of the evidence in regard to this went in without objection. It was all stricken out later, and the court in Instruction No. 34, specifically instructed the jury not to consider any evidence rejected or ruled out or stricken out, and that the jury should not allow any such rejected matters to make any impression upon their minds, or have any weight whatever in making up the verdict, but that they should decide the case from the evidence submitted alone, independent of all other consideration, and acting fairly and impartially, etc. We see nothing in this calculated to excite the passions of the jury. It was cured by striking it out, and by the instruction.

9. Many of the instructions are complained of. Some have already been noticed. The argument in regard to them is brief, and we think there is no substantial merit in the objections thereto, so that we shall notice the complaints as briefly as may be. In one of the instructions on the subject of self-defense, the court said that the jury was to take into consideration "whether or not defendant was warranted in doing what you may find from the evidence he did do, at the time and place in question." It is complained that by this the court left it to the jury to guess and conjecture on what may have happened, instead of confining them to what the evidence in the case showed did happen. The court simply left it to the jury to determine what the defendant did, if he did anything, as shown by the evidence.

8. CRIMINAL
LAW: curing
error by
striking tes-
timony and
by instruc-
tions.

9. HOMICIDE:
self-defense:
instruc-
tions.

Had the court confined himself to telling the jury what did happen, as suggested, he would have assumed a fact as having happened. We do not understand this to be permissible in a criminal case.

By Instruction No. 9, in regard to circumstantial evidence, the court stated that there was no direct evidence,—that is, no evidence of eyewitnesses to the alleged shooting,—and that the State must rely upon circumstantial evidence. It is thought that this was erroneous, because there was an eyewitness, in the person of Mrs. Parlos. This has been disposed of by prior discussion.

Instruction No. 10 is complained of, for that it is thought that it assumes that defendant did take the life of Parlos. We do not so read the instruction. A sentence or clause is separated from the rest by the defendant, upon which the argument is based. The subject of the instruction is that, if the jury find from the evidence, beyond a reasonable doubt, that defendant took the life of Parlos, they should consider and determine whether or not, at the time, he was acting in self-defense, and that, in determining whether or not he was so acting in self-defense, the burden is not upon the defendant to so show, but was upon the State to show, beyond all reasonable doubt, that he was not acting in self-defense. Defendant was claiming self-defense at the trial, and is doing so here. We do not see how the court could have stated it differently. The court left it to the jury to determine whether defendant did take the life of Parlos, and then stated the law of self-defense. Some of the later instructions are complained of, for that it is thought that the State was relieved of proving that defendant was not acting in self-defense. The court had properly covered it once, and it was not necessary to repeat that statement in every other instruction on the subject.

After having left it to the jury to determine whether defendant did the shooting,—and the jury did so find, which would necessarily be a finding that the person in the room with whom Parlos was talking was the defendant,—the court said that no mere words would justify the de-

fendant in taking the life of Parlos, if the jury should find from the evidence that defendant did take his life. The jury was also told in this instruction that, if Parlos made an assault upon the defendant without a dangerous and deadly weapon, this would not justify the shooting, unless the attack was of such a character as to lead him, while acting as a reasonably prudent or cautious person, under similar circumstances, to believe that his own life was in danger, or that he was in danger of great bodily injury, etc. The complaint of this last is that it assumes that Parlos did not have a weapon. We do not think it does, and there was evidence that Parlos dropped the chair in the trunk room, before the shooting in the bedroom. There was evidence upon which to base such an instruction. We have not given all the instructions on self-defense, but only answered those parts selected for attack by the defendant.

Instruction No. 18 does not assume that the defendant did the shooting. This instruction is on the question of intent, and the court, in at least two places, qualified his language by saying, "If you should find he committed the act."

The objection to Instruction No. 19, on malice, is that it states that malice may be express or implied, but does not define what is express, or what is implied malice. We set out in full Instructions Nos. 19 and 20.

10. CRIMINAL
LAW: Inex-
plicit but
correct in-
structions.

"19. Malice, within the meaning of the law, includes not only hatred and ill will, but also any other unlawful or unjustifiable motive which inspires one person to injure another, and it may be inferred from the willful doing of an unlawful act, within just provocation or excuse, with intent to injure the person of another. It does not necessarily mean hatred or ill will, but may be simply a vicious and wanton disregard of another's rights. Malice may be express or implied.

"20. Express malice may be shown by the exercise of such conduct in a transaction complained of as to indicate a wicked mind or malignant heart. Malice may be implied

from the unlawful use of a deadly weapon in a manner calculated to take the life of another human being. A deadly weapon may be any instrument capable of producing death from the manner in which it is used in a given case."

No instructions on this subject were asked by the defendant, and it seems to us there can be no just cause of complaint in regard to this matter.

In Instruction No. 23, the court told the jury that, if they should find from the evidence, beyond all reasonable doubt, that defendant was not acting in self-defense, and, using a revolver, assaulted deceased and shot him, and the deceased died as a result of the shooting, and there was malice aforethought, either express or implied, and so on, then, if the jury should so find, defendant would be guilty of murder in the second degree. We have not given it exactly as worded, because the only complaint is that it did not state upon whom the burden of proof rested; but the court had thoroughly stated that in previous instructions. This same complaint is made of other instructions.

It is said that Instruction No. 29, standing alone, assumes that the defendant is guilty of some crime charged in the indictment. This instruction has reference to motive. The instruction says no more than that, if the evidence fails to show any motive, or if it does, these are circumstances to be considered in making up the verdict.

The opinion is too long. We have considered some matters that perhaps do not really deserve attention. There may be some other matters which have not been noticed. All have been considered. After considering the whole case, we are of opinion that no prejudicial error appears. The judgment is, therefore,—*Affirmed*.

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

STATE OF IOWA ex rel. WOODBURY COUNTY ANTI-SALOON LEAGUE, Appellant, v. T. G. CLARK et al., Appellees.

PROSTITUTION, HOUSE OF: Declarations of Inmates. Declarations by the inmates of a house are admissible on the issue whether it is a house of prostitution. (Sec. 4944-h9, Code Suppl. Supp., 1915.)

PROSTITUTION, HOUSE OF: Abatement—Knowledge of Owner. A house of prostitution may be abated and the house closed, irrespective of the *knowledge* of the owner of the premises.

PROSTITUTION, HOUSE OF: Imposition of Mulct Tax—Knowledge of Owner. Premises which are shown to be used for purposes of prostitution are presumptively liable to the \$300 mulct tax. Want of knowledge on the part of the owner of such prohibited use will defeat the tax, but the owner has the burden to so show.

Appeal from Woodbury District Court.—W. G. SEARS, Judge.

JULY 6, 1920.

ACTION in equity to enjoin premises alleged to have been a house of prostitution, and to assess a tax against the property. The Clarks are alleged to have been maintaining the place. During the trial, Carter was substituted for Healy, as the real owner of the property. There was a decree for plaintiff as to the Clarks, but the court denied plaintiff's application to close the building and to impose the tax, under the so-called "Red Light Law." The State appeals.—*Reversed.*

John F. Joseph, for appellant.

Jepson & Struble, for appellee.

PRESTON, J.—The Clarks did not appear, and their default was entered. The trial court found that prostitution had been carried on in the premises by the Clarks, and that they were a nuisance; ordered the nuisance abated, and the furniture sold. The court refused to order the building closed for a year, and refused to assess the \$300 tax. From such refusal the plaintiff has appealed. These are the questions argued, and more particularly the question as to imposing the tax on the property. The ground of the trial court's refusal to assess the tax was that plaintiff had not shown that the owner had knowledge of the nuisance. No constitutional questions were raised in the district court, nor are they argued here by appellee, nor does he cite any cases. Constitutional questions are, therefore, not involved. *State v. Ross*, 186 Iowa 802. Some of the cases hereinafter cited deal with due process and other constitutional questions.

The evidence is undisputed. It appears that special agents for the state were working in Sioux City, and, on December 4, 1918, visited the place in question. Farrand testifies that, after he had sent Mavros ahead of them, he and Van Wagoner followed, and found Mavros in the bedroom with Mrs. Clark, who was dressed in a kimona, or bath robe, and stockings; that, in another bedroom, they found a girl who had on only a shirt, or gauze vest, and a man who did not live there, in his shirt sleeves; that he had given Mavros three \$1.00 bills, of which he had taken the numbers; that Mavros had given the money to Mrs. Clark, and it was found in a dresser drawer; that the whereabouts of the Clarks were not known at the time of the trial; that Mrs. Clark told witness that she had been renting out rooms for prostitution, and that she got a dollar for each room, and that she rented rooms to parties who sometimes occupied rooms but for a short time, but not over night; that the girl in the other room made affidavit that she had been there several times. At this point, defendant Healy objected to trying the case on affidavits, and the court sustained the objection; but there was no motion to strike out

the evidence already given. Later, at the close of the testimony of this witness, Healy moved to strike out the testimony of the witness with reference to what others than the defendant Mrs. Clark said, as being hearsay, which was overruled. Healy has not appealed. Mr. Clark was a man 55 or 60 years of age, and the woman was 40 or 45. It was a 5 or 6-room house. It was well furnished,—better than the average home. Mavros says he was at the place alone, about a week before the transaction in question; that another state agent had a report on the house, and wanted him to investigate. He gives the conversation with Mrs. Clark at his first visit as follows:

“When I first got in, she asked me how I knew the place, and I said a friend of mine told me. She says: ‘I don’t know you, but I guess you’re all right. You came here, I suppose, to see the girls?’ and I said, ‘Yes.’ She says, ‘I haven’t got any in now, but how do I look to you?’ I said, ‘You look pretty good;’ and she said, ‘Would you like to spend \$3?’ and I said, ‘Maybe I will come another time. I have some friends, and we will come up some evening, if you can get some girls;’ and she says, ‘I can do that.’ Then I fixed a date two or three days after that,—two days after the time I was talking to her. I was so busy that I didn’t go up; didn’t get a chance to go at that time; but I telephoned her; asked her if she had the girls; and she said, ‘Yes,’ and I said, ‘If I get a chance, I will come up this evening;’ and she told me, ‘At any time you get a girl from down town, I charge \$1.50 for the use of the room.’”

He testifies that, on December 4th, he and the others planned in the county attorney’s office for him to go first to the house, and the others would follow. He describes the transaction as follows:

“I went up and into the house. All the rest of the boys were pretty close,—about a block away. When I got into the house, she says, ‘You came back?’ and I said, ‘Yes.’ She said, ‘Why didn’t you come that night?’ and I said, ‘I couldn’t make it, because I was busy.’ She said, ‘The girls

are not here right now, but if you wish, you can spend \$3 with me.' Then I heard some talking in another room, and I asked who it was, and she said it was a couple, a man and a girl. I said, 'What are they doing?' She told me they were having a good time, having rented a room. She said, 'Do you wish to go into the bedroom and spend \$3?' and I said, 'All right.' We went into the bedroom and undressed. Of course, I expected the boys any minute. She undressed, and took the money, and was lying on the bed; and, just about the time she lay on the bed, there was a knock on the door. Mr. Farrand knocked on the door, and she said, 'I would like to know who it is,' and I said, 'You go and see,' and she opened the door, and the boys came in. Before she went to the door, she put on a nice kimona. The boys found the other couple there at the same time. I had given her the three \$1.00 bills, of which we had taken the numbers. There was a little dresser in the room, and she put it in one of the little drawers. I had only taken my overcoat off. Yes, I helped arrest the people. I worked with the boys. Clark was there at the time, in the other room, in the kitchen. I did not see him until the boys came in. Yes, I saw him when I first came in. He was in the parlor, and walked to the kitchen, and I asked, 'Who is that?' and she said, 'It is my husband,' and I said, 'I am afraid, if it is your husband,' and she said that she would take care of him; that he knows it."

Van Wagoner's testimony is similar to Farrand's, except that he says that the girl in the other bedroom was sitting on the bed, with her underwear on, and a man was standing in front of her, with his coat and collar and vest off. All were placed under arrest. This is the substance of the testimony. No evidence was given as to the reputation of the place, and there is no direct evidence that Carter had knowledge that the nuisance was being maintained therein. Defendant Carter was the only witness on behalf of the defendant. He says that Healy used to own a half interest in the property, and that he, Carter, owns all of it now,

under a contract, though it stands in Healy's name; that he rented the place to Clark on September 15th, and that they have been there ever since; that they were in the place, so far as witness knows, until the "Red Light" case was filed; that the man who rented the place was a man 25 to 35 years old; that he does not know whether he was a son of the others or not—thinks so; that he had known him before, and his name was Clark; that he did not know these Clarks personally, only that that was their name; that the rent was \$18 a month.

Though testifying as a witness, he does not state that he had no knowledge that the Clarks were maintaining a house of prostitution, the three months they were occupying it.

1. PROSTITUTION, HOUSE OF: declarations of inmates. It is not shown whether he lives close to the property or distant. The evidence is ample to sustain the finding as to the Clarks. The declarations of Mrs. Clark, as testified to by the State's witnesses, and undisputed, were competent, as bearing upon the character of the place. *State v. Toombs*, 79 Iowa 741. Proof of one act is sufficient. *Shideler v. Tribe of the Sioux*, 158 Iowa 417, 423, and cases cited. Though the evidence in this case shows but one transaction, it does not follow that that was the only act. It is a proper inference from the circumstances that the business was being carried on there. The statutes bearing upon the two questions presented are found in the Supplemental Supplement to the Code, 1915, Sections 4944-h1 to 4944-h11.

1. We shall take up first the question as to whether the court should have decreed an abatement of the nuisance by closing the building. No personal judgment is asked against the owner in this respect, but that the nuisance be abated by closing the building. Section 4944-h1 declares houses of prostitution and the equipment thereof a nuisance, and that they shall be enjoined and abated, as provided in later provisions of the act. Section 4944-h2 provides for the procedure in proceedings for injunction, and that, when such nuisance exists, an ac-

2. PROSTITUTION, HOUSE OF: abatement: knowledge of owner.

tion in equity may be maintained, to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building or grounds, from further permitting such building or ground, or both, to be so used. It provides for notice of the action. Such notice was given the defendant owner in this case. Section 4944-h3 provides that evidence of the general reputation of the place shall be competent for the purpose of proving the existence of said nuisance, and shall be prima-facie evidence of such nuisance and of knowledge thereof, and of acquiescence and participation therein on the part of the owner, etc. Reputation is, of course, not the only way knowledge may be shown. Actual knowledge may be shown, and the circumstances may be such as that, under the duty of the owner of property, as stated in *State v. Ross*, supra, to look after his property, he should know, and we shall see later that he is presumed to know. Knowledge shown by reputation or presumption is possibly not conclusive, but may be rebutted. We are not called upon, in this case, to pass upon the question as to whether it is necessary to show actual knowledge of the owner, because, as the writer thinks, he is presumed to know. The other judges are not willing to go that far, but think and hold that the property is presumptively liable to the tax, and that the burden is on the owner to prove want of knowledge. We agree that the nuisance may be abated and the building closed, regardless of knowledge, since it is not a penalty or punishment, but to prevent the maintenance of the nuisance in the future; and the statute provides for opening of the building, under certain conditions, and by giving bond to prevent a continuance of the nuisance.

The owner did not testify that he did not know. The fact that he took the stand as a witness, and did not so testify, tends, as I think, to strengthen the presumption against him. There are cases holding that, if the truth as to a fact in dispute is peculiarly within the knowledge of one party, especially if the fact is a negative one, the burden of adducing evidence on that point usually rests on him,

although, under other circumstances, the burden would rest on his adversary. Hammon on Evidence 42; *Goodwin v. Provident Sav. L. A. Assn.*, 97 Iowa 226, 242. Other cases hold that, if a party fabricates or withholds evidence concerning a fact in dispute, it gives rise to an inference that a disclosure of the truth would prejudice his case; otherwise there would be no motive for his act; and further, that nonproduction of evidence consists in the mere failure to adduce evidence which it is within the power of the party to adduce. It is a negative term, and so is distinguishable from suppression of evidence, which involves the use of active means to prevent a disclosure. Hammon on Evidence 154, Section 37; 1 Jones' Blue Book of Evidence, Sections 19 and 22. It was a matter within his own knowledge, so that the presumption of knowledge is not, in any way, rebutted.

Section 4944-h5 provides that, if the existence of the nuisance be established in such action or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment, which order shall direct the removal and sale of personal property therein, and shall direct the effectual closing of the building or place against its use for any purpose, and keeping it closed for a year, unless sooner released. Section 4944-h7 provides for a release if the owner appears, and gives bond conditioned that he will abate the nuisance and prevent the same from being established or kept within a year, if the court is satisfied of his good faith. This section seems to contemplate that the nuisance may be abated by closing the building, even though the owner appears after decree, and had not theretofore appeared in the proceeding. See, also, a similar provision as to the tax and the owner's appearance after trial, in Section 4944-h9. To hold that the state or a court of equity is powerless to abate nuisances of this character by closing the building, unless the state is able to show, by affirmative evidence, that the owner had knowledge of the nuisance, would make the remedy provided by the statute ineffectual. Tenants of this character are usually transi-

tory and irresponsible. An injunction against them alone would be of little value. The owner could put another tenant of like character in the premises, and the nuisance would go on, and they in turn be enjoined, and still other like tenants continue the business. We think the intention of the legislature was to effectually abate the nuisance for at least a year, by closing the building, or by a bond on the part of the owner that he will not permit its continuance. Suppose the owner of the building is not in court at all, and is a nonresident of the state; that a slaughter house (or house of prostitution) is maintained in the best residence or business district of a city; that the weather is hot, and the stench is unendurable; that an injunction is obtained against the tenant; that he at once sells his business to another party, who continues the business. It would take a month or two to get notice by publication even, on the owner. Could it be said that the court had no power to effectually abate such a nuisance? It seems to us it could not be so held, even though it be conceded that, as a general rule, it must be shown in some way that the owner had knowledge,—at least, before a personal judgment or decree could be rendered against him. 20 Ruling Case Law 395. The instant case is even stronger than that, because the statute does say that the building shall be closed for a year, when it is proven that the nuisance is maintained therein. The proceeding is *in rem*, so far as the building is concerned. As said, we are not required to determine in this case whether the owner would be liable to such penalty, if he had no knowledge of the character of the business carried on in his property.

The cases go farther than we hold in this case, and hold that the nuisance may be abated and the building closed, without showing knowledge on the part of the owner. It was said in *People v. Barbicre*, 33 Cal. App. 770, 778 (166 Pac. 812, 815), where there was a like question, under a similar statute, and where Iowa statutes and decisions were referred to, that:

“It is contended that neither the owner of a building

which has been declared a nuisance under the statute, nor the building itself, can be bound by the adjudication, unless such owner has knowledge that such building has been and is being used for purposes interdicted by the statute, and that it is not shown here that the owners of the buildings had knowledge of the character of the illicit uses to which they were being put. The action authorized by the statute is *in rem*, or against the property used in the maintenance of the nuisance, as well as *in personam*, or against the person maintaining it; and while, therefore, the owner, having no actual knowledge of the character of the business carried on in his building, might not personally be bound for the costs, the building and furniture may, nevertheless, be proceeded against, and subjected to the forfeitures prescribed by the statute. If, therefore, a building or other property is so used as to make it a nuisance, under the statute, the nuisance may be abated, and the property, if personal, confiscated, and, if real, subjected to the consequences of reasonable forfeitures, notwithstanding that the owner had no knowledge that it was used for the unlawful purpose constituting the nuisance."

The case cites, as sustaining this proposition, *Commonwealth v. Howe*, 13 Gray (Mass.) 26; *Hodge v. Muscatine County*, 121 Iowa 482; *State v. Ryder*, 126 Minn. 95 (147 N. W. 953); *Tenement House Dept. v. McDevitt*, 215 N. Y. 160 (109 N. E. 88); *People v. Casa Co.*, 35 Cal. App. 194 (169 Pac. 454).

Appellant cites *State v. Ross*, *supra*; but, in that case, knowledge was shown by the evidence. As said, defendant is presumed to have had knowledge of the occupants of his own property. A duty rests upon him to pay some attention to his property, and to the public. These tenants had been in the premises about three months. The evidence clearly shows that prostitutes occupied the building, and that it was maintained as a house of prostitution. On the question as to whether the owner is presumed to have knowledge, it was said, in *Hodge v. Muscatine County*, 196 U. S. 276 (49 L. Ed. 477, 481):

"The owner is not only chargeable with a knowledge of the law in respect thereto, but he is presumed to know the business there carried on, and to have let the property with knowledge that it might become incumbered by a tax imposed upon such business (citing *Sheldon v. Van Buskirk*, 2 N. Y. 473; *Brown Shoe Co. v. Hunt*, 103 Iowa 586; *Polk County v. Hierb*, 37 Iowa 361; *State v. Snyder*, 34 Kan. 425; *Hardten v. State*, 32 Kan. 637; *Sears v. Cottrell*, 5 Mich. 251; *Waldron v. Lee*, 5 Pick. (Mass.) 323; *Spencer v. McGowen*, 13 Wend. (N. Y.) 256; *Simpson v. Serviss*, 3 Ohio C. C. 433)."

2. We come next to the question whether the court should have imposed the \$300 tax. Some of the discussion in the prior paragraph, particularly in regard to knowledge

3. PROSTITUTION. HOUSE OF: imposition of mulct tax: knowledge of owner.	and presumption, is applicable to this feature of the case, and will not be repeated. The statute on this feature of the case, Section 4944-h8, seems to be plain and mandatory. It provides:
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"Whenever a permanent injunction issues against any person for maintaining a nuisance as herein defined, or against any owner or agent of the building kept or used for the purpose prohibited by this act, there shall be imposed upon said building and the ground upon which the same is located and against the person or persons maintaining said nuisance, and the owner or agent of said premises, a tax of \$300. The imposing of said tax shall be made by the court as a part of the proceeding, and the clerk of said court shall make and certify a return of the imposition of said tax forthwith to the county auditor, who shall enter the same as a tax upon the property and against the persons upon which or whom the lien was imposed * * * and the same shall be and remain a lien on the land upon which lien was imposed until fully paid. * * * The payment of said tax shall not relieve the persons or property from any other penalties provided by law."

Section 4944-h9 reads:

"When such nuisance has been found to exist under any

proceeding in the district court or as in this act provided, and the owner or agent of such building or ground whereon the same has been found to exist, was not a party to such proceeding, nor appeared therein, the said tax of \$300 shall, nevertheless, be imposed against the persons served or appearing and against the property as in this act set forth."

Then follow provisions as to the method of appearance by the owner after trial. Upon such appearance and trial by the owner, even after trial as against the occupants, and if the tax has been imposed without appearance of the owner, such owner may not be entitled to have the imposition of the tax canceled, but the court may, upon such trial as to the owner, modify, add to, or confirm such finding and judgment, as the case may require. Under these, the tax is imposed when the injunction issues against the person maintaining the nuisance, or against the owner, and whether the owner is a party to the suit or not. Our statute providing for a tax on property wherein cigarettes are sold is quite similar, so far as the tax question is concerned, to the statute now under consideration. In *Hodge v. Muscatine County*, 121 Iowa 482, 488, we held that such a tax is a tax upon the business, or traffic. The Supreme Court of the United States also so held, in the same case, and that the cigarette tax was analogous to the cigarette statute. *Hodge v. Muscatine County*, 196 U. S. 276 (49 L. Ed. 477, 481). In this last-named case, the Supreme Court of the United States said:

"It was within the power of the legislature to make the tax a lien upon the property whereon the business was carried. If general taxes upon real estate and specific taxes for improvements thereto, including pavements, sidewalks, sewers, the opening of streets and keeping them clean, may be made liens upon the property affected, it is difficult to see why a tax upon the business carried on upon such property may not be made a lien, as well as a claim against the owner. The owner is not only chargeable with a knowledge of the law in respect thereto, but he is presumed to know

the business there carried on, and to have let the property with knowledge that it might become incumbered by a tax imposed upon such business. * * * Acts of Congress impressing liens upon real estate for taxes or penalties arising from business illegally carried on there have been the frequent subject of controversy in this court. Conceding that the landowner is entitled to notice before he can be personally liable, or before his property can be impressed with a lien, we are of opinion that he is protected by Sections 2441 and 2442, which permit him to make application at the meeting of the board of supervisors next following the listing of the property, the sessions of which board are fixed by law, * * * to remit the tax. This application may be made at any time after the property has been assessed, upon eight days' notice being given to the county attorney. Witnesses are examined under oath before the board, which determines by a majority vote whether the tax shall stand or be remitted * * * In this case, the landowner states that she had no knowledge whatever that her real estate was being used for the sale of cigarettes, until after the assessment was levied, and never consented to the same; that she resides in Illinois, and rented the property through an agent, who had had no knowledge himself of the sale of cigarettes upon the premises. There is no allegation, however, that she did not have knowledge within ample time to make application to the board of supervisors for the remission of the tax. If such application had been made, it would have been the duty of the board to take the matter into consideration, and determine whether her want of knowledge would justify the remission of the tax. It is not for us to determine whether the defense be a valid one, since, having the opportunity to make it, she declined to do so."

The statutes now under consideration provide that the landowner may make such showing, but the statute does not say, nor does the case last cited hold, that want of knowledge is a defense. Appellant cites *State v. Fanning*, 97 Neb. 224 (149 N. W. 413). It was there said that:

"It is not necessary to prove that the owner of the prop-

erty knew that it was being used for the prohibited purposes; if the proprietor (that is, the person in control and management of the house) has such knowledge, it is sufficient."

That was under a statute of Nebraska, which provides a penalty if the person owning or having the control, knowingly leases the property for such purposes, etc. In that case, the court further said:

"The object of the statute is to provide an efficient and prompt means for suppressing the so-called 'Red Light District' in communities that are unwilling to tolerate such a nuisance. * * * The statute is a wholesome one. It ought to be liberally construed, to enable virtuous communities to protect themselves against public places kept for lewd purposes."

Appellant cites *State v. New England F. & C. Co.*, 126 Minn. 78 (147 N. W. 951), and *State v. Ryder*, 126 Minn. 95 (147 N. W. 953), as having a bearing. The opinion is already too long, and we shall not take the time or space to further discuss the matter.

We are of opinion that the trial court erred in not ordering the nuisance abated for a year, as provided by the statute, and in not imposing the \$300 tax. The cause is reversed and remanded, with directions to enter a decree in harmony with this opinion and the statutes on the subject.—*Reversed and remanded.*

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

STATE OF IOWA, Appellee, v. M. FARRIS, Appellant.

SODOMY: Acts Constituting. Sodomy may be committed by having copulation in the mouth of a human being.

SODOMY: Indicting Accomplice as Principal. One who permits the crime of sodomy to be perpetrated on his body may be indicted as a principal. Indictment held sufficient.

CRIMINAL LAW: Preconcerted Action Rendering Party Accomplice. When two persons, by previous agreement, voluntarily go to the room of a third person for the purpose of having said third person commit the crime of sodomy on each of their persons, with the mutual expectation of receiving money from said third person for said offenses, and said crimes are consummated as contemplated, each of said persons is an accomplice in the crime committed by the other.

Appeal from Woodbury District Court.—JOHN W. ANDERSON, Judge.

JULY 6, 1920.

THE defendant was indicted, tried to a jury, and convicted of the crime of sodomy, and appeals.—*Reversed and remanded.*

Sears, Snyder & Gleysteen, Vail E. Purdy, and H. C. Harper, for appellant.

H. M. Havner, Attorney General, *F. C. Davidson,* Assistant Attorney General, and *Ole T. Naglestad,* County Attorney, for appellee.

PRESTON, J.—1. The transaction and the evidence are so vile and nauseating that we shall refer to it as briefly as possible, and in such language as that a reading between the lines may be necessary at some points. The indictment follows:

1. SODOMY:
acts constituting.

"The grand jury of the county of Woodbury, in the name and by the authority of the state of Iowa accuse M. Farris of the crime of sodomy committed as follows: The said M. Farris on or about the 24th day of November in the year of our Lord One Thousand Nine Hundred and Eighteen, in the county of Woodbury and state of Iowa, did unlawfully, willfully and feloniously have copulation with and carnally know one Bert Stevens in an opening of the body of the said M. Farris other than the sexual parts, to wit: the mouth of the said M. Farris."

At common law, there was some question as to whether sodomy could be committed in the manner here charged,—that is, by the mouth,—though the weight of authority seems to be that it could (8 R. C. L. 334); but our statute, Code Section 4937, as later defined by Section 4937-a, Code Supplement, 1913, is broader than the definition at common law. *State v. McGruder*, 125 Iowa 741. The literal charge in the indictment is that the male organ of Bert Stevens penetrated defendant's mouth. The defendant can be held, if at all, only as an accessory or an accomplice.

The evidence, if believed, tends to show that Stevens and Barnes were together in the room of the defendant, and both on the bed at the same time, and that the act was committed by or on Stevens about a minute before a similar act was committed by or on Barnes. Both Stevens and Barnes would be guilty of sodomy, because there was copulation by each inserting their own organ in defendant's mouth, and they say they consented to it. Their conviction might be as salutary as the conviction of the defendant; though he, too, should be punished, if it has been shown, by competent evidence, that he is guilty. It is conceded by the State that Stevens would be an accomplice of the defendant as to the act with him, and we think, for a like reason, that Barnes would be an accomplice as to his act. It is clear, then, that, in that sense, both Stevens and Barnes are accomplices. It is contended by appellant that Barnes is an accomplice of both Stevens and the defendant, as to the act with Stevens, and the act relied upon by the State for a conviction. This

is denied by the State, and it is argued by the attorney general that the two offenses were distinct and separate.

Going back now, for a moment, to the indictment, we are of opinion that defendant could be indicted as a principal for the offense charged, even though he was but an accomplice. This rule applies to offenses where

2. SODOMY:
Indicting
accomplice
as principal.

two could not have committed the act, as in rape, or where a man is charged with rape upon his own wife. *State v. Comstock*, 46 Iowa 265, 266; *State v. McAninch*, 172 Iowa 96, 110; *Foster v. State*, 1 Ohio Cir. Ct. 467. In the last-named case, there was an indictment against three men for sodomy committed on the same man, at the same time; and the indictment was held good, because one could have done the act, and the others aided him. The defendant could not be guilty, except as an accessory or accomplice. We think the indictment is good.

2. This brings us to the real point in the case; and that is, whether Barnes, as well as Stevens, was an accomplice. Appellant contends that they both, as well as the defendant, were accomplices, and that it does not matter how many accomplices there may be, they must be corroborated. 16 Corpus Juris 710.

3. CRIMINAL
LAW: precon-
verted action
rendering
party ac-
complice.

Going now to the evidence, to determine whether Barnes was concerned in the crime charged, it appears from the testimony of Stevens that, some days before the time of the commission of the alleged offense, he went to defendant's rooms; that, at that time, he stayed half an hour, and had some drinks, but there was nothing out of the way at that time. He says that Barnes was with him at the time the alleged crime was committed, some time in November or December; that he telephoned from the billiard parlor to Barnes, asking if he wished to make some easy money, and that Barnes thought that was all right; that Barnes then went to the pool hall, and Stevens told Barnes that defendant did such things as that charged; that the two together then went to defendant's room, and they had sev-

eral drinks of whisky; that, after they had been in the room for a time, defendant went to the bed, and motioned for them to come over to the bed, and they both went over and sat down on the bed with defendant; that defendant unbuttoned their trousers, both Barnes' and Stevens' at about the same time; and that then the act was committed on both. Stevens says he practiced sodomy once after that, when no one else was present. No charges were made against either Barnes or Stevens. They were about 18 years of age; and both testified that they made no resistance, but consented to the act. Barnes testifies that, before they went to defendant's room, Stevens said that, if they would go there, there would be \$3.00 or \$4.00 in it, and some whisky, and so he went; that he knew, before they went, that they were going to defendant's room for the purpose of having this act of sodomy committed upon them; that, the way he happened to go with Stevens, was that Stevens phoned him, and asked if he wanted to make some easy money; and that Stevens told him how, after he got to the pool hall; that Stevens then said defendant would do this, and give him \$3.00 or \$4.00, and that there was whisky in it; that he knew what he was doing, all the time he was there, although they had used considerable whisky; that defendant said nothing out of the way to either Stevens or to witness. He describes the act substantially as does Stevens, and says that defendant did not ask him over to his room, but that it was Stevens. Defendant did not pay them any money. Some time after the transaction in question, both Barnes and Stevens, with another party or two, went to the defendant's room, evidently by arrangement with the officers. This was late at night, and defendant was in bed. He was then arrested. There is no claim that any improper conduct took place at that time. Barnes says he never saw defendant but twice.

Section 5299 of the Code provides that all persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense, or aid and abet its commission, though not present, shall be indicted,

tried, and punished as principals. The words "aid and abet" in the statute seem to apply to persons not present; though, of course, they could apply to those present. But the first part of the statute uses the word "concerned:" "all persons concerned in the commission of a public offense," etc. Code Section 5489 provides:

"A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof."

There are different definitions of the word "accomplice." Some of them are given in *State v. Ean*, 90 Iowa 534, 536, as:

"One who is joined or united with another; one of several concerned in a felony; an associate in a crime; one who co-operates, aids, or abets in committing it."

Under these definitions, was Barnes concerned in, or associated with Stevens and co-operating with him in, the act alleged to have been committed by the defendant with Stevens? We think he was. The State cites *State v. Bosworth*, 170 Iowa 329, to the point that Barnes' being present and not objecting is insufficient to make him an accomplice. The State also cites, to the same effect, *State v. Duff*, 144 Iowa 142; *State v. Jones*, 115 Iowa 113. But we think that, in the instant case, there is more than Barnes' mere presence. The State cites, also, *State v. Ean*, supra, to sustain its claim that there were two distinct offenses here. In that case, a man and a woman occupied one room, and another man and another woman, another and adjoining room, and the evidence tended to show that all were guilty of adultery; and it was held that those in one room were not accomplices of those in the other. That is somewhat different from the question we have here. It is doubtless true that, in the instant case, the acts were distinct, in a sense: that is, in the sense that both Barnes and Stevens were guilty as accessories or accomplices to the act committed by or on

each. But the two acts were closely related, and committed substantially at the same time. The test generally, as to whether one is an accomplice, is determined by deciding if he could have been indicted and convicted of the same offense. *State v. Duff*, supra. If, in the instant case, there had been no claim or testimony that the act was committed with Barnes, and all the other circumstances were the same as they appear in this record, we think Barnes could properly be said to have been concerned or associated with Stevens in the Stevens act. There was preconcerted action between them before going to defendant's room; they were going together for that purpose; and their claim is that defendant was to pay them money for the privilege of committing the act, and that Barnes was to receive the money, or share in it. He knew what he was going there for. There may be other circumstances, before set out, that show his participation in the act with Stevens.

Mere presence, in the absence of preconcert, etc., is ordinarily not enough; but, if the party's presence is by preconcert, he may be guilty as an aider and abettor, although neither by word nor by act does he encourage the commission of the crime. 16 Corpus Juris 132, 133, citing *State v. Dunn*, 116 Iowa 219; *State v. Nash*, 7 Iowa 347. The last-named case has reference, perhaps, more to the question of conspiracy; but it is held, in effect, that the act and declaration of each member of a confederacy, in pursuance of the plan with reference to the common object, is, in contemplation of law, the act and declaration of them all.

Appellant also cites *State v. Jones*, supra; *State v. Cowell*, 149 Iowa 460; *State v. O'Callaghan*, 157 Iowa 545.

We deem it unnecessary to review the cases further. We reach the conclusion that Barnes was an accomplice, as contended by appellant, and that there was no corroboration. The question was properly raised by the defendant in the trial court. This is decisive of the case, but we think it proper to refer very briefly to the evidence on the general situation.

3. We shall not go into any detail as to the unsavory

character of Stevens and Barnes. Some of the circumstances have already been referred to. Barnes testifies:

"I have been in jail for investigation and things like that before, when they were raiding around here. I was picked up in the Nigger Cabaret, when they had the Nigger Cabaret on the west side."

The defendant is a Syrian, 66 years old. Testifying through an interpreter, he says he is married, and that his wife and three children live in Constantinople; that he has been in this country 9 years, 8 of which he has worked for the Cudahy Packing Company, at Sioux City, and is still working there; that he took up a homestead in South Dakota, proved up on it, and still owns it; that he knows Stevens, who worked at Cudahy's for a while; that he never asked Stevens to come to his room. He denies that Stevens and Barnes were at his room at the time the crime is alleged to have been committed; says he never saw them at his room, prior to the night he was arrested; denies this charge; says he never did anything of the kind in his life, and was never in any trouble before; works 8 hours a day, and invests his money in property in this country; has houses in Sioux City. His employers and others testify to his good character; that he is a steady, faithful, hard-working man, and has missed not more than 4 or 5 days from his work in 8 years, and then to attend a funeral, or something of that kind. He may be guilty, but we have some doubt about it. At any rate, for the reasons stated in prior paragraphs of the opinion, we are satisfied that he was not convicted upon proper evidence, for that the only evidence is that of accomplices, who are not corroborated. The judgment is reversed and the cause remanded.—*Reversed and remanded.*

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

STATE OF IOWA, Appellee, v. ANDREW LONG, Appellant.

CRIMINAL LAW: Admissions as Substantive Evidence. An admission by the defendant of a fact tending to show guilt is admissible as substantive evidence of the fact, though not amounting to a confession.

Appeal from Johnson District Court.—R. G. POPHAM,
Judge.

JULY 6, 1920.

APPEAL from a judgment of conviction for fraudulently uttering a forged instrument.—*Affirmed.*

John J. Ney, for appellant.

H. M. Harner, Attorney General, and *F. C. Davidson*, Assistant Attorney General, for appellee.

EVANS, J.—Appellant's abstract is quite imperfect in its disclosure of the record below. A purported indictment of the defendant is set out in full, together with the names of the witnesses who appeared before the grand jury, and the purported testimony of each. We infer that this testimony was repeated at the trial, although the abstract does not so state. Demurrer to the indictment is set out in full in the abstract. It does not appear, however, that any ruling was had thereon, nor is any reference to the demurrer made in the brief of appellant. We infer that an appeal was duly taken, though no statement to that effect is contained in the abstract. The words, "Notice of Appeal," however, appear upon the abstract, immediately following the "demurrer" therein set forth. We infer that a verdict

of guilty was rendered against the defendant and a judgment entered thereon, though such fact does not appear in the abstract.

It is, therefore, a matter of great doubt whether sufficient is disclosed in the abstract to confer appellate jurisdiction upon us. We shall, however, solve the doubt in favor of the defendant, and consider the purported appeal upon its merits.

Two assignments of error are set forth in appellant's argument, as follows:

1. The confession of the defendant, unless made in open court, will not warrant a conviction.
2. The defendant was not a witness on the trial, and there was no evidence of his guilt.

The foregoing assignment of errors is supported by six lines of argument.

As to the first alleged error, the record before us does not disclose that there was any confession of defendant, nor that his conviction was made to rest upon a confession. It does appear that the defendant presented for collection a forged check for \$40. Evidence of later admissions by him that he forged the check and intended to collect it was introduced. These admissions were less than a "confession," in the legal sense. They were, however, admissible in evidence, and were competent evidence of the facts admitted. The thought suggested in appellant's brief seems to be that these admissions would have been admissible only as impeaching the testimony of the defendant as a witness, and that, inasmuch as he was not a witness, the same were not admissible. This is clearly an incorrect view.

As to the second alleged error, it is enough to say that the testimony set forth in the record was not only sufficient to sustain a conviction, but was virtually conclusive of guilt. The judgment below is—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, J.J., concur.

STATE OF IOWA, Appellee, v. WARD REBBEKE, Appellant.

CRIMINAL LAW: Harmless Error. An instruction correctly stating that defendant admitted the possession of the property in question on a Sunday and Monday is not rendered prejudicially erroneous by giving to said days an incorrect date.

CRIMINAL LAW: Inaccurate Instructions. An inaccurate instruction will not constitute prejudicial error, when the record and instructions as a whole demonstrate that the jury could not have been misled. So held where the court, in instructing as to two facts, either of which constituted a complete defense, joined the clauses by the conjunctive "and," instead of the disjunctive "or."

Appeal from Marshall District Court.—B. F. CUMMINGS, Judge.

JULY 6, 1920.

DEFENDANT was convicted of grand larceny, and appeals from the judgment of the court sentencing him to imprisonment in the penitentiary at Fort Madison.—*Affirmed.*

R. P. Scott, for appellant.

H. M. Havner, Attorney General, and *F. C. Davidson*, Assistant Attorney General, for appellee.

STEVENS, J.—The indictment charged the defendant with the larceny of a Ford automobile, on or about the 19th day of July, 1919. The record contains only the evidence of the defendant, but it is set out in full, in the form of questions and answers. From his testimony it appears that, for some time prior to the above date, he worked on a farm

1. CRIMINAL
LAW: harmless error.

between Grundy Center and Gladbrook, and that, on Sunday morning, July 20th, he went to Marshalltown, where he remained until about 2 o'clock Monday morning. He further testified that he traded another automobile, then in possession of a third party at Grundy Center, and \$15, to a stranger at Marshalltown, for the automobile in question; that negotiations for the trade were begun in the courthouse yard about 5 o'clock, and terms finally agreed upon about 10 o'clock P. M.; that the stranger claimed to reside at Conrad, a village between Marshalltown and Grundy Center; that, by mutual arrangement, they agreed to go together to Conrad in the automobile; that, about 2 o'clock A. M., after spending some hours about the street, waiting for the stranger to come with the automobile, they left Marshalltown, and, when they arrived at Conrad, the defendant, who had been sleeping in the rear seat of the car, was awakened by the stranger, to whom he paid the \$15 agreed upon; that the stranger then departed, and defendant has known nothing since of his whereabouts; that the defendant proceeded to Grundy Center, where he arrived about 5:30, and, in an hour or so, was arrested.

I. The sole reliance of appellant for a reversal is upon two alleged errors, in one paragraph of the court's charge to the jury. The court instructed the jury that it was admitted by the defendant that he was in the possession of the automobile on the night of Sunday, the 19th, and the morning of Monday, the 20th of July. The complaint urged against this part of the instruction is that Sunday was not the 19th, but the 20th, and Monday the 21st of July; that the defendant did not admit that he had possession of the automobile Sunday night, and that the evidence shows that he did not receive possession thereof until 5 o'clock Monday morning. So far as disclosed by the record, the only testimony introduced upon the trial as to the time the defendant obtained possession of the car is that of himself. He admitted that he and the stranger referred to rode about the streets of Marshalltown for a short time, for the purpose of demonstrating the condition of the automobile. The wit-

ness went into considerable detail in regard to the alleged transaction with the party of whom he claimed to have received the car. This testimony does not appear to have been contradicted by other witnesses, and, if the offered explanation was accepted by the jury, it was quite immaterial whether he obtained possession before midnight on Sunday, or about 5 o'clock Monday morning. The material fact admitted by him was the recent possession of the property. While the court was mistaken as to the dates, the days of the week were correctly stated. The jury could not have misunderstood the time, nor been misled in any way by this part of the instruction, nor the defendant prejudiced thereby.

II. The court, in another paragraph of the same instruction, in substance charged the jury that, if the statements of the defendant, accounting for the possession of the

car, were believed, *and* if the same raised a reasonable doubt as to his guilt, he should be acquitted. The criticism of this part of the instruction is of the use of the conjunction

2. CRIMINAL
LAW: Inac-
curate in-
structions.

"and," italicized above, instead of the disjunctive "or." The rule in this state undoubtedly is that, if the evidence offered in explanation of the recent possession of stolen property leaves a reasonable doubt in the minds of the jury as to whether the defendant came into possession thereof, he is entitled to an acquittal. *State v. Haycard*, 153 Iowa 265; *State v. Kimes*, 145 Iowa 346.

The court specifically charged the jury, in this instruction, that, if the statements of defendant accounting for the possession of the automobile raised a reasonable doubt as to his guilt, he should be acquitted. This statement was, however, preceded by the words, "if you believe the statement of the defendant," followed by the conjunction "and." Counsel argues that the instruction was misleading and prejudicial, for the reason that, under it, to raise a reasonable doubt in the mind of the jury, it must first believe the explanation of the defendant. It must have been apparent to the jury, under this instruction and the charge as a

whole, that, if the defendant told the truth, he came honestly into possession of the automobile, and that an acquittal must follow, as a matter of course. The explanation, if believed, conclusively established innocence; and, if it raised a reasonable doubt in the mind of the jury as to the guilt of the defendant, it was its duty to acquit. The closing language of the instruction was as follows:

"On the other hand, if you are satisfied, after hearing his [the defendant's] testimony, and from the whole evidence in the case, beyond a reasonable doubt, that the defendant is guilty as charged, then it is your duty to so find."

In an earlier paragraph, the court had given the usual instruction as to the presumption of innocence and the burden of proof. While the language of the instruction is not technically accurate, yet, when the charge is construed as a whole, it is not lacking in clearness. The defendant admitted, upon cross-examination, that he pleaded guilty to a felony in Illinois, and later served for a time in a penitentiary in Minnesota. The explanation volunteered by him of his possession of the automobile was far from convincing. The jury manifestly was satisfied that he was not telling the truth. The record does not disclose that any prejudicial error was committed, and the judgment of the court below is—*Affirmed*.

WEAVER, C. J., LADD and GAYNOR, JJ., concur.

TOWN OF WOODWARD et al., Appellants, v. IOWA RAILWAY &
LIGHT COMPANY, Appellee.

MUNICIPAL CORPORATIONS: Utility Rates Not Subject of Con-
1 **tract.** Rates for gas, water, and electricity are not the subject
of contract between a municipality and a private producer.
(Sec. 725, Code Supp., 1913.)

MUNICIPAL CORPORATIONS: Presumption in re Ordinance
2 **Rates.** Ordinance rates for gas, water, and electricity are pre-
sumptively reasonable; but a private producer may fix a higher
rate, and, on injunction to restrain the enforcement of such
higher rate, justify his conduct by showing that the ordinance
rate is confiscatory, and that the new rate is no more than
compensatory.

Appeal from Dallas District Court.—J. H. APFLEGATE,
Judge.

JULY 6, 1920.

THIS is an appeal by the plaintiff from certain orders of the district court: First, dissolving a temporary injunction; and second, refusing, upon final hearing, to order a permanent injunction. The defendant is a public utility corporation, holding a franchise from the town of Woodward, plaintiff, for the maintenance and operation of its electric light plant in such town. It furnished the service for many years, at rates provided by ordinance. In 1918, it declared its inability to further furnish such service at ordinance rate, on the ground that such rate had become unreasonable and confiscatory. The town of Woodward, through its city council, brought this action to enjoin it from breaching the alleged contract, and, in effect, to compel specific performance. Trial being had, the district court refused the relief prayed, and the plaintiff has appealed.—*Affirmed.*

S. Trevarthen and C. A. Robbins, for appellants.

Wm. Chamberlain, John A. Reed, and Ralph Maclean, for appellee.

EVANS, J.—I. The defendant's franchise in the town of Woodward was granted in June, 1912, by ordinance duly enacted by the city council and duly approved by vote of the electors, as required by Section 720 of the Code. Section 6 of the ordinance which granted the franchise specified the rates to be charged by the defendant to consumers.

1. MUNICIPAL
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contract.

The term of the franchise was 25 years. The essence of plaintiff's contention is that the enactment of this ordinance (including the franchise and the rates and the approval of the same by the electors) and the practical acceptance of the same by the utility corporation, constituted a contract, binding as such both upon the town and upon the utility corporation. The defendant resists this contention, and likewise denies that there is any power conferred by statute upon the city council to enter into contract on the subject of rates. The issue at this point is the controlling one in the case. The question thus at issue is answered by Section 725 of the Code of 1897, which provides as follows:

"Sec. 725. They shall have power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires, or other conduits, with gas, water, light or power, and to supply said city or town with water for fire protection, and with gas, water, light or power for other necessary public purposes, * * * and these powers shall not be abridged by ordinance, resolution or contract."

It will be noted from the foregoing that the legislative power to fix rates is conferred by this section upon the city council. The legislative power thus conferred is a continuing one, and may not be abridged or bartered away by

contract or otherwise. The same legislative power to enact rates by ordinance is a continuing power to repeal or amend in the same manner. The power thus conferred is subject only to the constitutional limitation that the rates thus enacted shall not be confiscatory or unreasonable, but shall be reasonably compensatory. There was a time in the history of our legislation when the right of contract as to rates was conferred by statute upon the city council. A comparison of certain sections in the Code of 1873 with our present Section 725 is instructive on that question. Section 473 of the Code of 1873 was as follows:

“When the right to build and operate such works is granted to private individuals or incorporated companies by said cities and towns, they may make such grant to inure for a term of not more than twenty-five years, and authorize such individual or company to charge and collect from each person supplied by them with water, such water rent as may be agreed upon between said person or corporation so building said works, and said city or town; and such cities or towns are authorized and empowered to enter into a contract with the individual or company constructing said works, to supply said city or town with water for fire purposes, and for such other purposes as may be necessary for the health and safety thereof, and to pay therefor such sum or sums as may be agreed upon between said contracting parties.”

By Chapter 16, Acts of the Twenty-second General Assembly, this right of contract by the city council was taken away from cities having a population of 7,000 or more, but was still permitted to cities of smaller population. By the revision and codification of 1897, the right of contract as to rates for utilities of this character was entirely eliminated, and the legislative power to regulate rates was conferred upon the city council in all cases. The reason for the change of method is obvious enough. Under the contract method, the rights of the public were often bartered away, either ignorantly or corruptly, and utility corporations became empowered, through the contractual obligations, to enforce

extortionate rates. The net result of the progressive legislation is found in our present Section 725, whereby it is forbidden to any existing city council to bind the city to any rate for any future time. The power of regulating the rate is always in the present city council. It must be said, therefore, that the rates fixed by Section 6 of the ordinance hereinbefore referred to were not fixed by contract.

II. The significance of our foregoing conclusion will be apparent, upon the further disclosure of the record. The defendant pleaded that the ordinance rates were confisca-

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tory and unreasonable, and that, for that

reason, the defendant declined to furnish

the service at such rate, and that, for the

same reason, they were not enforcible by the

city. Upon this issue of fact, the defendant

introduced testimony. This testimony was received by the trial court, subject to the plaintiff's objection to its competency and materiality. The argument in support of such objection is that, the defendant being bound by its contract obligation to give service for such rates, it is immaterial whether they were compensatory or not. The evidence introduced by the defendant established the fact that the rates were confiscatory and unreasonable. Such fact is admitted by the plaintiff, for the purpose of this appeal. In view of appellant's admission, no evidence has been incorporated in its abstract, and none was necessary. Under the record before us, we are not called upon to pass upon the question of fact, but to deem it established that the ordinance rates were confiscatory. The question put to us is, Was the evidence of such fact admissible, or should it have been rejected, as being immaterial? It is our judgment that the evidence was clearly material, and therefore admissible. The legislature could not confer upon the city council any greater legislative power than it possessed, itself. Such legislative power, whether retained by the legislature or conferred upon the city council, was and is, at all times, necessarily subject to the constitutional limitations. In the absence of a contractual obligation to perform, confiscatory

and unreasonable rates are concededly under constitutional inhibition.

The authorities cited and relied on by appellant are cases which have arisen in other states upon statutes conferring the right of contract, and all of them involved contractual obligations. We hold, therefore, that the evidence in question was admissible, and was, therefore, properly considered by the lower court.

III. It is further urged, in effect, that the ordinance rates are presumptively reasonable, and that such presumption continues until they are changed by a proper ordinance. That such rates are presumptively reasonable is to be conceded. The burden, therefore, was upon the utility corporation to show to the contrary. At this point, the evidence referred to in the foregoing division was admissible. The contention that the presumption of reasonable rates necessarily continues until new ordinance rates are adopted, cannot be sustained. To sustain such contention would be to hold that the utility corporation had no remedy, whatever the facts might be, if the city council refused to amend the rates. The constitutionality of the ordinance rates, like the constitutionality of a statute, is always open to challenge. Indeed, the only power conferred by the legislature upon the city council is the power to establish *reasonable* rates, and not unreasonable ones. To enact unreasonable rates, therefore, is to exceed, not only its constitutional power, but its statutory power as well. Without dwelling further upon the details of the argument, it is enough to say that the ground herein covered has been fully covered in our previous cases. *Cedar Rapids Gas Light Co. v. City of Cedar Rapids*, 144 Iowa 426; *City of Tipton v. Tipton Light & Heating Co.*, 176 Iowa 224; *Iowa Railway & Light Co. v. Jones Auto Co.*, 182 Iowa 982; *Selkirk v. Sioux City Gas & Electric Co.*, 188 Iowa 389.

Some question is raised in appellant's argument as to the effect upon the defendant's franchise of its repudiation of the ordinance rates. That question is in no manner presented upon the record before us. We have no occasion,

therefore, to pass upon it. We are not holding that the corporation can enforce an excess rate. For the reasons herein indicated, the decree of the lower court is—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

E. M. WARD, Appellant, et al., Appellee, v. THOMAS CHEW, Appellee.

APPEAL AND ERROR: Trial Theory on Appeal. Plaintiff's own
1 pleaded theory of his cause, acquiesced in by his coplaintiff, must necessarily be controlling on appeal.

PARTNERSHIP: Accounting—Erroneous Decree. On accounting
2 and division of partnership assets, it is manifest error to decree the division of the property in kind in certain fractional parts to each partner, and to require a partner who is a creditor of the firm to accept a naked lien on each allotted share for a fractional part of his claim, without any personal judgment for such claim, and without any remedy to enforce his claim.

Appeal from Woodbury District Court.—JOHN W. ANDERSON, Judge.

JULY 6, 1920.

SUIT in equity for an accounting, and for a division of assets in which the three parties to the suit were jointly interested. The contending parties are the plaintiff Ward and the defendant, Chew. Harris joined as coplaintiff with Ward. The defendant, Chew, filed a cross-bill, asking for partition in kind of the assets, which consisted of real estate. The decree granted the relief prayed in the cross-petition. The plaintiff Ward has appealed. The decree awarded to Harris the same relief as was awarded to Chew. Harris had not prayed the relief thus awarded. He has not

appealed, nor has he resisted the appeal of the plaintiff.—
Affirmed on condition; otherwise, reversed.

Edwin J. Stason, for appellant.

Henderson, Fribourg & Hatfield, for appellee.

EVANS, J.—Ward, having acquired the title to a certain 20-acre tract of land, entered into the following written agreement with Harris and Chew:

“This agreement, made and entered into this 17th day of March, 1917, by and between E. M. Ward, hereinafter called party of the first part, and Thos. Chew and Henry Harris, hereinafter called parties of the second part, witnesseth:

“That the second parties are to have a working interest in the S $\frac{1}{2}$ of NE $\frac{1}{4}$ of NE $\frac{1}{4}$ Section 25, Township 89 N., Range 48 W. 5th P. M. and that they are to receive one half of all profits from the sale of the above-described land over and above the cost price of the same. The carrying charges are to be settled jointly at least once a year.”

The tract had been acquired by Ward only a brief time before the date of the foregoing contract, and had been acquired for the purpose of entering into the contract herein set forth. Ward, however, paid the full purchase price therefor, and held the title in his own name. The mutual purpose of the parties in entering into above contract was to improve said tract, and to plat it into small tracts, and to offer the same for sale for residence purposes. Pursuant to this plan, the parties co-operated for a year or more. Some grading was done, and the tract was platted so as to comprise 100 lots, none of which had been sold, up to the time of the litigation.

Friction and disagreement arose, as between Chew and his copartners, to such an extent that they were not on speaking terms. According to the testimony of Ward and Harris, this friction resulted from the bellicose attitude of

Chew, who took the liberty of shaking his "fist in the face" of each copartner. This was only faintly denied by Chew, and is qualifiedly admitted. This friction rendered further co-operation in their enterprise impracticable.

Under the decree of the district court, the parties were treated as members of a partnership, the assets of which partnership consisted of the real estate in question. This

theory is strongly combated by the appellant. It is urged by him that the agreement did not amount to a partnership agreement at all; and that, even if a partnership for

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any purpose might be inferred from the agreement and from the oral understanding and the conduct of the parties, it was not a partnership in the ownership of the real estate, but a partnership only for the purpose of making and dividing profits from the sale of such real estate. As an abstract legal question, we should be disposed to sustain this contention. Inasmuch, however, as plaintiff, in his original petition, treated the real estate as assets, both Ward and Harris joining therein, and inasmuch as the only relief asked in the substituted petition, and now claimed by Ward, is precisely such relief as could be demanded by him on the theory of partnership and partnership assets, we shall adopt the theory of the trial court in that regard, for the purpose of the opinion.

On the trial, an accounting was had, and the result thereof declared in the decree. There were no creditors, except that, as between themselves, the members of the part-

nership were creditors thereof. to the extent of their respective contributions. The decree of the trial court found that Harris was entitled to a credit of \$267.09; Chew to a credit of \$771.35; and Ward to a credit of \$8,964. There were no assets, except the real estate. The respective share of each party in the partnership property was one fourth each to Harris and Chew, and one half to Ward. The relief prayed by Ward was that the respective credits due the parties be adjusted, and that the *real estate be sold, and*

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that the first proceeds thereof be applied to the payment of the credit due to himself, and that the remaining proceeds be divided between the parties in the proportion above indicated.

The relief prayed by Chew was that the property be divided in kind, and that one fourth thereof in value should be set apart to himself, subject only to a lien for his share of the amount due to Ward. It will be seen that the credit due from the partnership to Chew was entirely absorbed by the larger credit due to Ward, and that the net result of an accounting was to leave Ward as sole ultimate creditor of the partnership. Deducting from the amount advanced by Ward the sum of the credits allowed to his copartners, it would leave a net amount due to Ward from the partnership of \$7,925.56. Of this sum, his copartners were liable to him for \$3,962.78. This latter sum was apportioned in the decree as follows: \$1,729.26 due from Chew, and \$2,233.52 due from Harris.

The figures and computations thus incorporated in the decree are not complained of on this appeal. The complaint is directed to the form of the relief actually granted.

The decree ordered a partition of the property in kind, and refused to order a sale of any part thereof. It awarded one fourth of the property to Chew, subject to a lien in favor of Ward for \$1,729.26, with interest from April 16, 1919. It appointed a commission to make and report an equitable partition. It gave to Chew authority to sell the lots which should be apportioned to him, and authorized him to receive the purchase price therefor. It also ordered that Chew should pay over to Ward the "net proceeds, less commissions and expenses, at once, at the said divers times, * * * until the said indebtedness due him from defendant, Thomas Chew, is fully paid." It further ordered that Ward should, on request of Chew, release of record from his lien any lot for which he had received the full net proceeds of sale.

The following paragraph from the decree is sufficiently illustrative of the general nature of the relief awarded:

"That there is due from the defendant, Thomas Chew, to the plaintiff E. M. Ward, the sum of \$1,729.26, with interest thereon at 6 per cent per annum from April 16, 1919, and the proceeds of the sales of any and all lots by the defendant, Thomas Chew, of and from the lots so transferred to and owned by him under the provisions of this decree, at the times the same are paid to and received by the said Thomas Chew, being the net proceeds, less commissions and expenses, shall at once, at the said divers times, be paid to the plaintiff E. M. Ward, until the said indebtedness due him from defendant, Thomas Chew, is fully paid; and the said indebtedness shall be and remain a first and paramount lien in favor of the plaintiff E. M. Ward, and against the lots so conveyed to the said defendant, Thomas Chew, until the said indebtedness is fully paid. And whenever the net proceeds of the sale of any lot is paid in full to the plaintiff E. M. Ward, he shall at once, on request of the said Thomas Chew, release in writing of record in the office of the clerk of the district court of Woodbury County, Iowa, duly executed and acknowledged, the said lot from the lien given by this decree against said lot; and whenever said indebtedness of \$1,729.26, with accruing interest, is fully paid, the plaintiff E. M. Ward shall at once, in writing, duly executed and acknowledged, and filed in the office of the clerk of the district court of Woodbury County, Iowa, satisfy and discharge the lien of this judgment and decree, as against the said Thomas Chew, and as against the lots so transferred to him by the plaintiff E. M. Ward."

No personal judgment was allowed to Ward against Chew; nor was Ward awarded any right to execution, special or general; nor was he awarded any other remedy for the enforcement of the collection of the amount due him. No right was reserved to Ward to disapprove a sale for inadequacy of price or for excess of commissions or expenses, nor any right to enforce a sale under any circumstances.

We think the decree was clearly erroneous, in that it ignored the elementary rights of Ward. As between him and his copartners, he was a creditor of the partnership to

the extent of the net amount advanced by him over and above the amounts advanced by his copartners. The first liability of the partnership and its assets was for the payment of such indebtedness. Until such indebtedness was paid, there was nothing to divide, as between the partners. Nor could Ward be required to split his claim against the partnership, or to submit to an apportionment of it as separate claims against the respective moieties of his copartners. Nor could he be required to release his lien upon a part of the partnership property upon a partial payment. He was legally entitled to receive all his claim out of the partnership assets, before there could be any moiety to award to the copartners. If the partnership assets should prove insufficient to pay the claim, he was legally entitled to a personal judgment for contribution against each copartner. The decree entered would be an adjudication which would bar him forever from claiming contribution for a deficiency, and which would bar him also from any further judicial remedy for foreclosing, or for enforcing his lien against the partnership property in the hands of his copartners. The effect of the decree is to permit Chew to operate for an unlimited time upon the capital of Ward, without personal liability even for the interest that accrues thereon. It might be deemed advantageous by Chew to carry this property for 8 or 10 years or more. If he chose to do so, Ward would have no power, under this decree, to interfere. If such delay were to prove disastrous or unwise, Chew could abandon the property to its lien, and be himself free from personal liability; or he might hold it for 8 or 10 years longer, to await better times. In so far, therefore, as the decree withheld from Ward the right to enforce payment of the amount due him out of the partnership property, and withheld from him the right of personal judgment against his copartners for contribution in case of deficiency, it was erroneous.

The same kind of relief awarded to Chew was awarded to Harris, likewise. As already indicated, Harris did not ask such relief, nor has he resisted Ward's appeal. It is

possible that a formal reversal of the decree can be avoided by the performance of conditions which would render its error nonprejudicial. If the appellees are ready and able to pay forthwith to Ward the amount due him, as found in the decree, a showing to that effect may be made in this court within 30 days from the filing of this opinion. If satisfactory showing to such effect be made, it would save interference with the partition ordered under the report of the commissioners, and would avoid possible confusion of title, in the event that sales have been made, pending the appeal. The case will be reserved here until further order, in order to give appellees the opportunity here suggested.

If the condition here suggested is met, the case will be affirmed on such condition; otherwise, reversed. In either event, costs in this court will be taxed to appellee Chew.—*Affirmed on condition; otherwise, reversed.*

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

JOHN W. WATSON, Appellant, v. MISSISSIPPI RIVER POWER COMPANY, Appellee.

NAVIGABLE WATERS: Navigation Under Unsafe Conditions—Negligence. The owner of a boat on navigable waters who, on encountering such darkness as renders navigation unsafe, fails to anchor, as required by Federal statutes, is guilty of negligence *per se*.

Appeal from Lee District Court.—W. S. HAMILTON, Judge.

MARCH 12, 1920.

REHEARING DENIED JULY 6, 1920.

ACTION at law to recover damages alleged to have been

occasioned by negligence of the defendant to a boat owned by the Steiner Amusement Company, which has assigned to the plaintiff its claim for compensation. There was a directed verdict and judgment for the defendant, and plaintiff appeals.—*Affirmed.*

Hughes, Rankin & Doland, for appellant.

A. W. O'Hara, George B. Stewart, J. O. Boyd, and *Hazen I. Sawyer*, for appellee.

WEAVER, C. J.—The Amusement Company was an organization engaged in giving theatrical exhibitions at cities and towns along the course of the Mississippi River. It owned and operated a steamboat, "Dixie," 110 feet in length, and an amusement or show boat, about 150 feet in length. The latter craft was in barge form, having no motive power of its own, and was moved from place to place by being placed in front of the steamboat and pushed by its power. H. E. Steiner, president and manager of the company, was also the captain of the boat, and John H. Brown was mate, and one Dietz its only licensed pilot. The theatrical company, some 30 or 40 people in all, was transported on the steamer and barge, as was also its outfit of accessories.

The company, with its boats, was at the city of Montrose, Iowa, on the night of May 10, 1915, intending, on the following morning, to go therefrom to the city of Nauvoo, Illinois, on the opposite side of the river. This part of the river is above the defendant's great power dam, and the general level of the water at this point has been raised some 12 to 15 feet above its natural flow at ordinary stages. Between Montrose on the west and Nauvoo on the east, there intervene two islands, known as Kimball and Dundy. Kimball Island lies to the north, and is separated from Dundy Island on the south by what is called the ferry channel, about 100 yards in width. For navigation between Montrose and Nauvoo, there seem, at this time, to have been

three recognized routes or channels. The only one which was marked by buoys passed from Montrose around the south end of Dundy Island. Another, unmarked, kept to the north from Montrose, and thence around the north end of Kimball Island. The third, also unmarked, we have already mentioned as passing between the two islands. This latter route was the one usually taken by the ferry boat plying between the two cities, and occasionally by other boats.

On the morning in question, the boat and barge of the Amusement Company undertook to make the passage between the islands, and, in so doing, the steamer struck an obstruction, alleged to have been a submerged stump, with the result that she sank in 12 feet of water. The steamer was subsequently raised and repaired at very considerable expense. It is for the damage so done to the boat and to the property thereon and for other consequential injuries that this action is brought.

The defendant is charged with liability for the losses so suffered by reason of its alleged negligence in removing the timber from the submerged parts of these islands, and leaving the stumps of trees standing at such heights as to obstruct the navigation and render it dangerous.

The charge of negligence is denied by the defendant, which also claims that the accident to the boat was occasioned by the negligence of its owner and its servants and pilot having the boat in charge.

At the close of all the evidence, the trial court sustained the defendant's motion for a directed verdict, on the ground that the contributory negligence of the Amusement Company was conclusively established. In so ruling, the court stated to the jury the reasons for its ruling. From that statement, we quote as follows:

"The defendant, the Mississippi River Power Company, had authority from the government of the United States to build this dam. That building of the dam would necessarily raise the water of the river above the dam. Before this water was raised, the Mississippi River Power Company cleared off the timber from certain islands. The raising of

the water would necessarily change what may be called the topography of the river. Before the raising of the water, these islands were cleared of timber,—if not wholly, to a large extent. Among the islands cleared off in whole, I think, were the islands known as Kimball's Island and Dundy's Island, both lying between the town of Montrose, Iowa, and Nauvoo, Illinois. In clearing the island of Dundy, it seems to be established by the evidence that at least one, if not more, stumps of trees were left standing, at a height of at least five feet. This clearing was done early in 1913, and the water was raised in the same year, flooding these islands. Before the change in the level of the water, there had existed three channels; and, in speaking of the river now, I will refer to up the river as being north. There was one channel used from Montrose on the west bank which went north and around Kimball Island, Kimball Island being the island lying north of Dundy Island, and another channel, marked by buoys, which went south and around the lower end of Dundy Island, and the third channel, which was used by the ferry boat, and perhaps to some extent by the larger boats, which was known as the ferry channel, and which has been described as being 100 yards wide between the lower or southern point of Kimball Island and the upper or northern point of Dundy Island.

“Now, the Steiner Amusement Company, on the Sunday before this accident, had shown at the town of Nauvoo, the pilot of the boat being one Edward Dietz, who had piloted the boat from the town of Nauvoo over to the town of Montrose, where they had shown the evening before, May 11, 1915. Now, at this time, there was but one of these channels marked by buoys, and that was the one running south from Montrose, around the southern point of Dundy Island, and out into the river or lake. The ferry channel, was not marked by any buoys. On the morning of May 11, 1915, about the hour of 4 o'clock in the morning, the boat Dixie was taken from the landing at Montrose, being backed out by the pilot, Edward Dietz. The boat had in front of it an amusement barge, called America. Upon that barge was

located a pilot house, and from that pilot house, the pilot apparently steered. The evidence is undisputed that navigating such a steamer as the *Dixie*, with a barge of that character in front of it, was a different proposition from the operation of the steamer *Dixie* by itself. Now, a craft, in navigating the Mississippi River, navigates it under well-defined rules and regulations. Many of these regulations are by virtue of the statutes of the United States. A craft such as the *Dixie* could not be operated, in the exercise of due care, except by one who knew the river; and the government recognizes that fact, because the government provides for the licensing as pilots men who know the river. They must be men who are familiar with the river, with its channel, with its sand bars, with its snags, with its rocks, with its sinuosities; they must be experienced men; and, for that reason, they are examined by the United States government as to their familiarity with the portion of the river over which they expect to pilot vessels; and persons who pass this examination are what are known as licensed pilots. Edward Dietz was such a licensed pilot. He held a license from the government as a pilot from Dubuque, Iowa, down the river,—at any rate the territory in question was embraced in the territory covered by his license; and, in addition to that, he had navigated this same steamer *Dixie* the summer previous to the accident. He started from the harbor of Montrose on the morning of May 11th, at four o'clock. The evidence shows that this was a hazy morning,—not a clear morning, by any means. He tells in his own testimony just what took place. He says: 'When we were at Montrose, the morning of the accident, Brown and I had a talk about taking the boat and barge out, and about which channel I should take. I told him we had better go down around the foot of the island, because we could not see the marks through the slough; and he said he could see them plain.' Then he was asked, 'After this talk, did you take the boat out yourself, or did Brown take the wheel?' to which he replied: 'I backed the boat out from the land myself, and was going down through the slough, through the main chan-

nel; and he said for us to hurry out as fast as we could, to get out of the lake before the wind raised; he said he could see the hole between the two islands where the slough was, and, if I let him have the wheel, he could take the boat through. I let him have the wheel, and stood right behind him. At the time, I could not see but one end of the hole through between the islands.' I need not read much more of this testimony, except the question, 'What, if anything, prevented you from seeing the hole between the islands?' to which he answered, 'It was hazy,—kind of a smoke, rather. You could not see both ends, and you couldn't see clear through. That was the reason I would not take the boat through myself.' Brown was the mate, who took the wheel, and undertook to go through this ferry channel; and I may say that it has been established by the evidence that he went out of the channel 150 feet, and struck a snag, or one of these stumps left by the Power Company on the upper end of Dundy Island, within a short distance of where the Dixie sunk. A pilot has peculiar responsibilities; so has a captain. The captain is the man who has control of the boat; the mate is the man who acts in place of captain when the captain is off watch. He has charge of the boat when the captain is off watch. He has charge of the men and of the boat, but that authority ceases, the moment the pilot takes the wheel and the boat starts on its trip on the water. The pilot then becomes the supreme dictator, and certain well-defined duties devolve upon him. One of these duties is that provided by the Revised Statutes of the United States, Section 4487, as follows: 'On any steamer navigating rivers only, when, from darkness, fog, or other cause, the pilot on watch shall be of opinion that the navigation is unsafe, * * * the vessel shall be brought to anchor, or moored as soon as it can be prudently done.' It is also provided that, if he does go on, it is at his own risk; and, in such case, both he and the owners of such steamer shall be held responsible for all damages which may arise.

"In order to recover, in a case like this, the plaintiff must establish, not only that the defendant was negligent,

but that the injury which he sustained came about without any negligence on his part, contributing thereto in any degree; and, unless these two facts are established, he cannot recover. If either of these facts is not established by the evidence, if he fails to establish both of these facts, it is the duty of the court to direct a verdict. No contributory negligence can be blamed on the defendant. But the plaintiff avers that a person has a right to navigate this whole river. There is no question about that; but, in the navigation of the river, he must exercise due care on his part, and he must follow the regular channel; and I think the law of the United States is that, if he goes out of this channel, he does so at his own risk; but, if he goes out of this channel without any fault on his part, the case is different, and in such case, gentlemen, I would not direct a verdict, but, on the question of negligence, I would leave it to you gentlemen to say whether or not, under all the facts and circumstances of going out of the channel, it imputed contributory negligence on the part of the plaintiff."

This statement of the facts, which we approve, renders it unnecessary for us to discuss the legal propositions urged by counsel upon the question of defendant's negligence. We may concede, for the purposes of the case, the soundness of the plaintiff's contention in this respect, but the concession avails nothing, in face of the clear and decisive proof of the negligence of plaintiff's assignor.

The judgment of the district court is—*Affirmed*.

EVANS, PRESTON, and SALINGER, JJ., concur.

SOLOMON WEEKLY, Appellee, v. HARRY T. YOST, Appellant.

VENDOR AND PURCHASER: Mutual Mistake in Acreage. Mutual mistake in the acreage of land bought at an agreed price per acre gives right to a *pro tanto* reduction in price, or to a *pro tanto* return, if the price is paid before discovery of the mistake.

Appeal from Decatur District Court.—THOMAS L. MAXWELL, Judge.

JULY 6, 1920.

Suit in equity to reform a contract of purchase of real estate, and to recover from the seller the excess purchase price paid therefor by the purchaser by the mutual mistake of the parties. This excess payment arose out of a shortage of acreage in the tract purchased. There was a decree for the plaintiff, and the defendant has appealed.—*Affirmed.*

McGinnis & McGinnis, for appellant.

B. M. Russell and Baker & Parrish, for appellee.

EVANS, J.—In November, 1911, the plaintiff purchased, by written contract, from the defendant a certain farm, described in the contract as containing “200 acres more or less.” The consideration named was \$21,500. The farm contained, in fact, only 192.55 acres, leaving a shortage of 7.45 acres. This fact being discovered by the plaintiff some time after the purchase, he brought this suit to recover the excess amount paid.

It is the contention of plaintiff that the price agreed upon, preliminary to the contract of sale, was \$107.50 per acre; whereas it is the contention of the defendant that a

lump sum of \$21,500 was agreed on, without any regard to price per acre. This presents the only issue of fact or law involved in the case.

The farm involved is located in Decatur County. The plaintiff was a resident of Keokuk County. He had no prior acquaintance with the farm or with the defendant. The defendant had listed the farm for sale with land agents, who advertised the same as a "200-acre" farm, for sale at \$110 per acre. This advertisement came to the notice of the plaintiff, and brought him in contact with the agents. This advertisement was a clear representation that the farm contained 200 acres, and that its value was predicated upon its acreage. This is not a case of inaccuracy in the government survey: that is to say, it is not a case where the government subdivisions fall short of their purported area by actual measurements. This farm had formerly contained 200 acres, but small tracts had been sold therefrom, so as to reduce its acreage to the number above indicated. The defendant himself had owned the farm only one year. He himself believed it contained 200 acres. His land agents believed to the same effect. The trial court found that the parties were mutually mistaken. From such finding there is little escape, upon this record. The really disputed question is whether the parties had agreed upon \$107.50 as a price per acre. On this question, the evidence is in conflict. The circumstances are all corroborative of the plaintiff's contention. So far as appears, the land was of uniform quality, and one acre thereof was as valuable as another. It is not a case where a farm includes valuable, tillable lands on the one hand, and non-tillable lands, of little value, on the other hand. In such a case, the value of the farm would be predicated largely upon the valuable land contained therein, rather than upon its whole area. In such a case, the fact that a lump sum was agreed upon could be found more readily than otherwise.

The advertisement to which the plaintiff responded fixed an acre valuation in express terms at \$110. Later, a reduction of \$500 from the total purchase price was agreed to

by the seller. If the plaintiff had accepted the advertised offer to sell at \$110 per acre, he would have been required to pay, upon the actual acreage, only \$21,175. However, he paid \$325 more than such amount, after receiving a supposed reduction of \$500.

A careful examination of the record satisfies us that the finding and conclusions of the trial court were fully justified. *Fisher v. Trumbauer & Smith*, 160 Iowa 255; *Gardner v. Kiburz*, 184 Iowa 1268. The decree is, therefore,—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

JOHN YONOTA et al., Appellants, v. FRANK MODRACHEK et al., Appellees.

HIGHWAYS: Damages Consequent on Vacation—Appeal. No appeal lies from the disallowance by the board of supervisors of claims consequent on the vacation of the highway.

Appeal from Cedar District Court.—JOHN T. MOFFIT, Judge.

JULY 6, 1920.

ON July 21, 1915, John Gladfelter and three others filed their petition to the board of supervisors of Cedar County, praying that "a road commencing at a point 80 rods and 20 feet south of the northwest corner of Section 21, Township 80 north, Range 3 west of the 5th P. M., and running thence south on the section line between Sections 21 and 20 until it intersects Cedar River, be vacated." The commissioner appointed by the county auditor reported in favor of the vacation of the highway, on March 21, 1918, and on April 8th following, John Yonota, Jr., filed a claim for damages consequent on said vacation, and, three days later, John

Yonota filed a like claim for \$1,000 damages. Thereupon, appraisers were appointed, as provided by Section 1499 of the Code, and later reported that no damages would result from the vacation proposed. Objections to said vacation had been filed May 4, 1918, for that "said road is the only road reaching the said river for many miles, and the same is the only highway that is laid out reaching lands of John Yonota lying on the said river, and is the only highway that is available for John Yonota, Jr., who owns 5 acres of land lying east of the said highway about 40 rods." On June 2d following, the board of supervisors entered an order denying the claims for damages, and vacating the road. Thereupon, an appeal to the district court was effected. That court sustained a motion to dismiss such appeal, on the ground that no appeal may be taken from an order by the board of supervisors denying damages on vacation of a highway. From this order John Yonota and John Yonota, Jr., appeal.—*Affirmed.*

C. J. Lynch, for appellants.

J. C. France, for appellees.

LADD, J.—The only issue raised on this appeal is whether a claimant for damages consequent on the vacation of a highway by the board of supervisors may appeal from its order denying allowance thereof, to the district court. The case is ruled by *Grove v. Allen*, 92 Iowa 519. That decision was based on *Brady v. Shinkle*, 40 Iowa 576, holding that damages were not allowable for vacation of a highway by the board of supervisors. It is said that this and like cases were overruled by *McCann v. Clarke County*, 149 Iowa 13, and it is so said in that opinion. Such was not the effect of that decision. The reasoning on which *Brady v. Shinkle* and like cases rest, was disapproved in holding that recovery of damages peculiar to the complainant's property, and not shared by the public generally, may be recovered. But that was an action instituted in the

district court, and not brought there by appeal from an order by the board of supervisors, and therefore the right to appeal therefrom was not involved. Nor was this inquiry touched in *Heery v. Roberts*, 186 Iowa 61. An examination of the statutes relative to the establishment, alteration, and vacation of highways leads to the conclusion that there is neither provision for the filing of a claim for damages consequent upon the vacation of a highway or for an appeal from the order of the board of supervisors vacating the same. * Section 1493 of the Code provides that:

“If the commissioner’s report is in favor of the establishment, alteration or vacation of the road, it shall show the number of bridges required, and the probable cost thereof; and the auditor shall appoint a day, not less than sixty nor more than ninety days from such time, when the petition and report will be acted upon, on or before which day all objections to the establishment, alteration or vacation of the road, and all claims for damages by reason of its establishment or alteration, must be filed in the auditor’s office.”

Note that objections to the vacation of the road may be filed, but only claims for damages by reason of establishment or alteration! The following section directs the auditor to fix a day for hearing, and the next section thereafter prescribes the notice thereof to be given, requiring, among other things, that “all objections thereto, or claims for damages must be filed,” on or before a designated date. Section 1499 of the Code provides for the appointment of “three disinterested electors of the county as appraisers, to assess the amount of damages any claimants may sustain by reason of the establishment or alteration of such road.” Note that no provision appears for the appraisement of damages consequent from vacation of a highway. Section 1501 of the Code reads:

“When the time for final action arrives, the board may hear testimony, receive petitions for and remonstrances against the establishment, vacation or alteration, as the case may be, of such road, and may establish, vacate or

alter, or refuse to do so, as in their judgment, founded on the testimony, the public good may require. Said board may increase or diminish the damages allowed by the appraisers, and may make such establishment, vacation or alteration conditioned upon the payment, in whole or in part, of the damages awarded, or expenses in relation thereto."

As the appraisers were not authorized to allow damages, these might not be increased or diminished by the board of supervisors, and the last clause cannot well be construed as authorizing the allowance of damages consequent on the vacation of a road. A highway might be vacated in part or wholly, and another established or altered in the same order entered by the board, and payment of damages consequent on alteration or establishment would be required as a condition precedent to the order's being effective. This conclusion is confirmed by Code Section 1513, which reads:

"Any applicant for damages caused by the establishment or alteration of any road may appeal from the final decision of the board to the district court of the county in which the land lies, notice of which appeal must be served on the county auditor within twenty days after the decision is made. If the road has been established or altered on condition that the petitioners therefor pay the damages, such notice shall be served on the four persons first named in the petition, if there be that many residing in the county, in the manner in which an original notice may be served."

Only applicants "for damages caused by the establishment or alteration of any road" are authorized to appeal, and, as plainly appears, claims for damages caused otherwise than by the establishment or alteration may not be filed. Evidently, the statutes referred to proceed on the theory of *Brady v. Shinkle*, supra, that injury distinct and apart from that suffered by the public generally is not caused by the vacation of a highway. Whether damages may be recovered by claimants in an independent action, as was sought in *McCann v. Clarke County*, supra, we express

no opinion. What we do say, is that the statutes do not authorize the filing of a claim for damages consequent on the vacation of a highway with the county, or, if filed, the allowance for such damages by the board of supervisors, or, if not allowed, appeal therefrom to the district court.—*Affirmed.*

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

SOFIE BLAZEK, Appellee, v. JOHN TELECKY, Appellant.

DEEDS: Quitclaim of Easement—Fraud. A quitclaim of a private way passes, at best, but an easement. Evidence held wholly insufficient to show fraud in obtaining such a conveyance.

Appeal from Linn District Court.—MILO P. SMITH, Judge.

JULY 17, 1920.

SUIT to set aside a conveyance, as having been obtained by fraud, resulted in a decree as prayed. The defendant appeals.—*Reversed.*

C. W. Bingham, for appellant.

S. V. Shonka, and Crissman & Linville, for appellee.

LADD, J.—On December 19, 1918, the plaintiff, a widow, did:

“Quitclaim unto John Telecky, his heirs and assigns of the county of Linn, and state of Iowa, all my right, title and interest in and to the following described premises in the county of Linn, state of Iowa, to wit: A right of way described as follows, to wit: Over that portion of the main road now traveled by me to my residence across the lands I now own in the SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 16, and the NW $\frac{1}{2}$

of NW $\frac{1}{4}$ of Sec. 15, all in Twp. 82, R. 6, W. 5th P. M., to a point 102 feet north of a point in said road in said SW $\frac{1}{4}$ NW $\frac{1}{4}$ where the said road turns from a northeasterly to a northerly direction, said first-mentioned point being midway between two iron stakes twelve (12) feet apart thence easterly, embracing a strip twelve feet wide, being six feet wide from each side of said last-named point about 171 $\frac{1}{2}$ feet to a point midway between two iron stakes 12 feet apart, thence over the meandering road as now traveled easterly and thence northerly to the west line of the West $\frac{1}{2}$ of the NE $\frac{1}{4}$ NW $\frac{1}{4}$ in said Section 15."

It appears that the defendant owned a 20-acre wood lot beyond plaintiff's land; that, for many years prior to June 12, 1916, he had enjoyed a way over the land of plaintiff, then owned by her husband, in going back and forth to said land, and that, on the last-named date, the husband, with plaintiff joining, executed a lease to defendant for a period of 10 years of "a private way to be used as a road by the party of the second part [defendant] to enter upon his land which joins the parties of the first part, the road that the first parties are renting to the second party is the old road that has always been used for this purpose in going to and from the parties' of the second part land," at a yearly rental of \$2.50. Plaintiff's husband deeded the land to her, and, shortly after his death, she obstructed the way; and defendant instituted an action to compel the removal of the obstruction, and to establish the private way as a private easement over her land. Issue was joined, and the cause set down for trial, when the attorneys for the parties, concluding that the cause should be settled, proceeded to the premises, and, after inspecting the way which had been traveled for many years, arranged to so change it that, instead of passing over cultivated land for a long distance, it would touch such land only 171 feet, and, as thus changed, defendant would have the private way; and the deed was drawn accordingly. This deed was delivered to defendant, and in this suit plaintiff prays that it be set aside, for that, as is alleged, defendant, aided and abetted

by his attorneys, "by threats and intimidation, and by fraudulently taking advantage of plaintiff's ignorance of the English language, and by reason of her physical condition and weakness and mental incapacity, which facts were well known to said defendant and his attorneys, without any consideration therefor, secured the signature of plaintiff to an instrument which she then understood to be a temporary concession to defendant, relative to the trial of the case then pending in the district court of Linn County, Iowa, wherein John Telecky and Josephine Telecky were plaintiffs, and this plaintiff was defendant, being action No. 27052, and which she then understood was set for trial for the next day;" that, but for being misled and intimidated, she would not have signed said deed; that, "at the time of signing said instrument, she was frightened, nervous, and, by reason of the said threats, intimidation, and undue influence, and misrepresentations brought to bear upon her, as aforesaid, did not understand, and did not know the meaning or force and effect of said instrument." These allegations find scant, if any, support in the record. True, the plaintiff could not speak English, and had enjoyed only 7 years of schooling in Bohemia, and was a widow, with 6 children; but her testimony indicates the possession of average intelligence, and she was accompanied by an interpreter, who was a trusted friend, an attorney, whose good faith is not questioned, save by the issues raised, and a daughter, of 21 years, who understood and could speak English. Upon the arrival of the attorneys, accompanied by defendant, they proceeded to inspect the premises with respect to the way. Plaintiff sent for Havlicek, a neighbor, to act as interpreter, and, through him, her attorney informed her that the other attorneys were acting for defendant; that he had looked up the law, and that she "would have to have the road measured out." She knew what they came for, as her attorney had informed her by telephone, through the interpreter, the day before. With her attorney, Havlicek, and her daughter, she looked over the way, and observed what was being done, and was

present when the new portion, 171½ feet long, was being staked. Havlicek testified that defendant's attorney, Buresh, explained to her the substance of the conveyance, "told her that the property belonged to her just the same, but Telecky would be allowed to use that land over the field;" that, when out on the premises, plaintiff, her attorney, and the witness had a talk about the matter, and the attorney advised her that "it was all right, and if not, we would have to let it go to court;" that plaintiff was standing close by, when the measuring of the new line was being done; that plaintiff was in the kitchen when a rough sketch of the road was made, and the deed prepared, and that Buresh took her acknowledgment. According to her attorney, he advised her, through the interpreter, that it was the settlement to make, and also that she sign the deed. Buresh swore that he heard a conversation between plaintiff, her attorney, and the interpreter, in which plaintiff proposed that defendant go near the house, and then follow a ravine; and that her attorney replied that this would not be possible, but suggested the change heretofore referred to; and that, in response to a question by plaintiff, the interpreter said he thought that the change would be all right; that this was before it was measured; that she was there when the measuring was done; that the deed was prepared according to what was then understood; that her attorney told her, through the interpreter, that defendant would have to have a quitclaim deed; and that she responded, "That would be all right;" that she was in the kitchen, during all the time the deed was being prepared; that it was handed to Havlicek, who returned it to the witness, saying he could interpret it better; and that the witness read it word for word, and so translated it from the English into the Bohemian language, and he then explained to her how the road ran; that he explained that it was a quitclaim deed, and that, after he had read it over, she inquired of the interpreter whether it was all right to sign it; that her attorney advised her to sign it, and the interpreter gave the same advice, and then signed it as a witness; that her

attorney said defendant would pay the costs in the action then pending, and dismiss it, before she signed the deed, which was communicated to her by Havlicek. Defendant's son confirmed Buresh concerning the reading and explanation of the deed. True, Havlicek testified that he did not understand that the instrument was a deed; but he must have been aware of its contents, from hearing it read. The plaintiff swore that she had to sign the deed, but did not know what she signed; that she did not know whether it was read over to her or not. But she was aware that the attorneys were undertaking to settle the case. She was out in the field over which the way extended, knew that a change was being negotiated, had been advised by her attorney that she "would have to give the road,"—that "they had been using it so long" that she would have "to give it to them,"—and must have known that the instrument signed was to assure defendant of the further enjoyment of the "right to the road that I bought from Clark." She insisted that no one told her. But the road was not segregated in parts. Negotiations were concerning the private way as an entry to defendant's wood lot. She claims to have been afraid; but this is not credible, inasmuch as she was accompanied by her attorney, friend, and daughter, and, moreover, nothing occurred to frighten her. Some question is raised concerning the form of the deed; but, as counsel for appellee concedes that it should be construed as conveying no more than an easement, in the nature of a private way over the land, it is so adjudged, and must have been, under the authorities. The quitclaim deed is not of land, but of a right of way, and this is not of a defined strip, save for a small fraction of the distance; and, if anything passed, it was an easement, in the nature of a private way over her land. See *Low v. Streeter*, 66 N. H. 36 (20 Atl. 247); *Grafton v. Moir*, 130 N. Y. 465 (29 N. E. 974); *Snyder v. Warford*, 11 Mo. 513 (49 Am. Dec. 94); *Peterson v. Machado*, (Cal.) 43 Pac. 611; Jones on Easements, Section 208; *Coburn v. Coxeter*, 51 N. H. 158. We are satisfied that the parties to the transaction acted in good faith, even though the bearing of the lease on the controversy pending at the

time of the settlement may not have been appreciated, and that the plaintiff was not deceived in conveying the right to a private way over her land. The decree is reversed, and the cause remanded, with direction that a decree be entered, dismissing the petition.—*Reversed*.

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

T. F. DUHIGG, Appellee, v. WATERLOO GASOLINE ENGINE
COMPANY et al., Appellants.

PROCESS: Service in Actions Growing out of Agency. An action
1 may not be said to "grow out of" or "be connected with" an
office or agency because of the fact that, after the purchase
of the article *directly from the maker*, the agent (1) sold re-
pairs to the purchaser and (2) attempted to remedy defects
in the article. (Section 3532, Code, 1897.)

PROCESS: Dealer (?) or Agent (?) One who, under a contract
2 for the exclusive sale of an article in a given territory, makes
C. O. D. purchases of the manufacturer, and sells at his own
price, with a claim to a portion of the difference between the
retail and wholesale price, in case his exclusive right is vio-
lated, and who attends to the manual delivery and replace-
ment of defective parts furnished by the manufacturer under
his warranty against defective material or workmanship, is
a "dealer," and not an "agent," in the sense that service may
be made on him in an action against the manufacturer growing
out of a purchase from the latter. (Section 3532, Code, 1897.)

PROCESS: Agency and Action Arising out of. Evidence reviewed,
3 and held insufficient to show that one on whom service was
made was other than a "dealer," and that, if agency be con-
ceded, nevertheless the action did not "grow out of" nor was
it "connected with" such agency.

Appeal from Polk District Court.—THOMAS J. GUTHRIE,
Judge.

JULY 17, 1920.

MOTION to set aside services of original notice and judgment was overruled. The defendants appeal.—*Reversed*.

Charles F. Maxwell and Myron H. Cohen, for appellants.

Mulvaney & Mulvaney, for appellee.

LADD, J.—I. About March 6, 1918, plaintiff, in his petition, claimed to have purchased of defendants a "Waterloo Boy Tractor" for \$1,150; that he had paid out for freight, additional parts, and labor to put the machine in condition, amounts aggregating \$79.56; that the tractor was represented to plow from 8 to 10 acres a day, but was unable and unfit to do so; that the seller was unable to put it in condition, and that, instead, plaintiff was able to plow only about 100 acres during the plowing season; that, if it had plowed as represented, he would have plowed 22 acres additional, and intended so to do and to put the land in corn; but, owing to the condition of said tractor during the last four days used, though operated by experts, it was unable to plow more than 6 acres; whereupon, plaintiff tendered the return of the machine, and prayed that the contract of purchase be rescinded, and that he be reimbursed for the amounts paid out, as stated, and for \$1,500 as damages. Original notices were served on the alleged agents of defendants, in accordance with the requirements of Section 3532 of the Code. On January 4, 1919, the court found defendants to be in default, and, on May 2d following, adjudged each defendant to be in default, and, on May 7th of the same year, entered judgment for damages in the sum of \$1,800, and declared the contract rescinded. Each defendant filed a motion, June 26, 1919, asking that the original notice be set aside and the judgment vacated, on the grounds that such service did not give the court jurisdiction to enter default or judgment, for that G. Mc-

1. PROCESS:
service in
actions
growing out
of agency.

Clelland, the alleged agent of the Waterloo Gasoline Engine Company, was not, at the time, and never had been, an officer, agent, representative, or employee of the Waterloo Gasoline Engine Company, and that C. S. Denny, on whom the notice to the John Deere Plow Company was served, was not then, and never had been, an officer, agent, representative, or employee of the said John Deere Plow Company. The sole inquiry is whether the court acquired jurisdiction of the defendant companies by the service of the original notice on these persons. Section 3532 of the Code provides:

“When a corporation, company, or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be had on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency.”

It appears that the plaintiff, on March 6, 1918, signed an order as purchaser from the Waterloo Gasoline Engine Company of one Model N tractor, at \$1,150. This was endorsed by “F. M. Culbertson, salesman,” and a check drawn by plaintiff for \$100, payable to the company, was mailed with the order. The tractor was shipped to plaintiff from the company’s factory at Waterloo, and the bill of lading, accompanied with a sight draft for the balance of the purchase price, sent to the People’s Savings Bank of Des Moines, and there paid by the purchaser, who, obtaining the tractor, took it to his farm. Up to this time, McClelland had nothing whatever to do with the sale, delivery, or payment of the machine, and these did not grow out of, nor were they connected with, the business he was conducting at Polk City. McClelland complained that, as all of Polk County north of Des Moines had been set apart as territory in which he had the exclusive sale of tractors of the company, plaintiff should have purchased of him; but there is no pretense that the deal grew out of, or was in any manner connected with, McClelland’s place of business at Polk City. This conclusion is not obviated by the circumstance that

McClelland sold plaintiff parts to be used on the tractor, or that he attempted to remedy matters with the tractor. None of plaintiff's claim grew out of McClelland's efforts, and there was no evidence that any orders for parts were made on the company through McClelland. Even though the company maintained an office or agency at Polk City then, this action neither grew out of nor was connected with the business of such office or agency, and for this reason the service of the original notice on McClelland was not good. See *Barnabee v. Holmes*, 115 Iowa 581; *State Ins. Co. v. Granger*, 62 Iowa 272; *Winney v. Sandwich Mfg. Co.*, 86 Iowa 608.

II. But the Waterloo Gasoline Engine Company did not maintain such an office or agency in the territory which included plaintiff's farm. McClelland had his place of business at Polk City, where he handled carriages, automobiles, tractors, and engines since January 15, 1917, and during 1918.

2. PROCESS :
dealer (?)
or agent
(?)

He handled the tractors of the Waterloo Gasoline Engine Company at that place. When he sold one of these tractors, he made out an order therefor, and mailed it, with his check for \$100, payable to the company, and the tractor was shipped to him, with sight draft for balance attached to bill of lading, and he paid this on delivery. He had in his possession none of the company's property. The company warranted all parts of the machine as to material and workmanship during the first year, and forwarded new parts upon the return of those which were defective, and McClelland attended to replacing these. The parts were shipped invoiced to him, for which he remitted in time to obtain a discount. He purchased at the company's prices, and sold at those of his own choosing. There was no agreement between them under which he was to receive salary or commission, or other compensation. Under oral agreement with the company's agent, he was to have the exclusive sale of tractors within Polk County north of the city of Des Moines, the agent saying that, if someone else should sell in such territory, he was to receive a part

of the difference between the wholesale and the retail price of the tractor sold; and, as the sale of the tractor was in his territory, he had claimed what had been promised, denominating it a commission. He explained that he had handled goods in no other manner, and thought himself a dealer, and not an agent. J. E. Johnson, in charge of the company's business at Waterloo, testified that McClelland, as dealer, looks after a tractor which is claimed after sale to be defective, and that parts to replace those found to be defective are shipped to him, without awaiting the return of the defective parts, and that it was his duty to look after the tractors in his territory during the year. But the only testimony as to warranty was that there was a "warranty as to parts as against defective material and workmanship for within one year from the sale of the tractor. If a part breaks because of defective material or workmanship, we furnish a new part, on board cars at factory, free, without charge, to replace the old part, on condition that the old part is returned to the factory and found to be defective." The company performed its obligation in furnishing the parts, and what else he did was as dealer. Both McClelland and Johnson deny that McClelland was employed in any manner by the company, and this was not denied. Some evidence that McClelland had declared himself an agent of the company was adduced; but nothing is better settled than that agency may not be proven against another than the declarant by the declarations of an alleged agent. The agent upon whom service may be made must be the agent in fact, having representation and derivative authority. *Wold v. Colt Co.*, 102 Minn. 386 (114 N. W. 243). To constitute one person the agent of another, the former must have been authorized by the latter to act in some respect for him; and, as McClelland was not so authorized, he was not agent of the Waterloo Gasoline Engine Company, and service of the original notice on him as agent of said company gave the court no jurisdiction over it.

III. Default was entered against the John Deere Plow Company on service of the original notice on it through its

alleged agent, C. S. Denny. Our inquiry is limited to the issues (1) whether Denny was such agent, and, if so, (2) whether the transaction grew out of or was connected with such agency.

3. PROCESS:
agency and
action arising out of.

It appears that the John Deere Plow Company occupied a four-story building at Southwest Ninth and Tuttle Streets in Des Moines. Thereon were the signs of that company, and stored therein were its implements. These were in the care of one Johnson, who received the company's manufactured products, and shipped the same out as ordered. Such occupancy has continued several years. During this time, W. S. Denny Company, composed of Denny and his wife, has had an office in the building, and has been selling at retail the company's products within the city of Des Moines. On March 15, 1918, nine days after the order was given by plaintiff, Deere & Company became owner of all the capital stock of the Waterloo Gasoline Engine Company. Deere & Company appears to be the holding company of the capital stock of the defendant, which is a sales organization, and also of the stock of another corporation of the same name, engaged in manufacturing the products defendant puts on the market. At and prior to the deal with plaintiff, a portion of the warehouse was set apart to and occupied by the Waterloo Gasoline Engine Company with implements manufactured by it. After the transfer of its stock, its products were put on the market through the John Deere Plow Company, defendant herein. Denny testified that he was not agent, and acted in no manner for the John Deere Plow Company; that he paid no rent for the premises occupied by him; that the firm of W. S. Denny Company bought and paid for all goods sold by it; that Culbertson was traveling agent for the Waterloo Gasoline Engine Company, and that, as he had to go away, he telephoned the witness to get a contract from his house for plaintiff to sign, and also to have him sign a check for \$100, payable to the company, which he did, and forwarded said contract to Culbertson; that plaintiff had submitted to him a list of horse-drawn and of tractor-drawn

implements, for prices on each, and inquired concerning tractors, and asked to meet Culbertson, to whom the witness introduced him; that he did not handle the goods of the Waterloo Gasoline Engine Company until the fall of 1918, and was not aware that that company was referring to him as agent of the John Deere Plow Company; that he did not sell or assist in selling the tractor to the plaintiff. The witness thus explains the method of doing business:

"If I want a wagon, I give an order to the Deere Company to deliver to John Jones a wagon, and sign my name to it. The order first goes to that office, and the workman delivers the wagon to Jones, and reports the order to the factory, and the factory bills it to me, and I pay for it. The order I give is an order for a wagon, or whatever I may not have in my stock. The order directs the Deere Company to ship to John Jones, and, when the company ships to John Jones, it charges that wagon to my account, and the Deere Company then bill me in the regular way, and I pay for it. I collect for the wagon sold to John Jones. I put my money in the bank to the account of W. S. Denny Company. Q. Does any money for any goods you sell go to the account of the John Deere Company? A. No, sir, absolutely not."

Hammer, cashier of the John Deere Plow Company, testified that he paid the help of said company, and that Denny was not on its payroll, and that he had not been one of its employees, but that he had nothing to do with the adjustments of agents' commissions; that Denny was a retailer; and that neither he nor W. S. Denny Company sells or has sold implements otherwise than as dealers. The order signed by plaintiff as purchaser and Culbertson as salesman was addressed to the Waterloo Gasoline Engine Company, and directed that company to ship from Waterloo to Des Moines at once, sight draft for \$1,050 attached to bill of lading, one Model N tractor complete. It was so shipped, and, upon payment of sight draft for the balance of the purchase price, delivered to plaintiff. The latter testified that, in a conversation in February of 1918, Denny informed him

that he was agent of the John Deere Plow Company; that Denny, when the order was signed, recommended the tractor as the best in the world, and that he was handling it; that, upon the arrival of the tractor, Culbertson and Denny set it up, and drove it to his farm; that Denny told him he was agent of both defendants (though Denny denied having so stated), and that they were really one organization; that witness went to the warehouse to buy, and had never before heard of the Waterloo Gasoline Engine Company; that Denny introduced Culbertson as an expert, to explain certain features of the tractor with which he was not familiar; that he bought the tractor of Denny, who, as he supposed, was agent of the John Deere Plow Company; and that, though the order was on the other company, and the price paid to it, he supposed that the other company was consolidated with said company.

As pointed out, the declarations of Denny, even if made, are not sufficient to establish agency of himself or of W. S. Denny Company; nor was the letter of the Waterloo Gasoline Engine Company to plaintiff, designating him "the agent for John Deere Plow Company goods." The evidence other than the written contract between Denny and the John Deere Plow Company does not warrant the inference that the former was other than a dealer in the implements sold by the former within the city of Des Moines, or that their relations were not those of seller and purchaser. Though Denny, by himself or through W. S. Denny Company, handled the company's implements, there is no room to say that he did so as agent in any respect. Occupancy of its property cannot be ascribed otherwise than to convenience, and the relation of agency is not to be inferred therefrom.

IV. But the relations of Denny to the John Deere Plow Company were covered by a contract, entered into each year, including 1918. This contract was much like that considered in *Pugh v. Bothne Co.*, 178 Iowa 601. The court there ruled that, even though the defendant therein was a dealer and an automobile company seller, this did not pre-

clude the conclusion that the former was agent of the latter, and that the matter in controversy grew out of such agency. Conceding, for the purposes of the case, that it is ruled by the above decision, we do not find that the sale of the tractor grew out of or was in any manner connected with such agency. In so far as appears from the record, the Deere Company had no interest in the Engine Company, prior to acquiring all its capital stock, March 15, 1918, and defendant John Deere Plow Company, which was a sales organization, is not shown to have undertaken the handling of the Engine Company's products, prior to August 1st following. Though the secretary of the Engine Company swore that Denny was a dealer in its products at the time of the sale to plaintiff,—and the trial court might have so found, though Denny denied it,—still there was no evidence that the defendant John Deere Plow Company was concerned in the handling or sale of the tractor or other products of the Engine Company prior to August 1, 1918, or that anything Denny may have done in connection with the tractor was as agent or dealer for the John Deere Plow Company. There is no pretense that Culbertson was acting for the latter. The order, together with plaintiff's check, was forwarded directly to the Engine Company, and, if Denny negotiated the sale or assisted therein, it was not as representative of the John Deere Plow Company, and the tractor did not pass through its warehouse. There is no room to say, then, that the controversy grew out of or was connected with such agency, if any, as that company maintained in the city of Des Moines. Our conclusion is that the motion to set aside the service of the original notice and vacate the judgment should have been sustained.—*Reversed.*

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

E. M. S. McLAUGHLIN, Appellee, v. CITY OF NEWTON et al.,
Appellants.

MUNICIPAL CORPORATIONS: Notice of Election in re Granting
1 of Franchise. A notice of election to vote on the approval of
a duly enacted ordinance granting a public utility franchise
to a private party is sufficient if the *substance* of the proposed
ordinance is set forth in the said notice. (Sec. 721, Code Supp.,
1913.)

MUNICIPAL CORPORATIONS: Ballot in re Election on Fran-
2 chise Ordinance. The ballot used at an election to vote on the
approval of a proposed ordinance granting a public utility
franchise must have printed thereon the ordinance *in full*.
(Sec. 1106, Code Supp., 1913.)

SALINGER, J., dissents.

MUNICIPAL CORPORATIONS: Ballot in re Election on Fran-
3 chise Ordinance. The ballot used at a *special* election to vote
on the approval of a proposed ordinance granting a public
utility franchise need not be printed on *yellow* paper, as re-
quired by the statute. (Sec. 1106, Code Supp., 1913.)

MUNICIPAL CORPORATIONS: Franchise Election—Different but
4 Related Propositions on Separate Ballots. The requirement that
different propositions relating to public measures, submitted
to the people for approval or disapproval at the same election,
be printed on the *same* ballot, even when the propositions are
directly related, is held *not* mandatory. It is plainly stated,
however, that the better practice would be to comply with the
strict letter of the statute.

Appeal from Jasper District Court.—D. W. HAMILTON,
Judge.

JULY 20, 1920.

ACTION in equity to enjoin the defendant city and A. H.
Rich, proposed grantee of an electric franchise, from pro-

ceeding under ordinances duly passed by the city council, granting to Rich a franchise to operate an electric light plant within the corporate limits of the city. The injunction was granted by the court on the theory that the election returns did not affirmatively show an approval by a majority vote of the electors, because the ballots used did not state the proposition in full, to which the voter was asked to give his consent, as required by Section 1106 of the Code Supplement of 1913, and it did not appear, therefore, that a majority had authorized the proposed action. Defendant appeals.—*Affirmed.*

J. E. Cross and George E. Campbell, for appellants.

Stipp, Perry, Bannister & Starzinger and E. O. Korf, for appellees.

GAYNOR, J.—I. This action is brought by a resident taxpayer of the city of Newton. Its purpose is to restrain the mayor and city council and one A. H. Rich from proceeding under, or in any manner carrying into effect, two certain ordinances, hereinafter referred to, regularly passed by the city council, and submitted to the electors for their approval at a special meeting called for that purpose, and, on the face of the record, approved by a large majority. The council proposed, in one of the ordinances, to grant to the defendant A. H. Rich a franchise for an electric light, heating, and power plant, to be constructed and operated in the defendant city, and by the other to sell to Rich a certain municipal plant, then owned and operated by the city. The scheme of the two ordinances apparently was to pass to defendant Rich all the right, title, and interest of the defendant city in the old plant, for a consideration named, and, when this was done, to grant to him a franchise to erect and maintain and operate another plant in the city for the same purpose. The first ordinance is known as No. 185, and by it the city proposed, subject to the approval of the electors of

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CORPORATIONS:
notice of
election in
re granting
of franchise.

the city, to grant to Rich, his heirs, successors, and assigns, the right to maintain and operate in the city of Newton a plant for the production, transmission, and sale of electric current for light, power, and heat for a term of 25 years, subject, however, to a condition expressed therein in what is known as Ordinance 187, to wit, that Rich purchase the old plant at a consideration named. It appears that the old plant had become antiquated, and did not furnish such service as the city required, and it was the thought of the city council to sell the old plant to Rich, and grant to him the right to furnish fuller and better service than could be had through the plant then owned by the city.

We will not set out these ordinances in full in this opinion. They are long. Ordinance 185 contains 23 sections. The legality of the ordinances is not called in question. Ordinance 185 provided, among other things, that it should not become effectual unless the proposition to sell to Rich should be approved by a majority of the legal voters of the city. It was further provided that the two propositions should be submitted to the legal voters of the city at a special election, to be held on the 3d day of May, 1920, under a proclamation to be issued by the mayor, to be published in two newspapers published in the city, for at least four consecutive weeks before the election; and further, that, in the event the ordinances were approved by the electors, they should not become effectual unless Rich, within five days thereafter, accepted the terms and conditions of the franchise ordinance; and that neither proposition should become effectual unless both were approved. Notice was given, and the city undertook to submit to the voters of the city the propositions contained in the two ordinances, for their approval. The election was called for and held on the 3d day of May, 1920. At that election, the record shows that, on the proposition to sell the old plant, there was an affirmative vote of 895, against a negative vote of 459, a total vote on this proposition of 1,354. On the proposition to grant the franchise, there were 911 affirmative votes against 433 negative votes, making a total vote on the proposition of 1,344

votes. The total voting population of Newton at that time was about 1,400. So it appears on the face of the record that both propositions carried by a large majority.

The injunction is sought on the following grounds:

First. That the notice of election was insufficient, in that it did not have set out in full the proposed ordinance or public measures. It is not contended that, if the notices were sufficient in substance, the council did not comply, in all other respects, with the requirements of the statute as to publication.

Second. It is contended that the *ballot* did not have printed thereon *in full* the proposed ordinances or measures, as required by Section 1106 of the Code Supplement of 1913.

Third. That the ballots were not printed on yellow paper, as required by said section.

Fourth. That the two propositions were printed on separate ballots, when they should have been printed upon the same ballot, as required by the said section.

So it is apparent that the injunction is sought on two grounds: (1) That the notice of election given was insufficient in substance; and (2) that the ballots did not conform to the requirements of the statute, in character, form, and substance.

It is true, as contended by the plaintiff, that the notice of the election, as published, did not contain the ordinances in full, but it does appear that the purpose of the election and the measures that the electors were required to pass upon were, in substance, set out in the notice.

The power to purchase, establish, erect, maintain, and operate an electric light or electric power plant is found in Section 720 of the Supplement to the Code, 1913. This section provides that they (meaning the city council) may grant to individuals or private corporations the authority to erect and maintain such works or plants for a term of not more than 25 years, and also provides that this authority shall not be exercised unless a majority of the legal electors voting thereon declare in favor of the same, at a general,

city, or special election, called for that purpose. It is apparent that the power to grant to Rich the right to erect and maintain the plant in question existed, and that the city council attempted to exercise it, and that the ordinance was passed in pursuance of the authority granted. This authority, though it existed, did not and could not become effectual to bind the city or inhabitants until its exercise was approved by the electors of the city. It appears that, following strictly the requirements of the statute, the city council attempted to exercise the power granted, and passed and published the ordinances in due form, before the election was called. No question is made upon this point. After the ordinances had been passed, the election was called, the matter submitted to the voters for their approval, and a vote taken. There is no question as to the sufficiency of the notice to invoke an expression of the will of the people, except as hereinbefore set out. Our statute does not prescribe the form of notice, nor does it attempt to say what the notice shall contain. Section 721, Code Supplement, 1913, reads:

“Notice of such election shall be given in two newspapers published in said city or town, if there are two, if not, then in one, once each week for at least four consecutive weeks.”

This was done, and it appears that the council ordered the question submitted at the special election called for that purpose. The notice published contained the substance of what the council proposed to do, and fixed the time and place at which the elector might express his approval or disapproval, and referred the voters to the ordinance which had been passed, published, and recorded, for a fuller expression of the city's purpose and what it proposed to do. There was not only an official publication for four weeks, as required by the statute, but an unofficial publication in papers of general circulation in the city. It further appears that the matter of granting the franchise and selling the old plant had been fully and freely discussed in the city for many weeks before the election. Public meetings were held in many places in the city, to which the voters were invited,

and at which the merits and demerits of the proposed action of the city were fully and freely discussed. We do not mean to be understood as saying that this method of giving notice to the people of the proposed action of the city council can be substituted for the statutory requirements. The ordinances, reciting fully what the council proposed to do, were officially published, published in conformity with the statute, and notified the people of the contemplated action of the city, touching the matter now in controversy; and the notice of election made reference to the proceedings of the city council touching its proposed action, as the same appeared of record. Inasmuch as the city council had taken action before the election was called, and its purpose was embodied in ordinances duly framed, considered, and passed by the council, and inasmuch as these ordinances had been fully published, as required by statute, and made a matter of record in the office of the city clerk, in the proper books of the city, kept for that purpose, and inasmuch as the notice calling upon the people to express their approval or disapproval of the action of the city fixed the time when and the place where the people could assemble for that purpose, and inasmuch as the notice gave the substance of what the city proposed to do, we cannot say that the notice was insufficient to make effectual the very purpose for which the notice was required. The statute, as we said before, does not fix the form of notice, or say what it must contain. It simply says that the council may order any of the questions provided for in Section 720 submitted to a vote, at an election specially called for that purpose, and then says:

“Notice of such election shall be given in two newspapers published in said city or town, if there are two, if not, then in one, once each week for at least four consecutive weeks.”

It appears that almost the entire voting population of the city appeared at the election, in pursuance of the notice, and expressed themselves for or against the proposition. Although we have no authorities in this state bearing directly upon the question here under consideration, we have to say that, in our opinion, the notice was effectual for the

purposes for which the notice is required, and no prejudice could result from a failure to give a fuller notice than that which was actually given, as shown by the record in this case. As bearing upon this question, however, see *Hall v. City of Cedar Rapids*, 115 Iowa 199, and cases therein cited; *Goerdts v. Trumm*, 118 Iowa 207; *Lehigh S. P. & T. Co. v. Incorporated Town of Lehigh*, 156 Iowa 386; *Wells v. County of Boone*, 171 Iowa 377.

Plaintiff's contention cannot be sustained on the ground of insufficiency of notice.

II. It is next contended that the ballots furnished the voters at the election, and used by them in expressing their approval or disapproval of the ordinances, did not contain, in full, what the council proposed to do; that the ballots did not have printed on them, in full, the proposed ordinances or public measures, as required by Section 1106 of the Supplement to the Code, 1913.

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ordinance.

The ballot followed the notice, and set out only so much of the matter of the proposed action of the council as appeared in the notice. The section relied upon reads as follows:

"When a constitutional amendment or other public measure is to be voted upon by the electors, *it shall be printed in full* upon a separate ballot, preceded by the words 'Shall the following amendment to the Constitution (or public measure) be adopted?' and upon the right-hand margin, opposite these words, two spaces shall be left, one for votes favoring such amendment or public measure, and the other for votes opposing the same. In one of these spaces the word 'yes' or other word required by law shall be printed; in the other, the word 'no' or other word required, and to the right of each space a square shall be printed to receive the voting cross, all of which shall be substantially in the following form:

" 'Shall the following amendment to the Constitution (or public measure) be adopted?'

“(Here insert in full the proposed constitutional amendment or public measure.)	Yes	
	No	

“* * * If more than one constitutional amendment or public measure is to be voted upon, they shall be printed upon the same ballot, one below the other, with one inch space between each constitutional amendment or public measure that is to be submitted. All of such ballots for the same polling place shall be of the same size, similarly printed, upon yellow colored paper. On the back of each such ballot shall be printed appropriate words, showing that such ballot relates to a constitutional or other question to be submitted to the electors, so as to distinguish the said ballots from the official ballot for candidates for office.”

This record discloses that two ballots were furnished in this instance, one relating to the granting of the franchise, and the other to the sale of the plant then owned by the city. They were printed on white paper. In neither ballot was the proposed action of the city council set out in full. A franchise constitutes a contract. The most that the city could do would be to propose the contract, and formulate the terms and conditions upon which it was willing to enter into the contract. The proposition was to grant a franchise, which involved, when granted and accepted, mutual contractual duties and obligations, duties and obligations to be assumed by the city for and in behalf of the citizen, and duties and obligations to be assumed and performed by the grantee in the franchise. If it became effectual, it was a contract between Rich and the city, fixing and regulating the rights, duties, and obligations of each to the other for 25 years. Every detail of this contract, in so far as the ordinances were contractual, was a matter of concern to the citizens and electors of the city. When they were called to the election, it was to express their approval or disapproval of the contract proposed by the city, every detail of which, in so far as it involved contractual rights and duties, was essential to be known by the voter, before he

could intelligently approve or disapprove the same. It may be that this strictness in the form of the ballot was thought necessary to the intelligent action of the voter, when called upon to personally express his assent to or dissatisfaction therewith, and that the contract in all its fullness should be there before him. It was the first time it became a personal matter, calling on him for action. Whatever the reason for this requirement of the statute,—and many reasons might be suggested,—the legislature has seen fit to say, in no uncertain terms, that the voter shall have before him, upon the paper upon which he is required to express his approval or dissent, the entire proposition involved in his act. The city is acting under a grant of power. Without the grant of power, it could not act at all. The same authority that granted the power prescribed the manner in which it shall be exercised, and it is not for us to question its wisdom. It may be that, in the instant case, it would be a hardship upon the city and upon the taxpayers of the city to require the printing of these entire ordinances on the ballot. It may be that, under our method of voting, neither time nor opportunity would be given the elector to read, understand, digest, and fully appreciate the ordinances, in all their details. But this does not justify us in saying that he may be denied the opportunity to do so, and does not justify an act which is done in contravention of the plain provisions of the statute. Moreover, we are not in a position to know whether these electors who voted for these propositions would have voted for them, had they then before them all the conditions under which the franchise should be granted.

We therefore hold that the statute is mandatory. It provides that the proposition shall be printed in full upon the ballot. A reference to the preceding action of the board does not meet the requirements of the statute. Such provisions are generally held mandatory. It is true that, in *Rock v. Rinehart*, 88 Iowa 37, it would seem that this court held to the doctrine that, where every step necessary to submit the proposition to the voters in a legal way had been,

taken, preceding the ballot, the ballot was sufficient if, from the ballot, the voter may know or readily ascertain the full scope and meaning of the proposition, by reference to other papers and proceedings. When that decision was handed down, there was no provision of the statute specifying the form of the ballot, but it was only required that it fairly and intelligently present the question to be voted upon.

The court nullified the election, and enjoined the city and Rich from proceeding under the ordinances. This was based on the thought that the action of the city council did not have the support which the statute requires it should have from the electors of the city, authorizing and justifying its action. It therefore granted an injunction, as prayed; and its action in so doing is sustained, for the reasons hereinbefore set out.

It is claimed that the ballots were insufficient, because printed upon white paper. It will be borne in mind that this was a special election. There could, therefore, be no

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confusion of ballots. The election was called for a specific purpose. There is no reason suggested, and none suggests itself to us, why the elector could not express himself as intelligently upon white paper as upon yellow paper. We think there is nothing in this contention.

It is next contended that the election was void because the two propositions were submitted to the electors upon separate ballots. In the matter submitted to the electors,

4. MUNICIPAL CORPORATION: franchise election: different but related propositions on separate ballots.

there were two propositions involved, one dependent upon the other. A ratification of one could not become effectual unless the other was ratified also by a majority of the electors. We think that the better practice would be to follow the statute, and print

both propositions upon the same ballot, when one proposition is dependent on the other, to the end that the voter may have before him both propositions on the same ballot, for consideration at the same time. A majority affirmative

vote became effectual only when there was an affirmative majority vote on the other. We do not, however, hold the provision mandatory.

For the reasons pointed out, the action of the district court is—*Affirmed*.

WEAVER, C. J., LADD, EVANS, PRESTON, and STEVENS, JJ., concur.

SALINGER, J. (dissenting). It is, of course, true that the use of the word "shall" in a statute has some tendency to prove that the statute is mandatory. On the other hand, it will not seriously be questioned that, in many cases, the statute has been held to be directory merely, though mandatory words are used. In deciding which class the statute falls into, the consequences of a given interpretation are often controlling. In the case at bar, the logic of the majority, if followed to the bitter end, creates such consequences as that I feel constrained to disagree to its position. Under its holding, a municipality may be deprived of light or water for an indefinite length of time, if election officers fail to copy a franchise ordinance upon the ballot which deals with the adoption or rejection of such ordinance. It would be wholly immaterial that every voter had carefully read and reread the ordinance before voting upon it. If, through no fault of the elector, he is not given the opportunity to reread that ordinance, and do so from his ballot and in the booth, he is powerless to cast a vote for adoption, no matter how urgently he may desire adoption. It seems to me there is much, in both reason and authority, that militates against such interpretation. The statute under consideration here is not more mandatory than, say, statutes that declare what the form of the ballot at a general election must be. Yet it has universally been held as to those that failure of the election officers to provide such a ballot would not be permitted to disfranchise the electorate. Before annulling a decisively large affirmative vote on a question upon which, in the very nature of things, the electorate must

have heard much discussion, and have had much information, and before annulling such vote upon the naked ground that the ballot itself did not contain the copy of an ordinance, it seems to me there should be some evidence these voters would have refrained from voting, or would have voted "No," had they had the ordinance before them on the ballot.

I would reverse.

STATE OF IOWA, Appellee, v. RAY KESSLER, Appellant.

RAPE: Corroboration—Designedly Planned Opportunity. Evidence
1 tending to show that the accused designedly planned the opportunity to commit a rape, the commission of which is properly shown, may furnish the required corroboration.

WITNESSES: Character Witnesses—Cross-Examination. A defend-
2 ant who, instead of confining his good-character witnesses to the trait involved in a charge of rape, questions them, without objection by the State, as to his character for (1) morality, (2) decency, and (3) character, may not complain if the State cross-examines as to defendant's (1) drinking habits, and (2) whether they had heard of defendant's wife's securing a divorce for cruelty and drunkenness, when the record reveals (a) that, in some instances, no objections were made, (b) that, in other instances, the objections were indefinite, and (c) that the error points on appeal were quite delayed.

EVANS, J., concurs.

WEAVER, C. J., concurs specially.

LADD and GAYNOR, JJ., sustain the examination, on the ground that, inasmuch as defendant saw fit to enter into the broad, general field of morality, decency, and character, the State had a right to follow, in like manner, by cross-examination.

SALINGER and STEVENS, JJ., dissent, generally.

Appeal from Pottawattamie District Court.—J. B. ROCKAFELLOW, Judge.

JULY 20, 1920.

THE defendant was charged with the crime of rape upon Flossie Hogaboom, who was 13 years of age. He was tried and convicted. He appeals.—*Affirmed.*

W. H. Killpack and Thomas Q. Harrison, for appellant.

H. M. Harner, Attorney General, C. E. Swanson, County Attorney, and F. E. Northrop, Assistant County Attorney, for appellee.

PRESTON, J.—1. The point most relied upon by appellant for a reversal is the alleged insufficiency of the statutory corroboration of the prosecutrix. It was claimed by defendant, all through the trial, that there was no sufficient corroboration. Motions were made, at the close of the State's testimony and at the close of all the testimony, to direct a verdict for the defendant. These motions were overruled. We shall not go into the evidence in detail as to the transaction itself and the corroborating circumstances tending to show that a crime was committed by someone. We do not understand appellant to contend that the evidence is not sufficient to show that the crime was committed. The crime may be established by the testimony of the prosecutrix alone. There may be, of course, two kinds of corroboration. One kind is that her clothes were bloody, and that she could not sit down for some days, and medical testimony as to the rupture of the hymen, and so on. The other kind is that under discussion, wherein, under Code Section 5488, it is provided that a defendant cannot be convicted upon the testimony of the person injured, unless she be corroborated by other evidence, tending to connect the defendant with the commission of the offense. It is not required that the act itself, or the details and circumstances, be witnessed by some other person, but there must be other evidence than that of the prosecutrix, tending to point out the defendant as the person who committed the crime which the jury may find, from the testimony of prosecutrix, was committed. If

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roboration:
designedly
planned
opportunity.

the crime was committed by someone, and there was no other person present who could commit it, and it was shown by evidence other than that of the prosecuting witness that defendant was present, and that no one else was, it could not, of course, have been committed by anyone other than such defendant. In other words, it would be impossible to commit the offense, without the opportunity to do so. In *State v. Stevens*, 133 Iowa 684, 686, we said:

"It affirmatively appeared, however, from the testimony of others than the child, that the accused was the only person in the house at the time, capable of committing the act. This, in connection with the immediate circumstances corroborating her testimony that the crime was committed at that time, was proof of something more than mere opportunity; for, by excluding the possibility of anyone else having committed the offense, and confirming the child's story that it was then committed there under the circumstances, tended to single him out as the real perpetrator."

It has been held repeatedly, however, that mere opportunity is not, of itself, sufficient corroboration. This is doubtless on the theory that a man and woman are very often, in the ordinary, everyday affairs, and under proper and innocent circumstances, alone together. It is appellant's contention that the evidence of witnesses other than prosecutrix, which is relied upon by the State, shows no more than mere opportunity. It has been often held, however, that, if the opportunity was of defendant's creation, and made with apparent deliberation, such circumstances should be considered in determining whether or not defendant is the guilty party. *State v. Crouch*, 130 Iowa 478; *State v. Lindsay*, 161 Iowa 39, 44; *State v. McGhucy*, 153 Iowa 308; *State v. Waters*, 132 Iowa 481; *State v. Bricker*, 135 Iowa 343; *State v. Norris*, 127 Iowa 683; *State v. Powers*, 181 Iowa 452; *State v. Ralston*, 139 Iowa 44; *State v. Stevens*, 133 Iowa 684. In the instant case, the State relies upon the testimony of the brother of prosecutrix, and some other circumstances, to show statutory corroboration; and it contends that the testimony of the brother corroborates

the testimony of his sister, the prosecutrix, and shows that defendant took the little girl to his room, to create the opportunity to commit the crime which the prosecutrix says was then and there committed. The principal item of evidence- relied upon as corroboration is that of the brother, wherein he states that defendant told him to stay at the gate, while defendant and prosecutrix went to defendant's room.

It appears from the testimony of the prosecuting witness that, at about 4 o'clock on the afternoon of the day in question, prosecutrix, in company with her 10-year old brother, Richard, and her cousin, a girl about the size of Flossie, met defendant near defendant's residence, and defendant told Flossie to come up to his room; that he wanted to give her her brother's picture. Her brother had gone to war, and she and her parents knew that defendant had the picture. Richard went with Flossie as far as the gate. Defendant lived upstairs. Flossie then accompanied defendant to his room, and Richard remained at the gate, or yard, as he was requested to do by the defendant. After defendant and the little girl got into the room, defendant got the picture of her brother, but did not give it to her immediately, but put it in his pocket, and told Flossie to lie down on the bed in the room. According to her testimony, the rape was then committed. We shall not go into the details, except to say that she testifies that she complained that it would hurt, and that he told her it wouldn't hurt, and not to tell anybody. She describes some of the furniture in the room. a brass bedstead; and witnesses other than Flossie testify thereto. She estimates that she was on the bed, in the position described, for about five minutes. After the transaction complained of, defendant accompanied prosecutrix to her home, where she lived with her parents, about a block distant. He went ahead of her, and she followed. After reaching the Hogaboom home, defendant observed that Flossie had some small change, and asked her how much she had, and told her to give that to him, and he gave her a dollar. This was in the presence of her father, mother,

brother, and sister-in-law. That evening, the mother testifies, she noticed blood on Flossie's skirt, and the girl told her it hurt her to sit down.

The brother testifies that he remembers being at the place indicated by his sister, and with her and his cousin; that he saw defendant there; that witness went just to the gate, then defendant told him to stay down; that defendant said he had a picture of the brother, and told Flossie to come and get it; that defendant said it was up at his house; that the boy stayed down; that they went up into the house; that witness was down by the gate.

The jury may well have found that the opportunity for intercourse was created or manufactured by the defendant, under suggestive circumstances, and that his purpose in asking the boy to stay outside at the gate was for the purpose of having intercourse with the girl. It occurs to us that he could have had no other purpose. If he was only wanting to get the picture for prosecutrix, and his purpose and intention were innocent, there could be no object or reason for not wanting the boy present. The picture was that of the boy's brother, as well as Flossie's, and there would appear to be no reason why the boy should not have gone with defendant and the little girl. We shall not discuss the other circumstances relied upon by the State. The matter referred to was properly corroborative, and we think it was sufficient for the jury. This disposes of the principal point in the case.

2. Some of the instructions are complained of, but they were not excepted to, and this is conceded.

3. Defendant called five or six witnesses as to defendant's good character. The questions were not framed so as to call for any specific trait of character. Some of the wit-

2. WITNESSES :
character
witnesses :
cross-exam-
ination.
nesses say that they were acquainted with his general reputation as to morality and decency. Some say it was good, so far as they knew; others that it was good. One witness says he knows his reputation as to general morality and character. It seems to us that the questions in this

form were somewhat broader than such questions are usually propounded, in regard to general moral character or reputation for morality. No objection was made, however, by the State, as to the form of the questions. These witnesses were cross-examined by the county attorney, in regard to his drinking habits and associations, and as to whether they had heard that defendant's wife obtained a divorce from him on the ground of intoxication and cruel treatment. One of them says he understood that defendant's wife got a divorce, but never heard the grounds. It is thought by appellant that this was misconduct on the part of the county attorney. In appellant's original argument, there is no brief point or proposition or assignment of error in regard to this. There is a reply argument, an additional argument, and an additional abstract, filed for appellant. In a later argument, the matter is sought to be raised. The matter complained of was not even set out or referred to in the abstract. This question is not argued by the State, or even suggested in its argument. We assume that the reason for this is that it was not raised in appellant's argument or abstract. We think the rule contemplates that the errors or points relied upon shall be disclosed in the opening or original argument, rather than that the abstract and argument may be prepared on one theory, and then, if appellee's argument has been made, an additional abstract and argument and assignments of error, or points, filed. That would certainly be no more than fair to an appellee. Whether this is proper procedure, we need not determine, because of matters which will be now referred to. It may be that it would have been better had the county attorney not pursued this method of cross-examination. We do not know what was in his mind. He is not confined, on cross-examination, to the exact questions asked in chief. Some latitude might be given, in cross-examination of character witnesses. He may have had information in regard to the matters inquired about, and may have proceeded on the theory that the witnesses had knowledge thereof, and that, if they did, it might qualify their opinion

as to his character. Whether specific acts may be inquired about on cross-examination, we need not determine, though the writer has his own idea about it, that a person's character is judged by his life conduct, and should be so. Aside from all this, there was no repetition of questions after adverse rulings by the trial court, and no defiance or persistence in repeating questions after such rulings. The answers of the witnesses to the questions propounded by the county attorney were to the effect that they did not know, and had not heard of the matters inquired about. In *State v. Tippet*, 94 Iowa 646, 651, it was held that, where such answers were in the negative, and no improper evidence was elicited, the mere asking of the questions was not prejudicial; and further, that such answers were really in defendant's favor. In that case, the questions were asked over objection. In the instant case, there was no objection to any of the questions propounded by the county attorney, as to any of the matters inquired about, of which complaint is now made, except in one or two instances, which will be now stated. In the cross-examination of the first of the character witnesses called, there was an objection to the last question asked, and this was in regard to the obtaining of a divorce by defendant's wife, on the ground of drunkenness and cruel treatment; and the witness answered that he understood she did get a divorce, but had never heard the grounds. This and one other are the only objections on the subject complained of, in all the evidence of all the witnesses. Near the end of the testimony of the next character witness, this question was asked:

"Q. Defendant was quite friendly with Sam Christensen this summer?

"Mr. Hess: Objected to as not cross-examination.

"Court: I take it that is preliminary. You may answer."

There was no other objection to any question propounded to this witness. (The first witness had testified before, and in the same cross-examination, and without objection, in regard to defendant's drinking habits.) The

next witness, after testifying at some length, was asked in regard to the acquaintance and associations of witness with the defendant, and was further asked:

“Q. That was just because you happened to live on the way to his home from the lodge room? (Objected to as argumentative, incompetent. Overruled.)”

The same witness was asked as to the divorce, and the objection was that the testimony was incompetent, irrelevant, immaterial, and not a fact, and that the decree does not so show. The witness answered, “No.” These two objections are the only ones made to the testimony of the witness just mentioned. To the next two witnesses, there was no objection whatever.

To my mind, it is unbelievable that a jury, acting as such under oath, could have ignored the testimony given on the trial, and decided this case upon these matters, or that there was any prejudice to the defendant. Counsel for defendant seem not to have considered it of enough importance to even refer to it in their abstract filed in this court, or in their original argument.

We discover no prejudicial error, and the judgment is, therefore,—*Affirmed*.

EVANS, J., concurs.

WEAVER, C. J.—I concur in the conclusion that the judgment be affirmed, but wish to say that, in my opinion, the testimony discussed by Mr. Justice Salinger in his dissent should have been excluded. In view, however, of the record as a whole, I cannot believe that the error in its admission is of a character to call for a reversal.

LADD, J. (concurring.) Aside from evidence tending to show the improbability of prosecutrix's having been in defendant's room at the time fixed by her, the accused relied on proof tending to establish his character as a man of morality and decency. He called Nelson, Still, and Leffert, of whom he inquired as to his general reputation for mor-

ality and decency, and Conway and Smith, of the first of whom he asked as to his general reputation as to morality, and of the last as to his reputation for morality and character. All answered that his reputation as to matters mentioned was good. Manifestly, the inquiries covered a broader field than the trait involved, and, on appropriate objection, the evidence must have been limited to his reputation with respect to character in the sexual relation, on the theory that he was not the kind of man likely to commit the offense charged. But no objection was interposed by the State; and, counsel for the accused having opened the field of inquiry as to general reputation for morality, decency, and character, cross-examination covering this field was legitimate, and not beyond what the court, in the exercise of a sound discretion, might properly have permitted. No one would pretend but that excessive drinking, carousing, bootlegging, having had a divorce obtained on the grounds of drunkenness and cruel and inhuman treatment, would have a direct bearing on his character for morality and decency. As he was represented by a lawyer of learning and ability, there is no occasion for injecting into the record a limitation on his questions, or a construction thereof not appearing therein. It may well be assumed that, for some reason, believed by him to be helpful to the defense, he chose not to limit his inquiries to the trait involved, and, not having done so, appellant is not in a situation to complain of the State's action in following him into the same field of inquiry he had opened. Such has always been the rule. In my opinion, there was no abuse of discretion on the part of the trial court in permitting the inquiries on cross-examination, nor prejudice to the accused, in view of the nature of the questions and the negative answers. I am for affirmance.

GAYNOR, J., concurs in the above.

SALINGER, J. (dissenting). The defendant was charged with a sexual crime. He produced witnesses who testified

that his general reputation "as to morality and decency" was good. It is manifest that the reputation spoken to was as to sexual morality and decency. On cross-examination, one of these witnesses, Still, testified that he knew one Sam Christensen. He was then asked, "This defendant was quite friendly with Sam Christensen this summer?" to which defendant objected that it was not cross-examination, and as to which objection the court remarked, "I take it that is preliminary,—he may answer." The witness was then asked whether he had ever heard it rumored that defendant and Christensen were engaged in any bootlegging operations, or in dealing in whisky, and whether he had ever heard, during the past summer, that defendant was drinking quite a little whisky. Conway was asked whether he had ever heard defendant was indulging in the use of intoxicating liquor, and whether he had ever heard that he was carrying around a considerable quantity of liquor, a number of bottles, during the summer of 1918, and whether he had heard that defendant was suspected of bootlegging, in the summer of 1918. Loeth was interrogated on whether he had heard that defendant had indulged in the use of intoxicating liquors quite freely; whether he had heard that he was suspected of bootlegging during the last summer. One question to Nelson was: "Isn't it a fact you have heard some remarks about his drinking quite a bit and carousing around, while he was working at the Northwestern?" It was inquired of Leffert whether he had ever heard that defendant was or had been an habitual drunkard; whether he had heard of his indulging freely in the use of intoxicating liquors in the summer of 1918, or heard that he was suspected, by officers and others up in the Northwestern yards, of bootlegging in that community, and whether he had ever heard he was mixed up with Christensen in the bootlegging business, and that the liquor was kept at Christensen's house.

It is the fact that no objection was interposed to most of these inquiries. But the practitioner will instantly appreciate the dilemma of defending counsel. True, failure

to object might deny appellate review. But counsel could not be certain of a reversal, even if objection was made. On the other hand, the odious nature of the accusation had a natural inflammatory tendency. And while the counsel could not feel sure of the benefit of objection, he might well fear the effect objecting would have upon the jury. And experience teaches that this persistence in this line of inquiry filled the atmosphere of the trial with a prejudice which neither objecting nor sustaining of objections could remove.

Moreover, the record discloses that objections would have been futile; for, as has been and will be shown, they were overruled when they were interposed.

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Loseth was asked whether he ever heard that, in 1914, a petition for divorce was filed against defendant by his then wife, which charged him with cruelty and habitual drunkenness, and whether he had heard that she had later got a divorce. Smith was questioned to like effect; and Leffert. Conway was cross-examined as follows:

"Q. Did you ever hear that his wife at that time, got a divorce from him, on the ground of cruel and inhuman treatment such as to endanger her life, and on the further ground of habitual drunkenness?"

Defendant objected that this was incompetent, irrelevant, and immaterial; that it was not a fact; and that the decree shows no such thing. The court overruled the objection, with the statement: "It isn't a question of what the decree shows; it is a question of what this witness heard." The answer was "No." Thereupon, he was asked again:

"Q. Did you ever hear that his wife, in 1914, filed an application for divorce, in which she set up the claim that he was guilty of cruel and inhuman treatment towards her, such as to endanger her life, and also habitual drunkenness?"

It was objected that this was incompetent, irrelevant, and immaterial, and the objection was overruled.

"Q. Did you ever hear that she subsequently got a di-

vorce from the defendant in that action? A. I know he was divorced from that woman; yes, sir, I heard it."

Nelson was asked:

"Did you ever hear that his former wife got a divorce from him, in September, 1914, on the charge of habitual drunkenness and such cruel and inhuman treatment as to endanger her life?"

This was objected to as incompetent, irrelevant, and immaterial, not the best evidence, not cross-examination. The objection was overruled, and the witness answered: "I understood she got a divorce, but I never heard on what grounds."

II. It was persistently put before the jury that defendant had the reputation of drinking and bootlegging and consorting with bootleggers, and that he was an habitual drunkard; persistently put before it that his wife had asked a court to divorce her because defendant was an habitual drunkard, and guilty of treating her with such inhuman cruelty as to endanger her life. This last line of testimony and some of the other was permitted despite objection. First, the jury was thoroughly inoculated with the drinking and bootlegging tendencies of the defendant. Then the rulings of the court added that, in its opinion, this, and the reputation that the wife had filed such a divorce petition, and that she had obtained a decree, tended to impeach the testimony of witnesses who said that defendant had a good reputation for sexual morality and decency. It seems to me to be manifest that the overruling of these objections constitutes error. And from error, prejudice is presumed. And I have attempted to set out what shows that the presumption is well founded. I am abidingly convinced that permitting this line of inquiry wrongfully deprived the defendant of the weight justly due the testimony supporting his good character. I must not be understood, however, to argue that a character witness may not properly be cross-examined as to what he has, in fact, heard concerning the reputation to which he has spoken. Observing relevancy, the witness may be interrogated on whether it has not been

generally reputed in the community that the defendant has done disreputable things. We said, in *State v. Rowell*, 172 Iowa 208, 214, that such examination is permissible because it bears directly on the value of the testimony in chief; that there is no reason why the jury may not be advised that a witness who said the general reputation of defendant in certain respects was good, was so testifying when, in fact, the community was rife with reports indicating the contrary; that such testimony tends to show, either that the witness is unfamiliar with the reputation to which he has testified, or that his standards of what constitutes good repute are unsound; that it founds an argument that the witness either was in ignorance of defendant's reputation or that he testified in disregard of what he did know. Such examination is permissible to test the conception of the witness as to what is good character, and bears on his credibility or accuracy (40 Cyc. 2496-7), and to ascertain the foundation for his opinion, or the data from which he draws his conclusion, with a view to lessening the effect of his testimony as to general reputation (*Basye v. State*, 45 Neb. 261 [63 N. W. 811]). In *Annis v. People*, 13 Mich. 511, it was said that such examination is permitted to enable the court and jury to determine whether the impeaching witness in fact knows the general reputation of another, and, if so, whether he has testified truly in regard to it. Making concrete application, then, it was proper to inquire of these character witnesses whether it was not generally reputed, or even whether they did not in fact know, that defendant had been guilty of sexual immorality and indecency. Were the charge larceny, it would be proper to inquire what the witness knew, or knew to be generally reputed, as to defendant's character for honesty. But this honesty is irrelevant where sexual morality is in issue, even as reputation of being a sexual pervert would not negative a reputation for honesty in business dealings. It is a truism to say that the cross-examination must be relevant, and equally a truism to assert that the examination permitted here was irrelevant.

True, the special concurrence asserts that appellant cannot object, because, when he put in testimony that he had a good reputation for morality and decency, he opened the door so wide as that the cross-examination was relevant and permissible. Manifestly, this begs the entire question. It assumes, and I think erroneously, that the morality and decency testified to were general. It seems to me to be manifest that, where the charge involves sexual immorality, the inquiry is limited to such morality or lack of it. It follows that the cross-examination was erroneous, because bootlegging, drunkenness, or giving cause for a divorce on account of cruel and inhuman treatment, do not negative sexual morality.

As to another argument, to the effect that, where guilt is so clearly proven that, though there was error, there is no prejudice, I have this to say: There was a flat conflict. There was testimony as to good character, and no one may say that utterly conclusive proof overcomes the presumption that error is prejudicial. Had this been a suit for damages, based on alleged rape, and had a jury found for the defendant, no court would have set the verdict aside on the ground that it was not sufficiently sustained by evidence. And we held, in *Cram v. City of Des Moines*, 185 Iowa 1292. that, even as to a defendant in a civil suit, we could not hold that the record showed a cure of the error, because of conclusive evidence of negligence on part of the plaintiff. If that must be held in a civil suit, and against one who has no burden, surely, the State, which had the burden of showing guilt beyond reasonable doubt, may not say in this case that it has so overwhelmingly met its burden as that the state of the evidence has overcome the presumption of prejudice arising from the commission of error.

I would reverse, and am authorized to say that Mr. Justice Stevens concurs in this dissent.

A. E. COPPOCK, Appellant, v. THOMAS H. REED et al., Appellees.

COURTS: **Modification of Correct Record.** No power exists in a court of equity to disturb or in any wise modify an absolutely correct judicial record. So held where a party, years after he had been convicted of crime, applied for an order expunging from admittedly correct record shorthand notes, a paragraph of testimony alleged by him to be false and perjured.

Appeal from Crawford District Court.—E. G. ALBERT, Judge.

JULY 6, 1920.

REHEARING DENIED SEPTEMBER 25, 1920.

A DEMURRER to the petition on the ground that the facts alleged did not warrant the relief sought, was sustained. The plaintiff appeals.—*Affirmed.*

Brown McCrary and John Urbany, for appellant.

Thos. H. Reed, for appellee.

LADD, J.—According to allegations of the petition, plaintiff was convicted of the crime of cheating, in 1911, sentenced to serve 7 years in the penitentiary, so did, and about 18 months after his discharge, discovered evidence which, in connection with that adduced at the trial, as is alleged, established his innocence; and in this action he prayed that the records in which false statements appear, injurious to plaintiff's rights, be annulled and changed, and that said statements be expunged from such records. It seems that plaintiff drew a check for \$6.50 on the First

National Bank of Shenandoah, Iowa, of which defendant Reed was president, and gave it to one Johnson for value; that the bank refused to honor the check; that Reed, who was the president of the bank, and M. L. Ayers, deceased, caused him to be prosecuted criminally, as above recited, and appeared as witnesses; and that their testimony was taken down in shorthand, and made a part of the record of the court. Ayers was asked:

“Q. Did you ever authorize him to sign your name to checks drawn on the First National Bank of Shenandoah, Iowa? A. No, sir. Q. Did you ever make any arrangements to honor or have the First National Bank of Shenandoah honor any checks which the defendant might draw on you at any time? A. No, sir. Q. Did defendant, to your knowledge, sign your name to any checks drawn on the First National Bank of Shenandoah at any time? A. Yes, sir. Q. Did you make the payment of any one of these checks? A. No.”

Reed testified:

“I examined all checks; never honored a check signed M. L. Ayers, per A. E. Coppock. I should say no arrangements were made to honor checks. I say we never did. We never had the authorized signature of A. E. Coppock. * * * He cashed one check at our bank for \$5.00, drawn on some bank in Omaha, which I cashed;” and that he had other checks.

The petition says that this testimony was false, for that these witnesses had arranged that plaintiff might draw checks on said bank, and thereby did induce plaintiff to make the check mentioned; that they testified to induce the jury to convict the plaintiff; that the latter had no means other than testifying that he had authority to draw the check, and that the bank had honored other checks, and that he never drew a check on an Omaha bank, but did draw one for \$5.00 on the Bank of Dedham, Iowa, with which he had arranged that his checks should be honored; that the jury, however, accepted the testimony of Reed and Ayers, and convicted him; that, subsequent to his service in the

penitentiary, he had ascertained that, in litigation between Reed and Ayers, in 1911, both had agreed to changing a check or checks signed by plaintiff, and paid by the bank to Ayers; and that Reed admitted in writing, in December, 1917, that the check on the Bank of Dedham had been presented to and paid by the First National Bank. Plaintiff averred that the alleged false statements of these men at the trial were believed, and will continue to be believed, to the detriment of his reputation for veracity; that both have remained silent, and not corrected their testimony, as it was their duty to do; that the plaintiff is without a remedy, save by a court of equity; that said false records and evidence are "a continued slander and injury to this plaintiff, and an invasion on his personal rights of life, liberty, and pursuit of happiness, as guaranteed by the Constitution; and that the officers, in permitting the records to remain, would be violating the said rights, guaranteed to the plaintiff as a citizen." He prayed for a decree "that the records, wherein they show false statements that are injurious to plaintiff's rights, be annulled, changed, and expunged from the records."

By sustaining the demurrer, the district court ruled that the facts alleged did not entitle the plaintiff to the relief prayed; and rightly so. The shorthand notes, upon being certified as required, became a part of the record. Section 3675 of the Code. It is not pretended that these did not truly represent precisely what Reed and Ayers testified to. The contention is that, though truthfully preserved in the shorthand notes, their testimony was false in the particulars alleged, and that, because of this, such testimony be "annulled, changed, and expunged from the records:" i. e., the shorthand notes. The clerk of court is charged with the duty of keeping the court records. Section 287 of the Code. These, as made up, may be corrected, amended, or supplied by order of the court. Sections 243, 244, and 4127 of the Code; *Goodrich v. Conrad*, 28 Iowa 298; *Ormsby v. Graham*, 123 Iowa 202; *Lambert v. Rice*, 143 Iowa 70. But we know of no authority which will justify annulling, chang-

ing, or expunging an absolutely correct record. Certainly, this may not be done through the writ of error *coram nobis*; for that does not lie, even if available in this state, to correct an issue of fact which has been adjudicated, nor for alleged false testimony at the trial (*Beard v. State*, 81 Ark. 515 [99 S. W. 837]; *State v. Stanley*, 225 Mo. 525 [125 S. W. 475]; *State v. Armstrong*, 41 Wash. 601 [84 Pac. 584]; *Asbell v. State*, 62 Kan. 209 [61 Pac. 690]; *Wilson v. State*, 46 Wash. 416 [90 Pac. 257]; 16 Corpus Juris 1327); nor for newly discovered evidence (*Asbell v. State*, supra). Conceding that there should be a remedy for every wrong, as contended, it is to be said that such remedy was afforded plaintiff in the opportunity to prove the alleged false testimony of Ayers and Reed untrue. That he was unable so to do, or that he later discovered facts which tended to sustain his story, as contradicting theirs, does not militate against our conclusion that he was accorded the opportunity. The judgment in the criminal case, not having been appealed from, is conclusive as to every element essential to plaintiff's conviction of the offense charged, and may not be relitigated on the specious pretext put forward in this case. In other words, the issue as to whether Reed and Ayers spoke the truth was there adjudicated, and cannot be reheard in this action. Whatever of odium attaches to plaintiff or to his name is incident to conviction of the crime of which he was found guilty. Having had his day in court, he may not invoke vindication in a subsequent hearing in equity. To change the record, as prayed, would not make it speak the truth, but prevent it, by suppressing the truth.

In *In re Molineux*, 177 N. Y. 395 (65 L. R. A. 104), Molineux was convicted of murder, and sentenced to death. During his imprisonment, his photograph was taken, and he was measured according to the Bertillon system, and the photograph and measurements preserved by the superintendent of the prison, as required by law. Upon appeal, the conviction was reversed, and on another trial, he was acquitted. Thereupon, he brought an action to have these removed from the public record, and for possession thereof.

In denying the relief, the court said:

"The custodian of a public record cannot deface it or give it up, without authority from the same source which required it to be made. The statute directed the superintendent to make the record, and when he made it, the state made it, and it has not authorized him to destroy it under any circumstances, not even to relieve a citizen from an unjust reflection upon his character. It would be usurpation of power for him to surrender the record or for the court to direct him to do so. If the position of the defendant is sound, where is the destruction of public records to end? What may become of the indictment, the minutes of the clerk, recording the verdict of guilty and the judgment of conviction? May the death warrant be withdrawn from the custody of the warden, although it is the only authority he had for the imprisonment of Molineux while he was awaiting execution? Even the courts, which have control of their own records, do not direct one made through error to be physically destroyed, although they vacate it and direct that it shall be held for naught."

The cases cited by appellant are not in conflict with this, but concern different statutes. See *Mabry v. Kettering*, 89 Ark. 551 (16 Am. & Eng. Ann. Cas. 1123); *Schulman v. Whitaker*, 117 La. 703 (7 L. R. A. [N. S.] 274); *Downs v. Swann*, 111 Md. 53 (23 L. R. A. [N. S.] 739); *Hodgemann v. Olsen*, 86 Wash. 615 (L. R. A. 1916 A 739). The statutes, on sound reason, direct the preservation of the records of trials. If these are defective, the power to correct or amend is conferred on the courts; but neither the clerk, who is custodian thereof, nor the courts are clothed with authority to destroy or expunge a record, or any part thereof, when without defect and true. The ruling of the court in sustaining the demurrer is—*Affirmed*.

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

J. O. SEXTON, Administrator, Appellant, v. C. L. PERCIVAL
COMPANY et al., Appellees.

CORPORATIONS: Ownership of Stock Dividends Under Agree-
1 **ment to Resell.** A holder of corporate shares of stock who has
purchased them under an agreement that he shall receive "all
dividends" thereon during his lifetime, but that the seller may
repurchase after the death of such holder, is the absolute
owner of *stock* dividends declared and issued on said stock
during the lifetime of the said holder, when such stock divi-
dends represent *income* or *earnings* of the company, and not
the natural growth or increase in value of its permanent prop-
erty.

CORPORATIONS: Dividends—Presumption. Stock dividends are
2 presumed to represent *earnings*. Corporate records reviewed,
and held not to overcome the presumption.

CORPORATIONS: Nature of Earnings. Earnings of a corporation
3 remain such until the intent to make them a part of the perma-
nent property of the corporation is in some way manifested.

CORPORATIONS: Dual Way of Distributing Earnings. Earnings
4 may be divided in two ways: (1) By declaring and paying a
cash dividend; or (2) by declaring and issuing a stock divi-
dend.

Appeal from Polk District Court.—HUBERT UTTERBACK,
Judge.

APRIL 13, 1920.

REHEARING DENIED SEPTEMBER 25, 1920.

IN this suit, begun February 21, 1918, the plaintiff, as
executor of C. M. Sexton, deceased, prays that the defend-
ant C. L. Percival Company and its officers be required to
issue a certificate for 15 shares of stock to him, as such ex-
ecutor. Prior to 1901, a corporation known as the D. H.

McDoneld Company was organized. On June 23d of that year, C. L. Percival sold to Sexton a certificate of 10 shares of stock of the par value of \$100 each, known as Certificate No. 15, in that company, on terms substantially as hereinafter recited. This stock was left with the Des Moines Savings Bank, as trustee. In February, 1904, the name of the company was changed to C. L. Percival Company, and Certificate No. 15 was surrendered, and a certificate for 10 shares, known as No. 7, in the latter company, was issued in its stead, and left with the bank. At a directors' meeting, immediately following a stockholders' meeting, on January 13, 1908, a motion was adopted:

"That the 20 shares of stock now held by the Des Moines Savings Bank as trustee for C. F. Percival be turned back to the company, and 20 shares in lieu of the same be issued direct to C. F. Percival. Motion carried. It was further moved and seconded that the 10 shares of stock now held by the Des Moines Savings Bank, as trustee for C. M. Sexton, be put in such shape that said C. M. Sexton can draw the dividends on same as long as he lives. At his death, stock shall be sold back to C. L. Percival or his assignees at par value."

On June 23d following the death of the decedent, C. L. Percival Company and the Des Moines Savings Bank entered into an agreement with reference to the 10 shares of stock evidenced by Certificate No. 15.

"First. That, in consideration of the sum of \$1,000, the receipt whereof is hereby acknowledged, the said Percival has hereby sold, subject to the terms of this agreement, to the said C. M. Sexton, 10 shares of the capital stock of the said C. L. Percival Company.

"Second. In the event of the death of the said C. M. Sexton, the said C. L. Percival, his heirs or assigns, shall, for 90 days thereafter, have the right to repurchase the said stock, at his election, and, in the event that he elects to so repurchase the same, the said C. L. Percival, his heirs or assigns, shall pay therefor the sum of \$100 per share, plus interest upon the said amount from the date of the last

dividend paid upon the said stock to the date of such purchase, at the rate of 8 per cent per annum.

"Third. In order to effectuate the purposes of this agreement, the stock so purchased by the said C. M. Sexton has been issued to the Des Moines Savings Bank, trustee, and shall be held by it in trust for the parties hereto, pursuant to the terms of this agreement, until such time, if any, as said Percival, his heirs or assigns, shall elect to repurchase the said stock, subject to the terms of this agreement. All dividends upon the said stock during said period shall be paid to the said C. M. Sexton as they become due, and the said C. M. Sexton shall have the right, during the said period, to vote the said stock at all meetings of the said corporation; but he shall not pledge or transfer said stock, or otherwise prevent the carrying out of this agreement.

"Fourth. In the event the said C. L. Percival, his heirs or assigns, shall, under this contract, elect to repurchase the said stock, he shall pay the purchase price therefor to the said bank, as trustee, and the said bank shall thereupon transfer the said stock to the said C. L. Percival, his heirs or assigns, and pay over the said purchase price to the executors or administrators of said C. M. Sexton. If, having the right to repurchase said stock, said C. L. Percival, his heirs or assigns, shall elect not to do so, said bank shall thereupon, and after 90 days after the death of said C. M. Sexton, transfer the same to his said executors or administrators, whose title thereto shall thereupon become absolute."

At a stockholders' meeting in January, 1913, a resolution was adopted, amending its articles so as to increase the amount of capital stock from not in excess of \$50,000 in the aggregate to "not in excess of \$100,000," and striking the limitation of the preferred stock to the amount of common stock, from the articles. The officers were directed to effect these changes, and they so did. Following adjournment of the stockholders' meeting, the directors convened, and, after the election of officers, resolved:

"That a dividend of 25 per cent of the par value of the

capital stock of this company that has been issued be and is hereby declared. Said dividend to be paid in cash at once to the stockholders of this company as they appear of record on the first day of January, 1913."

Thereupon, a resolution declaring a stock dividend of 150 per cent, with preamble as follows, was adopted:

"Whereas, the authorized capital stock of the C. L. Percival Company was, at the annual meeting of the stockholders, on January 13, 1913, increased, by amendment to its articles of incorporation, from \$50,000 to \$100,000, in order to take care of the growing needs of the company; and whereas, the surplus or undivided earnings of the C. L. Percival Company, as of the 1st day of January, 1913, amounted in the aggregate to \$47,345.28; and whereas, it is deemed advisable to set aside of the surplus or undivided earnings of the company the sum of \$30,000 as a stock dividend to the common stock now outstanding, amounting to \$20,000; and whereas, it is desired to sell for cash, at not less than \$150 per share, the remaining portion of the increased issue of common stock, i. e., \$25,000."

On March 25, 1913, C. L. Percival, as president, and Carl F. Percival, as secretary and treasurer, executed, under the seal of the C. L. Percival Company, a certain stock certificate No. 58, for 25 shares of the capital stock of the C. L. Percival Company, of the par value of \$100 each, said certificate being issued in the name of the Central Trust Company, trustee, and having written on the top thereof the name "C. M. Sexton;" and the stub from which said certificate was originally detached, bears the following endorsement:

"Certificate No. 58, 25 shares. Issued to Central Trust Company, trustee for C. M. Sexton, dated March 25, 1913. From whom transferred, Des Moines Saving, Trustee, dated February 1, 1904. No. original certificate, 7. No. original shares, 10. Stock Dividend, 15. No. of shares transferred, 25."

The blank form of receipt on the stub was not signed, and Certificate No. 58 was never delivered, nor any in its

stead. Within 90 days from Sexton's death, Percival paid par value, with interest, as stipulated, to the Des Moines Savings Bank, and thereupon the original certificate No. 7, for 10 shares of stock, was surrendered to him, and, on June 20, 1917, in lieu thereof and of Certificate No. 58, the company issued a certificate No. 77, for 10 shares, and a certificate for 15 shares, known as No. 78, to Percival. No dividend has been paid to decedent or to the executor of his estate since January, 1917. During the last 4 years, or after the stock dividend, decedent was paid dividends on 25 shares of stock, and prior thereto, on 10 shares. During all this time, he was one of the four directors of the company, actively participated in its management, served as bookkeeper, and later as cashier, at a salary. The court, on final hearing, entered its decree:

"That, upon the payment, within 90 days from the entry of final decree in this cause, to the plaintiff by the defendant C. L. Percival, of the sum of \$1,500, together with 8 per cent interest thereon from January 15, 1917, said defendant shall be and become the absolute owner of said 15 shares of dividend stock in said C. L. Percival Company, together with all rights which have accrued thereunder since said last-named date, and all rights which may hereafter accrue thereunder; that, in default of such payment to the plaintiff by the defendant C. L. Percival, the defendant Percival Company, through its proper officers, shall issue and deliver to the plaintiff said 15 shares of stock as and pursuant to the said stock dividend of February 22, 1913."

One half of the costs was taxed to each party, and each appealed on the same day.—*Reversed*.

Brookhart Bros. and Charles W. Lyon, for appellant.

Miller, Parker, Riley & Stewart, for appellees.

LADD, J.—The plaintiff is the executor of the estate of C. M. Sexton, deceased, and as such prays for an order directing the C. L. Percival Company and its officers to issue to

1. CORPORATIONS: ownership of stock dividends under agreement to resell.

him, as such executor, a certificate of 15 shares of the capital stock of that company. It appears from the record that, on December 10, 1901, the decedent, being in the employment of the D. H. McDoneld Company, arranged to purchase 10 shares of the capital stock of said company from C. L. Percival. This was done, but on terms substantially like those entered into after the name of the company had been changed to C. L. Percival Company. Such change occurred in 1904, and on June 23, 1908, a new contract was entered into, under which the certificate for 10 shares of stock was deposited with the Des Moines Savings Bank, as trustee, on conditions that:

"In the event of the death of the said C. M. Sexton, the said C. L. Percival, his heirs or assigns, shall, for 90 days thereafter, have the right to repurchase the said stock at his election, and, in the event that he elects to so repurchase the same, the said C. L. Percival, his heirs or assigns, shall pay therefor the sum of \$100 per share, plus interest upon the said amount from the date of the last dividend paid upon the said stock to the date of such purchase at the rate of 8 per cent per annum.

"Third. In order to effectuate the purposes of this agreement, the stock so purchased by the said C. M. Sexton has been issued to the Des Moines Savings Bank, trustee, and shall be held by it in trust for the parties hereto, pursuant to the terms of this agreement, until such time, if any, as said Percival, his heirs or assigns, shall elect to repurchase the said stock, subject to the terms of this agreement. All dividends upon the said stock during said period shall be paid to the said C. M. Sexton as they become due, and the said C. M. Sexton shall have the right, during the said period, to vote the said stock at all meetings of the said corporation, but he shall not pledge or transfer said stock, or otherwise prevent the carrying out of this agreement.

"Fourth. In the event the said C. L. Percival, his heirs or assigns, shall, under this contract, elect to repurchase

the said stock, he shall pay the purchase price therefor to the said bank, as trustee, and the said bank shall thereupon transfer the said stock to the said C. L. Percival, his heirs or assigns, and pay over the said purchase price to the executors or administrators of the said C. M. Sexton. If, having the right to repurchase said stock, said C. L. Percival, his heirs or assigns, shall elect not to do so, said bank shall thereupon, and after 90 days after the death of said C. M. Sexton, transfer the same to his said executors or administrators, whose title thereto shall thereupon become absolute."

Sexton, who was a single man, died April 21, 1917, and, within 90 days thereafter, in pursuance of the terms of the contract, C. L. Percival deposited the necessary amount with the Des Moines Savings Bank, and it surrendered the 10 shares of stock. A stock dividend of 150 per cent was declared in 1913, and a certificate of 15 shares issued as a stock dividend on the original 10 shares, March 25, 1913; and the sole issue raised by counsel is whether these passed to C. L. Percival, upon repurchasing the original 10 shares of stock, or to the executor of the estate of the decedent. In other words, Was the stock dividend declared in order to distribute the income or earnings of the company, or as representing the natural growth or increase in the value of its permanent property—a mere change in the form of ownership? If the latter, then the 15 shares issued as a stock dividend, with the 10 shares, represented no greater part of the company's property than did the 10 original shares, and manifestly must have been turned over to Percival, upon repurchase of the latter; but if the former, then the dividend in stock passed to decedent, under the clause entitling decedent to all dividends on the stock.

It is to be observed that the relation of the parties was analogous to that of life tenant and remainderman, under a will or other instrument. Under the contract, "all dividends upon said stock during said period (life of Sexton) shall be paid to said C. M. Sexton, as they become due," and, within 90 days after the expiration of such period,

Percival might repurchase, and thereby acquire the same title thereto as would a remainderman at the expiration of the life estate. The rule which obtains in such cases in this state was settled in *Kalbach v. Clark*, 133 Iowa 215, where the court, speaking through the late Justice Deemer, said:

"We start with the notion that all pure dividends, whether in cash or stock, or other property, are a part of the income, and, when declared, should go to the life tenant, and not to the remainderman, as it is not a part of the corpus of the property, but a part of the income derived from the use and management thereof. Any dividends, so called, presumptively belong to the life tenant, as they are, in the absence of a showing to the contrary, assumed to have been divided as profits. If, however, the so-called stock dividends represent the corporate capital, that is, represent nothing but the natural growth or increase in the value of the permanent property, so that there is merely a change in the form of ownership, such stock should go to the remainderman; for in such cases the dividend is a dividend of capital, representing simply an increase in the value of the physical property, good will, or other thing of tangible value. * * * Under this rule it becomes a question of fact as to the actual nature of the dividend. The mere fact that the directors of the corporation call it either one thing or the other is not controlling."

It is often difficult to ascertain the precise nature of a specific stock dividend. The presumption obtains that all stock dividends are a part of the income, and, when declared, go to the life tenant. The burden of proof to show that the dividend was not of the income or profits was on the defendants. The board of directors, in their resolution declaring the dividend, recited, by way of preamble, that:

2. CORPORATIONS: dividends: presumption.

"Whereas, the surplus or undivided earnings of the C. L. Percival Company, as of the 1st day of January, 1913, amounted in the aggregate to \$47,345.28; and whereas, it is

deemed advisable to set aside, of the surplus or undivided earnings of the company, the sum of \$30,000 as a stock dividend to the common stock now outstanding, amounting to \$20,000; and whereas, it is desired to sell for cash, at not less than \$150 per share, the remaining portion of the increased issue of common stock, i. e., \$25,000."

This recital indicates plainly the design of the directors to have been the distribution *pro rata* among the shareholders of the profits, in the form of surplus or undivided earnings. Were there profits so to distribute? Bearing in mind that such is the presumption, in view of the declaration of the dividend, we examine the record to ascertain if anything appears therein tending to show the contrary. The capital stock of the corporation was \$20,000, divided into 200 shares, of par value of \$100 each. Though it was organized prior to 1901, no evidence of its financial condition previous to January 1, 1907, was adduced. There appears to have been a surplus of \$29,827 at that time. It must have exceeded this, prior to that date; for a new building at a cost of \$36,450 was included in its assets, without increase of capital, but with an incumbrance of \$15,000. Sexton purchased the stock of Percival in 1901, under contract similar to that of 1908. The changing of the name of the corporation in 1904 did not interfere with such contract, nor did the substitution of a certificate of 10 shares, issued by the corporation under the name of C. L. Percival Company, in the place of a certificate for like number of shares, previously issued by the same corporation under the name of D. H. McDoneld Company. The contractual relations between Sexton and Percival were not changed from the date of purchase until Sexton's death. True, the directors resolved, in January, 1908, "that the 10 shares of stock now held by the Des Moines Savings Bank be put in such shape that said C. M. Sexton can draw dividends on the same as long as he lives; that, at his death, said stock shall be sold back to C. L. Percival or his assigns at par value." This much was provided for in the contract of December 10, 1901, but added nothing to the rights or privileges of either

Sexton or Percival. The contract of 1908, made, as Percival testified, to carry out this resolution, differed, in substance, only in date and description of the company. The record is without proof of when or how the surplus existing in 1907 was created. According to Webster's Dictionary, the word "surplus" means "excess or overplus; * * * as distinguished from capital stock of a corporation, the excess of net assets over the face value of its shares." It is not unusual, in organizing corporations, to create a surplus by exacting payments in excess of the par value of shares; and often a surplus arises from the increased value of its property. Ordinarily, the term "surplus," as used in financial statements of corporations, indicates its accumulated earnings or profits, whether in money or otherwise, as distinguished from the par value of its capital stock, and it appears to have been so employed in the nine yearly statements following that of 1907. Aside from the large cash dividends declared, the surplus gradually increased \$17,518.01, during the five years following that date, without taking into account any increase in the value of property in its nature permanent. There is a clear distinction between accretions to the fund derived from earnings accumulating during the life estate and the enhanced value of the trust property due to other causes. The one is income; while the other is capital—a part of the corpus of the estate. A comparison of these statements demonstrates, as nearly as may be, that this increase of surplus consisted of accumulated earnings or profits of the company. If the surplus of 1907 did not consist of profits or earnings of the company, what was it? How did it arise? No answer other than as above stated, is to be found in the record. The value of property permanent in its nature, credited in the statement of that year as part of the assets, when compared with such values in other statements, precludes the inference that the surplus in the several statements was made up from enhancements in value of such property. Let the statements speak for themselves.

C. L. Percival Company.

January 1, 1907.

Assets.

Mdse. (Hides and Furs).....	\$ 20,985.39
Rend. Wks. (Stock on Hand).....	3,335.33
Butcher Tools (Stock on Hand).....	21,153.82
Accounts Outstanding (Good).....	10,705.18
Teams, Wagons, etc.....	2,200.00
New Building (Cost)	36,450.60
Hide Building Second St.....	200.00
Rend. Works, Real Estate.....	3,800.00
Rend. Works, Fixtures.....	1,700.00
Real Estate E. First St.....	5,051.31
	<hr/>
	\$105,581.63

Liabilities.

Capital Stock	\$ 20,000.00
Due Bank	24,000.00
Mtge. on Building.....	15,000.00
Mtge. on R. W.....	2,640.00
Due Employees	9,616.37
Cash Overdrawn	1,053.03
Butcher Tools	
Bills Unpaid	3,444.42
Surplus	29,827.81
	<hr/>
	\$105,581.63

The statement of 1913, when compared with that above, of 1907, indicates clearly the nature of the additions to the surplus.

C. L. Percival Company

Statement

January 1, 1913.

Assets.

Cash & Accounts Receivable.....	\$ 34,768.17
Mdse. on hand.....	18,904.79
B. Tool Stock on hand	28,364.63

Factory Stock on hand.....	17,405.96
Teams & Equipment.....	2,478.05
Hide House, 2d St.....	100.00
Rend. Works Stock	1,986.53
Rend. Works Real Estate.....	3,800.00
Rend. Works Equipment.....	1,977.00
Warehouse Building	36,506.87
Factory Building.....	5,385.87
Factory Equipment	3,513.97
Office Equipment	1,464.00
Rent, Int. & Ins. Paid in Adv.....	1,764.00
	<hr/>
	\$158,419.84

Liabilities

Capital Stock	\$ 20,000.00
Notes Payable	83,906.46
Accts. Payable	3,682.50
Reserve for Depreciation, Warehouse.....	2,518.63
Factory Building	538.58
Factory Equipment	351.39
Rend. Works Equipment	77.00
Surplus	47,345.28
	<hr/>
	\$158,419.84

The earning capacity of this company is illustrated by the cash dividends declared. A cash dividend of 50 per cent was declared in 1903, of 60 per cent in 1904, of 40 per cent in 1905, and of 25 per cent each year thereafter until 1911, which was passed, and a dividend of 25 per cent was declared in 1912, and also in 1913. As pointed out, the earnings or profits in the sum of \$17,518.01 accrued subsequent to the statement of 1907. This amount might have been distributed by the stock dividend, as was done, and must have gone to the life tenant. The statement of that year indicates that the surplus of \$29,827.81 also accumulated from the business of the company. Out of this, \$5,000 was paid out as a dividend. When or how the remainder,

of \$24,827.01, was earned or added, we have no means of knowing. If it had been made a permanent part of the capital or corpus of the company in some manner, this must have been known by its officers, and the circumstance that defendants adduced no evidence bearing on the subject tends to confirm, rather than overthrow, the presumption that the dividend was of the profits or earnings of the company. Nor is such presumption impaired by the fact that large cash dividends mentioned, were declared.

Counsel argues, as indicating that the dividend could not have been from the earnings, that the corporation was in such financial condition that a cash dividend in like amount

3. CORPORATIONS:
nature of
earnings.

might not have been paid without borrowing money. This is true, and furnishes the strongest reason for making a stock dividend. The very purpose of a stock dividend is to retain the earnings in the business, and issue stock evidencing same, instead of paying cash, or other property. It is not necessary that the earnings be set aside in money, to prevent them from being absorbed in the capital of the company, nor to segregate them into a separate account. They continue such until the intent to make them a part of the permanent property or corpus of the company is in some way manifested. In a sense, as counsel contends, every stock dividend is a mere matter of bookkeeping. No money is paid out or taken in. The property of the corporation continues unchanged. The accumulated profits, whether in money or property, are undisturbed. All that happens is the issuance of the certificates of stock, and changing the books so as to show a corresponding increase in capital stock, and this for the purpose of distributing such profits or income *pro rata* to the shareholders, and in that manner capitalizing the earnings. The earnings, as such, cease to belong to the corporation, but become absorbed in its capital, and are represented by the new shares, issued as a dividend. Counsel for defendants concedes, as he must have, that there were accretions representing the earnings of the corporation, but suggests that "the great advance in

the total of the assets column from the time of the breaking out of the world war is undoubtedly accounted for in part by the enhanced market value of the average of merchandise on hand." But the war did not begin, nor was it declared, until a little more than 17 months after the dividend was declared. We agree with *Jennery v. Olmstead*, 36 Hun 536, in holding that profits are not proven to have been earned by showing an increase in the market price, but must have been realized, to be denominated as such. For all that appears, the merchandise and other property of this company may have been of greater value than credited in the assets column, but such increase was not included.

We do not agree, however, that the word "dividend" has indefinite meaning, when employed in contracts relating to corporate stock. In *Lockhart v. Van Alstyne*, 31 Mich. 76 (18 Am. Rep. 156), the court, speaking through Cooley, J., said:

"A dividend to the stockholders of a corporation, when spoken of in reference to an existing organization engaged in the transaction of business, and not of one being closed up and dissolved, is always, so far as we are aware, understood as a fund which the corporation sets apart from its profits to be divided among its members. A corporation of which it is said that it is making an annual dividend of 10 per centum upon its stock, is supposed to be a prosperous corporation, because its gains leave it this clear annual percentage, which it can pay over without impairing its capital. A dividend among preference stockholders exclusively, is understood to imply that the sum divided has been realized as profits, though the earnings do not yield a dividend to the stockholders in general. We hazard nothing in saying that this is the primary and universal understanding of a dividend on stock, except when made use of in respect to a final closing up and distribution of assets on the occurrence of insolvency or in view of a dissolution."

See, also, *Jones v. Concord & M. R. Co.*, 67 N. H. 119 (38 Atl. 120); *Rose v. Barclay*, 191 Pa. St. 594 (45 L. R. A.

392). In 2 Cook on Corporations (7th Ed.), Chapter 32, Section 534, a dividend is defined as:

“A corporate profit, set aside, declared, and ordered by the directors to be paid to the stockholders on demand, or at a fixed time. Until the dividend is declared, these corporate profits belong to the corporation, not to the stockholders, and are liable for corporate indebtedness.”

“[A stock dividend] is lawful when an amount of money or property equivalent in value to the full par value of the stock distributed as a dividend has been accumulated, and is permanently added to the capital stock of the corporation. * * * In this country, these dividends are frequently made, and are sustained by the courts.” 2 Cook on Corporations (7th Ed.), Chapter 32, Section 536.

This definition is approved in *DeKoven v. Alsop*, 205 Ill. 309 (63 L. R. A. 587). See, also, *State v. Bank of Commerce*, 95 Tenn. 221 (31 S. W. 993); 3 Words and Phrases 2143 *et seq.* That the word was employed in the sense above indicated, is not open to controversy, in view of the context and the circumstances disclosed. That decedent so construed it, appears from his refusal to enter into the contract prepared by Percival, permitting the latter to repurchase the original 10 shares, together with the 15 shares of the dividend, at the price of the former. This happened in 1913, and nothing further was said. As Sexton was receiving the dividends on the 25 shares, there was no occasion for pressing the claim of title to the shares belonging to decedent, and it ought not to be said that decedent, who was bookkeeper of the company, by not entering into further controversy with the president thereof over the title to the 15 shares of stock, acquiesced in the latter's claim of the right to repurchase these on the terms claimed. The authorities cited by defendants are not in point. In *Spooner v. Phillips*, 62 Conn. 62 (16 L. R. A. 461), the articles of incorporation authorized the corporation to increase or diminish the shares of stock issued, as might seem to it best; and it was by virtue of this power, and not as stock

dividends, that the stock of the corporation was increased. As said by the court:

"The new shares were not, strictly speaking, the product of stock dividends, nor did they represent, in the ordinary sense, surplus earnings;" and it was found that the intention of the testator was the gift of the original shares, without others issued by way of increase. In *Wilberding v. Miller*, 88 Ohio St. 609 (106 N. E. 665), and *Guthrie's Trustee v. Akers*, 157 Ky. 649 (163 S. W. 1117), dividends were not declared, and all held was that, without declaration of dividends, the surplus does not pass to the life tenant. In *Kaufman v. Charlottesville Woolen Mills Co.*, 93 Va. 673 (25 S. E. 1003), the plaintiff claimed a 27 per cent stock issue, declared January 16, 1896, on the theory that he had reserved dividends up to January 1st of that year, and that the profits were on hand prior thereto, and could have been distributed. The court, after describing a stock dividend as characterized by the so-called Massachusetts rule, under which all such dividends are retained by executor or trustee for the remainderman, observed that:

"The accumulated profits of a corporation belong to the company; and, acting in good faith, and for the best interest of all concerned, the corporation may capitalize the surplus, or it may invest it in its work and plant so as to secure and increase the permanent value of its property, or it may reserve part of the earnings of a prosperous year to make up for a possible lack of profits in future years, or it may distribute its earnings at once to its stockholders as income. Which of these courses is to be pursued must be determined by the directors, with due regard to the condition of the company's property and affairs as a whole; and, except in case of fraud and bad faith on their part, their discretion in this respect cannot be controlled by the courts."

These decisions are in harmony with the rule laid down in *Moss's Appeal*, 83 Pa. St. 264 (24 Am. Rep. 164), where the court said:

"As a general rule, nothing earned by a corporation can

be regarded as profits, until it shall have been declared to be so by the corporation itself, acting by its board of managers. The fact that a dollar has been earned gives no stockholder the right to claim it until the corporation decides to distribute it as profit. The wisdom of such distribution must, of necessity, rest with the corporation itself. From motives of prudence and self-interest, it is frequently desirable to add all or a portion of the earnings to the capital. This is sometimes necessary as a basis of credit for more enlarged operations. It is often a wise exercise of discretion for a corporation to strengthen itself in this way, and with such discretion a stockholder cannot interfere. His only remedy is by an appeal to the ballot at the election for directors. But where a corporation, having actually made profits, proceeds to distribute such profits amongst the stockholders, the tenant for life would be entitled to receive them, and this without regard to the form of the transaction. Equity, which disregards form and grasps the substance, would award the thing distributed, whether stock or moneys, to whomsoever was entitled to the profits."

So well established is this rule that citation of authorities is unnecessary. See, also, *Hite's Devisees v. Hite's Executor*, 93 Ky. 257 (40 Am. St. Rep. 189), where the rule prevailing is like that of Pennsylvania, save as to apportionment, and in which the court stated that:

"Where a dividend, although declared in stock, is based upon the earnings of the company, it is in reality, whether called by one name or another, the income of the capital invested in it. It is but a mode of distributing the profit. If it be not income, what is it? If it is, then it is rightfully and equitably the property of the life tenant. If it be really profit, then he should have it, whether paid in stock or money. A stock dividend proper is the issue of new shares, paid for by the transfer of a sum equal to their par value from the profit and loss account to that representing capital stock; and really a corporation has no right to declare a dividend, either in cash or stock, except from its earnings;

and a singular state of case—it seems to us an unreasonable one—is presented, if the company, although it rests with it whether it will declare a dividend, can bind the courts as to the proper ownership of it, and by the mode of payment substitute its will for that of the testator, and favor the life tenant or the remainderman, as it may desire. It cannot in reason be considered that the testator contemplated such a result. The law regards substance, and not form, and such a rule might result, not only in a violation of the testator's intention, but it would give the power to the corporation to beggar the life tenants, who, in this case, are the wife and children of the testator, for the benefit of the remaindermen, who may, perhaps, be unknown to the testator, being unborn when the will was executed. We are unwilling to adopt a rule which, to us, seems so arbitrary and devoid of reason and justice. If the dividend be, in fact, a profit, although declared in stock, it should be held to be income."

Whether stock or cash dividend shall be issued was purely discretionary with the board of directors (*Lauman v. Foster*, 157 Iowa 275), and we are unable to find any ground

4. CORPORATIONS: dual way of distributing earnings.

for saying that such dividend was not of "undivided earnings," as that body asserted in declaring this stock dividend, and as the law presumed.

The doubtful question in the case is, as we think, whether the contract, in providing that "all dividends upon the said stock during said period shall be paid to the said Sexton as they become due, should be construed as including stock dividends." Ordinarily, in referring to dividends, those in money are intended. In *Kaufman v. Charlotteville Woolen Mills Co.*, supra, it was said that:

"A stock dividend is not, in the ordinary sense, a dividend; the latter being a distribution of profits to stockholders, as income from their investment. A stock dividend is merely an increase in the number of shares, the increased number representing exactly the same property that was represented by the smaller number of shares."

In *Spooner v. Phillips*, supra, it was said that:

"The word 'dividends,' if unqualified, signifies dividends payable in money."

See, also, *Smith v. Hooper*, 95 Md. 16 (51 Atl. 844). But here the word was qualified by "all." It added nothing, unless something other than cash dividends were intended. Dividends in stock are quite as well recognized in the law, though not so common as those in money. But they are dividends. As quoted with approval in *Rose v. Barclay*, 191 Pa. St. 594 (45 L. R. A. 392):

"'A dividend is that portion of the profits and surplus funds of a corporation which has actually been set apart by a valid resolution of the board of directors, or by the shareholders at a corporate meeting, for distribution among the stockholders, according to their respective interests, in such a sense as to become segregated from the property of the corporation to become the property of the shareholders distributively. It is a matter of no difference whether the dividend is declared in stock or paid in cash and thereafter converted into stock by the shareholders. In either event, it is a distribution of the surplus profits of the corporation.'"

Stock dividends were there held to be included in the expression, "all dividends due or to become due" on the shares sold. If a stock dividend is to be regarded as a dividend, and it is so recognized by the courts generally, then the contract under consideration should be construed to include stock, as well as money, dividends. The manifest purpose of the parties thereto was to give Sexton the entire benefit to be derived from ownership of the 10 shares during his life, and, at the same time, secure to Percival the option of acquiring such shares again, upon Sexton's death. We reach the conclusion that plaintiff, who, as administrator, stands in the shoes of decedent, is entitled to a certificate of the 15 shares which should have been issued to decedent, and the court should have so found, and entered a decree accordingly.—*Reversed*.

WEAVER, C. J., GAYNOR and STEVENS, JJ., concur.

STRAWBERRY POINT DISTRICT FAIR SOCIETY, Appellee, v.
DORA BALL et al., Appellants.

EMINENT DOMAIN: Right to Condemn Private Way. A landowner who has, *or may obtain*, a vested interest in a private way which will afford him reasonable opportunity to pass to and from his land, and enable him to reach a public way, may not condemn a private way over the land of another. (Sec. 2028, Code Supp., 1913.)

Appeal from Clayton District Court.—W. J. SPRINGER,
Judge.

MAY 15, 1920.

REHEARING DENIED SEPTEMBER 25, 1920.

ACTION to enjoin the defendants from opening a public highway over the land of the plaintiff, under Section 2028 of the Supplement to the Code, 1913. Opinion states the facts. Decree for the plaintiff in the court below. Defendants appeal.—*Affirmed.*

Alex Holmes, for appellants.

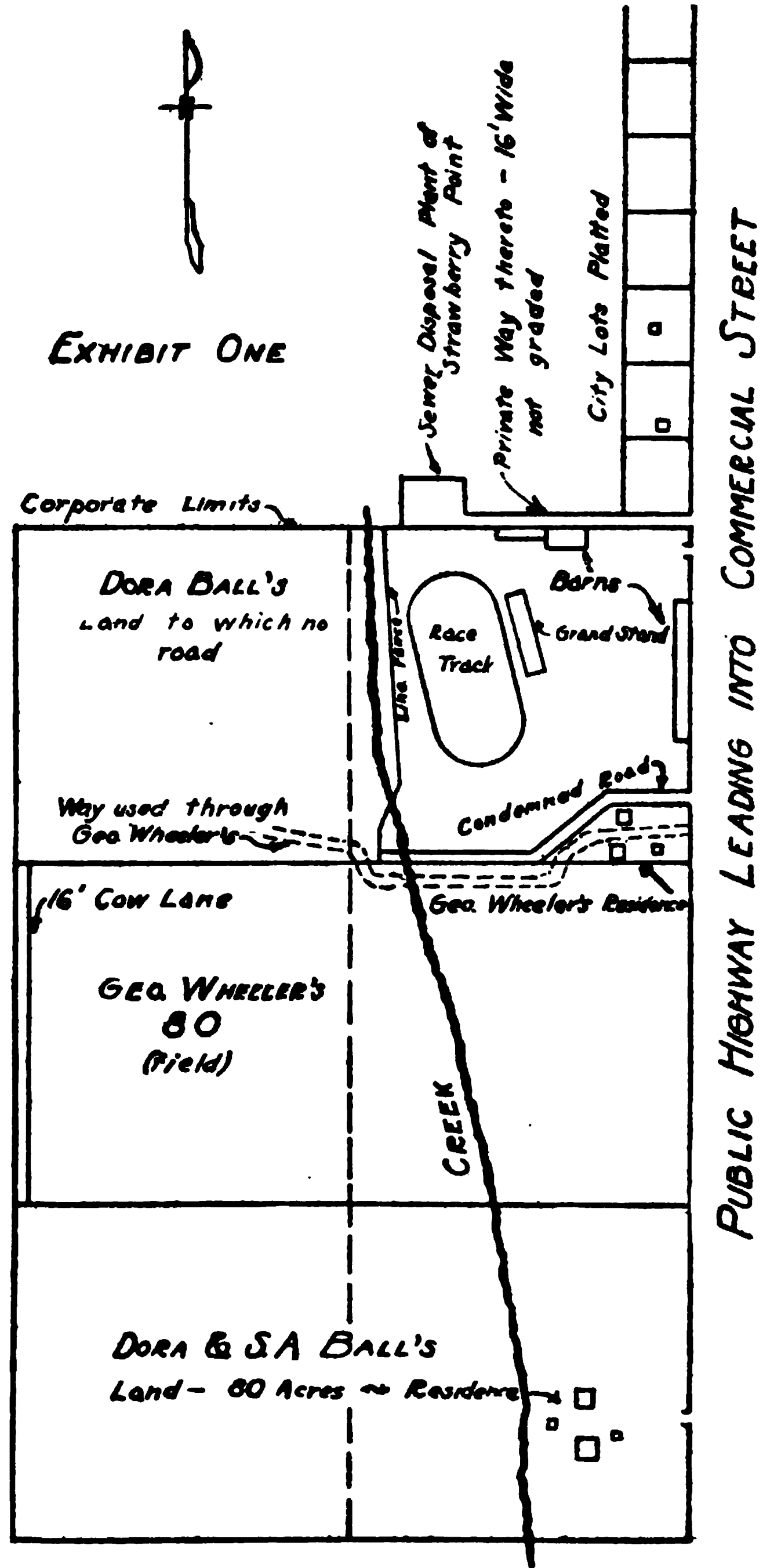
Newberry Bros. and *D. D. Murphy & Son*, for appellee.

GAYNOR, J.—This action was commenced on the 5th day of May, 1919. Its purpose is to enjoin the defendants from proceeding to condemn a strip 32 feet wide, over and across plaintiff's land, and from proceeding to lay out a public highway thereon, extending from the defendants' land on the west, over plaintiff's land to a public highway on the east.

The plaintiff is a corporation, and is the owner and in possession of a parcel of land consisting of about 28 acres,

situated in the eastern part of the north half of the southwest quarter of Section 27-91-16. The plaintiff is a fair association, and its grounds are used for fairground purposes. The defendant Dora Ball is the owner of land immediately west of plaintiff's land. Wheeler, who figures in this case, owns the land immediately south of the land above referred to. The defendants also own the land immediately south of the Wheeler land. On this south land are defendants' buildings, and defendants are in actual occupation of the same. We take it, all the defendants' land is farm land. Their north 40 is used in connection with their south 80.

We submit herewith a plat, which shows correctly the relative position of the pieces of land involved in this suit.



The above plat shows a strip of land 16 feet wide, running from defendants' north 40 to their south 80, along the west line of Wheeler's 80. This is the road which, plaintiff contends, gives defendants an outlet. It shows also the proposed road over plaintiff's land. The plat shows also, on the north of the fairgrounds, a road extending almost to defendants' north 40, to which reference will be made hereafter. The public road sought to be *reached* by these condemnation proceedings is a public road on the east of all the land herein referred to, and is shown on the plat.

It is the contention of the defendants that they have no public or private way of going to or from their north 40. On this contention, the defendants were proceeding to condemn land for a road over plaintiff's land, under Section 2028 of the Code Supplement, 1913, and Section 2029 of the Code of 1897, which read as follows:

"Section 2028. Any person * * * owning * * * any land *not having a public or private way* thereto, may have a public way to any * * * street or highway established over the land of another, not exceeding 40 feet in width, to be located on a division, subdivision or '40' line or immediately adjacent thereto."

"Section 2029. If the owner of any real estate necessary to be taken *refuses* to grant the right of way, or if he and the person * * * asking its establishment cannot agree upon the compensation to be paid therefor, the sheriff of the county in which said real estate is situated shall, upon the application of either party, appoint six freeholders of the county, not interested in the same or a like question, who shall assess the damage which said owner will sustain, and make report thereof in writing to the sheriff, and, if the applicant for such way shall, before entering upon said real estate for the purpose of constructing such way, pay to the sheriff for the use of the owner the sum assessed, said road may be at once constructed and maintained."

The contention of the plaintiff is, and its action to enjoin is based upon the thought, that the defendants, at the time this action was begun, had a private way leading from

their land to a public highway, and because of this they cannot maintain proceedings under the statute aforesaid, to establish a public road over plaintiff's land; that the fact upon which the right must rest, does not exist.

It goes without saying that the right to proceed under this statute depends entirely upon the existence of the facts upon which the right rests; that, to justify condemnation proceedings to secure a public way over the land of another, it must appear that the person seeking to exercise the right has no public or *private* way from his land to a street or highway. This is the word and spirit of the law. It must follow logically that, when the facts exist upon which the exercise of the right may be predicated, the exercise of the right cannot be interfered with in a proceeding such as has been instituted here. This necessarily resolves the case into a fact controversy, and presents the question: Did the defendant, at the time he undertook to exercise this statutory right, have a *private* way to his land, such as the statute suggests he is entitled to? If he did not, the statute affords him a remedy by which a way may be secured. If he did have a private way, such as the statute contemplates, then he was without right to proceed under the statute. It must, however, be a vested right of way, and not subject to the will of another. It must be either a vested private right of way, or such a public highway as vests in him a right to use in common with the public.

Prior to 1908, and until his death, which occurred on the 25th day of December, 1914, one Dunning was the owner of the land now owned by defendants. He was the father of the defendant Dora, and upon his death, she succeeded to his title. In the spring of 1908, while Dunning was the owner of this land, some arrangement was entered into between Wheeler and Dunning, under which a lane, 16 feet wide, was fenced off the west end of Wheeler's 80, connecting the 40 on the north with the 80 on the south of Wheeler's land, shown on the plat. This lane afforded ingress to and egress from the land on the south of Wheeler's, and to and from the land in question. Through this lane and over this

strip of land, Dunning and the defendants could and did pass to and from this north 40, from 1908 up to the time this proceeding was instituted. On this south 80 are defendants' buildings, and this lane afforded a fair and reasonable access to the same from their north 40, and from the buildings to the public highway on the east. This was used by Dunning before, and by the Balls ever since, Dunning's death, and was still used by them at the time the condemnation proceedings, herein sought to be enjoined, were begun. The condemnation proceedings were commenced on the 25th day of April, 1919. The application was filed on the afternoon of that day. On the 24th day of April, Wheeler, at the instance and request of the plaintiff, tendered to the defendants a good and sufficient warranty deed to the said strip, and this deed was returned to Wheeler, with defendants' refusal to accept it, on the morning of the 25th day of April. The reason given by defendant for refusing it was that:

"He would not accept any other outlet from his land except that which he proposed to condemn, and would not listen to anything else from anybody."

The evidence shows that this Wheeler lane furnished a fairly good and sufficient road to, and a fair and reasonable exit from, his land on the north to his land on the south. The defendant Ball testified:

"I drove a gang plow over that lane on the west end of the Wheeler 80 this spring, for the purpose of plowing, and nearly mired my team, as I came out right at the outlet. I could possibly mire a team on that road before I get on my wife's land, right at the outlet. There is just a little piece washed out at the outlet, that has been worn down by the cattle walking down there and permitting this to wash out, and it has never been fixed. I didn't try to fix it. It wouldn't take much trouble to fix it. I didn't want to fix it."

It will be noted that the statute does not fix the character or the width of the way, the existence of which must be negatived in order to justify this proceeding, but simply fixes the maximum width, in the event condemnation pro-

ceedings are carried out. The statute provides that one owning land, and not having a public or private way out from the land, may avail himself of the provisions of this statute. The statute must be construed to mean that one who has reasonable ingress to and egress from his land, over a private or public way, cannot avail himself of the statute, and condemn a public way over the land of another.

It may be argued, however, that the lane on the west of the Wheeler land, even though conceded to be a private way, within the provisions of the statute negating the right to maintain the proceedings to condemn, did not lead to a public highway. It led, however, to defendants' land on the south. This north land was farmed in connection with the land on the south. The defendants' home and all their buildings are on the land on the south. There is a public highway immediately adjoining defendants' land on the south. This lane gave access to the land on the south, and enabled them, by proceeding over their own land, to reach the public highway to which they were entitled to access, and this, without let or hindrance. Where one owns land from which there is a private way to other land owned by him, and it is made to appear that the other lands are on a public highway, it would seem to be not within the spirit of the statute to permit him to relieve his own land of the burden of a public highway, and place that burden upon his neighbor. For 11 years, this lane along the west side of Wheeler's land had been open to the use of the defendants, and had been used by them for ingress and egress. It had been used without objection from the owner of the soil. No obstructions were placed in the way of its use. Wheeler made no objections, and Wheeler was the owner of the soil over which it passed. The record shows that Wheeler not only consented to its use, but fenced it, so that it might be used exclusively as a lane, and for ingress and egress, and that the fence was kept up, some repairs made by Wheeler and some by the defendant, after it was erected. The preponderance of the evidence shows that this way was in good condition for travel, and that defendant could reach the

public highway, on the east of his south 80, by means of this lane, by crossing his own land.

It may be argued, however, that the right to use this lane was a permissive right only, and was not a vested right. Before this action was commenced, however, Wheeler, at the instance of the plaintiff, tendered to defendants—in fact, delivered into their possession—a good and sufficient warranty deed, conveying to them an absolute title to the land covered by this lane. The defendants, though seeming to desire a permanent outlet from their north land, contumaciously refused to accept it, and insisted that they would accept no other way except that which was obtained through the condemnation proceedings, and which was proposed by them to be opened under such proceedings. When condemnation proceedings, under the statute, are contemplated by a party who claims to have neither a public nor a private way to his land, it would seem, from a reading of the statute, that the thought is implied there that there must first be some attempt to procure a right of way of ingress and egress which will be fair and just to both parties, and a refusal. The Wheelers had given the use of this strip, its use had been accepted, and it had been continuously used for the purpose of ingress and egress, for more than 11 years. It was a reasonably sufficient way for ingress and egress. The only objection that could reasonably be urged to it is that it was permissive only. However, before the proceedings were commenced, its permissive character was destroyed, and an absolute right tendered. The fact that a right of way sufficient for ingress and egress was tendered, absolutely and unequivocally, to the use of the party desiring ingress and egress, when it affords him a reasonably sufficient way for ingress and egress, negatives the idea that he may proceed under the statute to condemn a public way.

The thought herein expressed is suggested in what was said by Justice Sherwin in the opinion filed in *Carter v. Barkley*, 137 Iowa 510, 514. What was said by Justice Sherwin there was upon the point urged: that the plaintiffs had a right of way. The evidence disclosed that they did not

have an absolute right to use the right of way, against the objection of the owner of the land over which the right of way passed. The court said:

"Unless a party has a way, either public or private, which is unobstructed and unquestioned, he may institute proceedings under the statute. If the defendants herein had said to the plaintiffs, 'You have a way from your land north, and we do not question your right to use it without the obstruction of gates,' a different question would be presented."

The defendant is not entitled to more than one way of ingress and egress. In *Fisher v. Maple Blk. Coal Co.*, 171 Iowa 486, 491, this court said:

"It is true that, when the condemnor comes within the statutory conditions, he may take his choice, as between a highway and a railway connection. But he can have only the one 'way.' No limitation is put upon his use of such way as he acquires. He may use it as a wagonway or railway, and probably both. But, having acquired the one or the other, he may not again condemn for outlet purposes; and it matters not, under the statute, whether he has acquired his previous outlet by condemnation or by private contract."

It is the general holding of the courts that statutes conferring the power of eminent domain are to be strictly construed in favor of the private owner. *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 137; *Bishop v. North Adams Fire Dist.*, 167 Mass. 364 (45 N. E. 925); *City of East St. Louis v. St. John*, 47 Ill. 463; *Chicago & E. I. R. Co. v. Wiltse*, 116 Ill. 449; *Ligare v. City of Chicago*, 139 Ill. 46 (28 N. E. 934); *McElroy v. Kansas City*, (Mo.) 21 Fed. 257.

We might stop the consideration of the case here; but a further fact appears in the record. That is, that the plaintiff, on the trial of the case, tendered to the defendants an absolute right of way from their north land to the public highway, which they seek to reach by condemnation, to and over one of the public streets of the town of Strawberry Point. This road so tendered affords a fair and reasonable ingress and egress from the north line of defendants' 40 to the highway leading into Commercial Street, on the east

of plaintiff's fairgrounds. It appears further in this record—though not a controlling thought—that to permit defendants to open this road where they propose to open it, through condemnation proceedings, would cause irreparable injury to the plaintiff's premises and the business carried on there.

The law and equity are both with plaintiff upon the basic right in controversy.

It is contended, however, that the court erred in permitting plaintiff to file an amendment, tendering a deed over land leading to the public streets of Strawberry Point; but this we need not consider. It in no way prejudiced any of the rights of the defendant determinative of this controversy.

Upon the whole record, we find that the defendants are not within the protection of the statute in their effort to condemn a public way over plaintiff's land; that they have a private way such as, under the statute, negatives their right to condemn a public way over the land of their neighbor. Upon the whole record, we think the judgment of the court was right, and it is—*Affirmed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

RETTA WILEY, Appellee, v. C. A. FLECK, Appellant.

SEDUCTION: Divorced Woman and Married Man. Sexual inter-

1 course, actually resulting from protestations of love by a married man for a twice-divorced woman, of chaste character, reinforced by repeated promises of marriage as soon as a divorce can be obtained, designed for the purpose of inducing such intercourse, constitutes legal seduction.

SEDUCTION: Promise of Marriage by a Married Man. Evidence

2 of a promise of marriage by a married man is admissible as bearing on the sincerity and good motives of the promisor in his protestations of love.

APPEAL AND ERROR: Harmless Error—Withdrawing Improper

3 **Exhibit.** After the erroneous reception in evidence of a written exhibit which embodied the statements of fact already testified to by an impeaching witness, the immediate withdrawal of the same, without reading to the jury, with direction by the court to the jury to wholly disregard it, effaces all possible prejudice to the objecting party.

TRIAL: Belated Opening of Case for Additional Testimony.

4 ing the case for additional testimony, in order to clarify obscure points, even as late as the pendency of a motion for a directed verdict, is within the fair discretion of the court.

Appeal from Greene District Court.—M. E. HUTCHISON, Judge.

JULY 6, 1920.

REHEARING DENIED SEPTEMBER 25, 1920.

ACTION to recover damages for an alleged seduction. Opinion states the facts. Verdict and judgment for the plaintiff. Defendant appeals.—*Affirmed.*

J. A. Henderson and C. H. Van Law, for appellant.

William G. Clark, F. L. Groesbeck, Howard & Sayers, and *John McLennan*, for appellee.

GAYNOR, J.—Plaintiff brings this action in three counts, and in each count asks judgment against the defendant for a specific sum. These sums she says should be allowed her as compensation for the wrongs charged to have been done to her by the defendant.

1. SEDUCTION:
divorced
woman and
married man.

The first count is based on an alleged rape, committed on or about the 30th day of April, 1916. The second rests upon the same character of offense, alleged to have been committed on or about June 1, 1916. In the third, she says that, on or about the 1st day of June, 1916,

defendant, by false promises and corrupt and seductive arts, and by professions of great affection and a great love for her, coupled with a desire and expressed purpose to marry her, seduced and debauched her; that the act of seduction occurred soon after the alleged rapes referred to in the first and second counts.

To each count the defendant interposed a general denial, and further alleged that the action therein set out was barred by the statute of limitations.

The cause was tried to a jury, and a verdict returned for the defendant on the first two counts. On the third count, however, the jury returned a verdict for plaintiff. A motion for a new trial was submitted and overruled, and judgment entered on this verdict. The defendant alone appeals.

This eliminates from consideration all questions involved in the plaintiff's claims made in the first and second counts, except in so far as the testimony offered in support of these counts has probative bearing upon the issues tendered in the third count.

The defendant, as a ground for reversal, says:

1. That, after the plaintiff had rested her cause, and a motion had been made by the defendant that the court instruct the jury to return a verdict for the defendant on this third count, and, after defendant had fully argued and submitted the motion, the plaintiff asked leave, and the court permitted her, to introduce further testimony in support of her contention, over defendant's objection. It is the thought of the defendant that the court was about to instruct the jury as requested; that the plaintiff was advised of this, and, perceiving the danger that attended her then situation, then asked for leave, and was permitted, to introduce further testimony upon a vital fact in the case; that this was of great prejudice to the defendant. The thought of the defendant is that the court abused its discretion in allowing the plaintiff to introduce further testimony after the motion for a directed verdict had been presented to the court and fully argued.

2. That the court erred in overruling a motion for a

directed verdict, made by the defendant as to this third count.

As to this second assignment, the thought of the defendant is that the evidence was insufficient to support a verdict in plaintiff's favor, should one be returned.

3. That the court erred in overruling a motion to set aside the verdict for a new trial, because the verdict is contrary to the law, and is not supported by the evidence.

4. That the court erred in giving the eleventh instruction, given on its own motion.

5. That it erred in permitting certain exhibits to be introduced in evidence, to which particular reference will be made hereafter.

We will take up the second and third assignments together, to wit: Did the plaintiff, at the conclusion of all the evidence, make out a case for the jury on the third count of the petition?

It would serve no useful purpose to set out even the substance of all the evidence that was offered in support of her claim based on this count. There is a sharp conflict in testimony as to the matters relied upon by the plaintiff to sustain her contention. It is not for us to determine the credibility of the witnesses or the weight to be given to their testimony. That lies peculiarly within the province of the jury. The jury has resolved the matter in favor of the plaintiff. We will, however, set out briefly the facts that the testimony tends strongly to show, and which, if found by the jury to be facts, justify its verdict. Before beginning a recitation of the evidence touching controverted facts, it is proper that we set out that which does not appear to be controverted at all.

At the time of the happening of the matters herein complained of, the plaintiff was about 44 years old, and unmarried, though twice married and twice divorced. She married her first husband in 1891, and lived with him about 4 years. No children survived this marriage. This marriage was legally dissolved in 1895, on her complaint. In 1897, she again married, and lived with this husband about 10

months. She was again divorced. At this time, plaintiff was about 25 or 26 years of age. Thereafter, she came to the city of Des Moines, and was engaged for several years in various avocations through which she earned a livelihood, supporting herself by her own labor, and, a portion of the time, supporting her mother and imbecile brother. For a time, she was engaged in the millinery business, worked in dry goods stores, and subsequently kept a boarding house. She was thus occupied at the time the defendant met her. This was some time in February, 1916. The defendant is, and was at this time, a farmer, residing near the city of Jefferson, and was about plaintiff's age. He had a son, 18 years old, residing with him on the farm, and a married daughter; but she lived in a home of her own. Defendant's wife had separated from him, and was then living in the city of Jefferson. The record shows that the separation was permanent, and was so understood by defendant and his wife, and a divorce was in contemplation. At the time these parties met, the plaintiff's mother was dead, and had been dead then about 2 years. Plaintiff and defendant met for the first time in February, 1916. They had never seen each other before. The meeting took place at plaintiff's home. She details it substantially as follows:

"He came to my home, and told me that the Ladies' Aid Society sent him to me, and had highly recommended me to him as a good woman to keep house for him. These ladies knew my circumstances, and they thought it would be good for me to have a change. They had heard me say that, if I could get my brother on a farm, I could make something of him. Defendant told me the minister gave him my name, and recommended me to him. He wanted me to keep house for him. I told him it would be impossible for me to leave my home and keep house for anybody. I told him I had a few boarders, and couldn't possibly leave my home. He wanted me to write to him. He came back, in about two weeks, and insisted that I should come and keep house for him. I then told him it was impossible. On this second visit, he made love to me. Told me he loved me, and wanted

me to go and keep house for him. I told him I was very sorry, but I couldn't return his love; that my love spirit was dead. He said, 'I am sure you will learn to care for me.' I said: 'Oh no, you would soon grow tired of my brother, and then you would soon grow tired of me through my brother.' My brother is mentally deficient, and shows it in all his manners. He wouldn't take no for an answer, at that time. He came again, about 4 o'clock in the afternoon, and stayed for supper, and wanted me to go to a theater with him. I invited a lady friend up to go with us, so we all three went to the theater that night. Ella Gilliland is the lady. I had known her for about 8 years. We have chummed together back and forth. She is now the wife of the defendant. He stayed over another day, and tried to have me go. On this day, he also stayed to supper. He said he didn't want anyone to keep house for him but me. I was the one he wanted, and I was the one he was going to have. I told a Mrs. Minear about the place. She came up to talk with him. He wouldn't talk to her. When he first came, he told me his wife had left him, and taken all the furniture, and he wanted me to bring all my furniture, because he thought I would be more contented to stay with my own things, and I brought all my furniture when I came. I consulted his daughter about my going up, and asked her if she thought it would be all right for me to go and keep house for her father. He kept telling me all the time he was going to have a divorce; that he would soon have a divorce; that he was going to have it in April; that it was pending in court. After his second visit, he came again, in about three weeks, and stayed three or four days. He took supper with me every evening. He stayed down town somewhere at night. It was about the last of March that I first visited his home. When I came, he took me to his daughter's house. She seemed glad to receive me, and was very nice. She told me her mother was gone forever. I came to stay on the 12th of April. To secure my promise to come to the farm, he kept insisting that I should promise to be his wife, and come up and keep house for him until he could get a divorce, and

today and get married.' He said, 'It will not happen again.' He said he wasn't going to let me leave him. Up to the time of the assault, he had been gaining more of my confidence. After this assault, he promised I would not have to live that way with him; that he was sorry that he did that way, and he begged me to remain with him; that he would soon have his divorce, and we would be married. I told him that, if he would treat me right, I would stay with him. He said, 'I will treat you right, baby,' and after that, he treated me very nice, for a couple of weeks. Later, he came to my room, and tried to have intercourse with me, but I prevented him. He seemed angry for several days. At the time of this occurrence, he said: 'Well, what is the difference? We are going to be married anyway.' He was always saying that. He didn't attempt to use much force at this time. He stayed in my room about half an hour, and then went away. About the first of June he assaulted me again. I had gone into my room to take a bath and rest. He came into my room. I said, 'What do you want, Charlie?' He said: 'It is lonesome down stairs. I don't want to stay there by myself.' I told him I would be down in a minute. He came and laid down on my bed; said he was going to lie down by my side. I had nothing but a kimona on. He took my kimona off of me—tore it off. I had fallen from a cherry tree, a few days before, and my arm was paralyzed and helpless. I made all the resistance I could. He handled me very easily that day, because I was weak and my arm was paralyzed and I was sick. He just held me there with his body until he was ready to do what he wanted. He had intercourse with me at that time. After this, he became more or less apologetic. He came to my room, and made love to me. He would come when I was asleep. He would get in bed with me, and say, 'Oh, baby, I am afraid.' He would smother me with kisses. From that time on, he continued to assure me of his love, and that he intended to marry me—always promising he would marry me. I told him: 'Please go and settle it with your wife, so we can be married, and have it all settled.' "

She was then asked these questions:

"Now, Mrs. Wiley, I will ask you whether, in spite of the force that had been used on you, about which you have testified, you still believed the professions and assurances of love and affection that the defendant made to you. A. I was perfectly sure that he intended to be fair with me, and stay by his promises with me. I would never have stayed with him at all, if it had not been for that."

She was then asked this question:

"Now, what occurred after these assaults, in the succeeding period that you remained there, as to the defendant's coming to your room, from time to time, in the night? Tell how frequently he came. A. Well, he came anyway two or three times a week. He seemed to have me in his power more than at any other time. Q. Now, what occurred when he came to your room at these times, two or three times a week, about which you testified? A. He would always make love to me and caress me, call me endearing names, and that, of course, would lead to another intercourse each time. I tried to persuade him to go away and leave me alone until we could get married. He couldn't grasp my bearings. I couldn't prove myself to him. I couldn't tell what I was there for—sweetheart, servant, or mistress. Q. What did he say to you when you said this to him? A. He would say, 'Oh, baby, we are going to get married anyway, just forget it.' Then he would embrace me and make love to me and say he couldn't stay away from me. I would not have submitted to him, had it not been for this. This continued all the rest of the summer after the first of June until I left there in October. After I left, he visited me in Des Moines. He asked me who I was going with, and urged me to go with someone. I told him I couldn't go with anyone, after he treated me like he had. He answered: 'Well, I will tell you. You have misunderstood all my love. All I wanted was to gain revenge on some good woman, because my wife had deceived me.'"

This is practically plaintiff's story.

The defendant admits the intercourse, does not deny the

protestations of love, but charges the plaintiff with being a vampire; claims that she solicited and invited all that she now complains of.

Assuming the plaintiff to be the subject of seduction, assuming that the plaintiff had a right to rely upon the assurance of love and affection, so coupled with a tentative promise of marriage, the jury could not well do otherwise than return a verdict for her in some sum. We take it that it is not seriously contended by the defendant that, if the plaintiff is the subject of seduction, and sufficient arts and promises were made to support a claim of seduction, the defendant is not liable. The contention of the defendant seems to be that, because the plaintiff had been married and divorced, she necessarily had such experience and knowledge of the lecherous ways of men that she should be immune from their wiles, and, being immune, as a matter of law cannot invoke the protection of the law, made for the protection of those who are led into yielding in reliance upon the false promises and artifices of designing men. It seems to be the thought of the defendant that a woman who had been twice married, who had reached the age of 44 years, who had the experience in life that the record shows this plaintiff had, cannot be heard to say that she relied upon the promises and protestations of love such as this record shows were made to her by the defendant, and cannot be heard to say that she was justified by them in submitting, or in being led into submission, through the operation of their influence upon her mind. It is true that, in this sort of offense, at common law the woman was considered *particeps criminis* with the man, and the man was not punished criminally for his participation in the joint delinquency. Courts, however, departed from this doctrine. It was observed that, in many instances, unmarried females of chaste character needed the protection of the law from the lustful machinations of evilly disposed men who resorted to flattery, blandishments, courtship, and false promises, to ruin their too confiding victim. In every case of seduction, the jury must be able to say first that the woman was of chaste char-

acter; that false promises and artifices were used to induce her to surrender her virtue; that she did surrender her virtue because of the false promises used. Further, we might say, it must appear that the false promises, machinations, flattery, or artifices used were of such character and were used under such circumstances that it can be said, after the act is accomplished, that the woman submitted to the act by reason thereof. The defendant contends that a woman who has been once married is possessed of such knowledge that she ought to be immune from the seducer's arts; but it cannot be said that, as a matter of law, a divorced woman is not within the protection of the law which punishes the seduction of a woman of previously chaste character. There is nothing unchaste or immodest in the marriage relation, nor does that relationship debase or lower the standard of morals and right living. We should have to say that it does, if we sustain defendant's contention. A widow may be as pure in thought, as chaste in purpose and life, as she would have been had she never sustained the marital relationship; and, if this be so, she is as much within the protection of the law as one who was never married. The most that can be claimed for the previous marriage is that it tends to show that she possessed a knowledge of life and of the relationship of the sexes which would make it improbable that she would yield to the blandishments of the seducer. But that makes it a jury question. We think the right doctrine is announced in *State v. Wallace*, 79 Ore. 129 (154 Pac. 430). It was there held that, if it be reasonable that a woman once fallen from virtue may, upon proof of reformation, be the subject of seduction, then a woman who has become a widow, after a married life of virtue, is surely entitled to no less protection. To hold that previously married women are not included within the protection of the law would be tantamount to saying that by marriage a woman becomes unchaste, and so loses the protection of the statute. Confidence and affection seem to play a part in all cases of seduction, and inducement may lead even a previously married woman to consent. We think

there is nothing in this contention. Whatever there is in the fact of plaintiff's previous marriage that has any probative force upon the issues here tendered, it goes only to negative her claim that she relied upon the actions of the defendant in surrendering her virtue. Whether she did or not is a question of fact, and not of law, and is to be solved by a consideration of the whole record; and it is for the jury to solve, according to the very right of the matter.

On the question as to whether the words "an unmarried female of previous chaste character" include in their meaning a widow of chaste character, see *State v. Eddy*, 40 S. D. 390 (167 N. W. 392), in which it is said:

"It might properly be the basis of an argument to the jury in the discussion of the question whether the prosecutrix really relied upon the promise, but we think no court should say, as a matter of law, that a woman who has been married is incapable of being the victim of seduction."

It is contended that, inasmuch as the defendant was a married man, and this fact was known to the plaintiff, she cannot be heard to say that she relied upon a promise to do that which, under the law, she knew he had no right to do. As to this, we have to say that the plaintiff does not rely solely upon the promise of marriage, as an inducement to her submission. This was always coupled with protestations of love and affection, abundantly and profusely showered upon her. This expressed desire and promise to marry added force to these protestations. Even in the absence of any promise to marry, a foundation for a claim of seduction is well laid in this record. The express desire and promise of marriage gave color of truth and honesty to his professions, and tended to disarm the plaintiff, and enable the defendant to scale the ramparts.

Though this express desire for and promise of marriage, under the circumstances, might not be sufficient, in itself, to justify the plaintiff in submitting, yet proof of it was surely competent. It tended to show his sincerity, his good motives in the use of those other seductive arts which, if relied upon, are recognized as supporting a claim of seduc-

tion. It tended to lead her mind to believe that he was honest in his protestations, and that his love was all that virtuous women dream of love.

On the question of a promise of marriage as an inducement, see *Hawk v. Harris*, 112 Iowa 543, 547. See, also, *People v. Weinstock*, 140 N. Y. Supp. 453.

On the question of an alleged rape, followed by seduction, see *Castleberry v. State*, 21 Ga. App. 69 (94 S. E. 269), in which the court said:

"Even if she had consented to the first sexual intercourse solely because of fear of bodily harm, which would have amounted to a rape, and he, afterwards, by persuasion and promises of marriage, obtained her free consent to have intercourse with him, and thus seduced her, he would be guilty of the crime of seduction."

We next consider the fourth error complained of: that the court erred in giving the eleventh instruction. This instruction told the jury:

2. SEDUCTION: "The promise of the defendant to marry
 promise of the plaintiff when he should obtain a decree
 marriage by of divorce from his then wife, would not be
 a married a promise to marry which of itself would
 man. warrant the plaintiff in submitting to sexual intercourse
 with the defendant; for an agreement under such circum-
 stances is against public policy; *but such promise to marry,*
if any such was made by the defendant, may be considered
by you together with all the other evidence in the case bear-
ing thereon, for what you may deem it entitled on the ques-
tion of the relations of the parties, in determining the ques-
tion as to whether the plaintiff was or was not seduced by
the defendant."

What we have already said disposes of this question. The portion of the instruction objected to is italicized by us.

The fifth error relates to the action of the court in overruling the objection of the defendant to certain exhibits offered by the plaintiff on the trial. The defendant's son was

3. APPEAL AND
ERROR: harm-
less error:
withdrawing
improper
exhibit.

called as a witness in his behalf, and his evidence tends to show that he had heard or had seen the plaintiff visiting his father's room; that she would get up early in the morning, with her shoes in her hand, and, before going down into the living room, would enter his father's room and remain with him some time; and that this frequently occurred. This boy was interrogated as to whether or not he had not made different statements out of court than that to which he had testified, and had not said that he heard his father going to the room of the plaintiff, instead of having heard the plaintiff going to the room of his father. He denied this, and denied that he had ever made any such statements. Mr. Howard, who was attorney for the defendant's wife in her divorce proceedings, was called to impeach this boy. He claimed to have interrogated this boy, touching his father's conduct, and said that the boy had stated to him, and he had reduced the statement to writing, that he had heard his father frequently visiting the plaintiff's room in the morning, and about the times when he testifies on the trial that plaintiff visited his father's room. Without objection, Mr. Howard was permitted to detail what the boy said. This, of course, was simply impeaching testimony, and offered as such. After this evidence was all in, the plaintiff offered the memorandum taken by Mr. Howard, and the defendant objected to it. The court overruled the objection, and plaintiff's counsel started to read the same to the jury. He had not proceeded far, when the court stopped him, and counsel then said that he would withdraw his offer of the exhibit, and the court admonished the jury that the exhibit was withdrawn, and defendant's objection sustained, and that it was not for their consideration; and told the jury that any portion of the exhibit read to them should not be considered by them as evidence at all. Nothing further was done. Every fact that this exhibit contained was detailed by Mr. Howard to the jury, when on the witness stand. He said that his statements were made after refreshing his memory from this exhibit. The exhibit never went to the jury. The jury was admonished not to

consider it. Of course, the court erred in at first overruling defendant's objection. That objection should have been sustained; but no prejudice resulted to the defendant because, before the exhibit was read to the jury, the offer was withdrawn, and the court admonished the jury that it should not be considered by them in any way as having probative force upon the issues tendered. We cannot see how there could be any possible prejudice to the defendant in what was done. Indeed, we think that the record negatives the thought that any prejudice resulted to the defendant from the action of the court. Error, to be reversible, must be prejudicial, and we see no prejudice here.

It is next contended that, after the plaintiff had rested, and after a motion for a directed verdict was made by the defendant, the court gave the plaintiff leave to introduce fur-

4. TRIAL: de-
lated opening
of case for
additional
testimony.

ther testimony. It seems to be the thought of counsel that, at the time the motion was made, it was good, and would have been sustained by the court; that the plaintiff was permitted to introduce new matter thereafter, and to build a case that she had not made at the time the motion was made; and that leading and suggestive questions were asked the plaintiff by her counsel. The leave to introduce testimony after a motion for a directed verdict, rests in the sound discretion of the court, and, unless abused, will not be interfered with. When it clearly appears that it was in the interests of justice, it will never be interfered with.

We have read the record made, and do not find the defendant's claim sustained in any of the matters urged as prejudicial. The questions were not leading or suggestive. The fact is that every matter inquired about at this time had been testified to by the plaintiff before. The examination of plaintiff after this motion simply emphasized and made plainer some portions of plaintiff's testimony that had come in so mingled with other matters that it was difficult to say, perhaps, whether the plaintiff was relying upon the promise of marriage exclusively, as a basis for recovery. The ques-

tions propounded at this time made it plain that her testimony could not bear the construction placed upon it by the defendant in his motion for a directed verdict.

We can see no ground for interfering here with the action of the court.

We do not find it specifically urged in the assignment of errors or in the brief points that the verdict is excessive.

A verdict for plaintiff on this third count has support in the evidence.

We find no ground for reversing the case on account of any matters urged by the defendant, either in his assignment of error or brief points. The case, therefore, must be and is—*Affirmed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

N. P. CARL et al., Appellants, v. MODERN BROTHERHOOD OF AMERICA et al., Appellees.

APPEAL AND ERROR: Nontimely Appeal. An appeal will be dismissed, when the record affirmatively shows that it was not perfected within statutory time.

Appeal from Linn District Court.—MILO P. SMITH, Judge.

SEPTEMBER 29, 1920.

For reasons that will appear in the opinion, it is not required that any preliminary statement be made at this point.—*Dismissed*.

E: C. Barber, G. P. Linville, and H. W. Wieman, for appellants.

Grimm, Wheeler, Elliott & Jay, E. A. Johnson, Geo. W. Miller, and Sam Sparrow, for appellees.

SALINGER, J.—I. The abstract discloses that the plaintiffs, appellants, are members of the defendant society, the Modern Brotherhood of America. They challenge the legality and validity of certain increases in insurance rates, enacted at certain supreme conventions of the society. They complain of various alleged illegal conduct of the defendant officers and directors. Upon this paper issue was joined. One defense was the claim that plaintiffs were estopped by former adjudications. The record shows these pleas in estoppel were sustained by the trial court, except as to certain matters reserved for future determination. After entry of decree, the plaintiffs petitioned the trial court for a rehearing. This petition was overruled. Thereafter, the plaintiffs perfected the appeal we are now considering.

Unless appeal be perfected within statute time, we have no jurisdiction over the subject-matter. We are constrained to dismiss this appeal, because the abstract filed by the appellants shows affirmatively that appeal was not perfected within statute time.

The decree appealed from was entered September 29, 1917. On October 10, 1917, a motion for rehearing was filed. This was overruled on October 25, 1917. Granting, for the sake of argument, that the time to appeal did not run until this overruling, even then appeal must be perfected within six months from that date. And it was not.

On page 243 of appellant's abstract, there is this recital:

"That, on the 27th day of May, 1918, the plaintiffs perfected their appeal to the Supreme Court of the state of Iowa by securing accepted service on defendants by their attorneys and the clerk of said district court, state of Iowa, in and for Linn County, of notice of appeal, and the same was on said date filed with the clerk accordingly."

More than seven months intervene between October 25, 1917, and May 27, 1918. Here is no case for mere paucity—no mere failure to aver jurisdictionals. There is an affirmative admission that appeal was not taken in time. Hence, cases such as *Sawyer v. Iowa C. P. A. Assn.*, 177

Iowa 218, and *Clinton Bridge Works v. Kingsley*, 188 Iowa 218, do not apply. And the first-named case does not control, because the print of appellee asserts that, "upon the face of the record, this court has no jurisdiction of the appeal herein."

We are compelled to order that this appeal be—*Dismissed*.

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

JENNIE E. DARST, Appellant, v. FORT DODGE, DES MOINES & SOUTHERN RAILROAD COMPANY, Appellee.

TRIAL: Equity (?) or Law (?) A quasi equitable prayer, following a strictly defensive answer at law to a petition at law, presents no justification for a transfer to equity, when an analysis of the pleadings demonstrates that such prayer may be just as effectually satisfied at law as in equity. (Sec. 3435, Code, 1897.)

Appeal from Webster District Court.—R. M. WRIGHT, Judge.

SEPTEMBER 29, 1920.

THE opinion sufficiently states the nature of the case and the material facts. From judgment in favor of the defendant, plaintiff appeals.—*Reversed*.

Healy & Faville and *Frank Maher*, for appellant.

Price & Burnquist and *Dyer, Jordan & Dyer*, for appellee.

WEAVER, C. J.—The plaintiff instituted this action at law, January 14, 1919. Her petition alleges her ownership of a described farm of 240 acres, which she has improved and fitted for use for agricultural purposes. Along the south line of this farm there is, and for many years has been, a public highway, which affords its only means of egress and

ingress; and on the north side of this road and immediately adjacent thereto are the residence and buildings and other structures intended for the farm and family use. She further alleges that, in the year 1916, the defendant company, a corporation owning and operating a line of interurban railway from Fort Dodge, in Webster County, to Webster City, in Hamilton County, acting without legal right or authority, and without in any manner obtaining the abandonment of the highway, and without obtaining permission from the board of supervisors to construct said interurban railway upon the public highway, and without obtaining the consent of the residents owning property abutting thereon, and without causing the damages to such property to be ascertained and paid, as provided by law, wrongfully entered upon said highway at or near the southwestern corner of plaintiff's farm, took possession thereof along its full length, where it borders upon said farm, and proceeded to destroy said highway, making deep and extensive excavations, and erecting embankments therein. In this manner, plaintiff alleges, the highway so bordering upon and serving the use of her farm and house has been destroyed for the full length thereof, has opened up a deep, wide, and dangerous cut, immediately in front of her house and other buildings and improvements, removed the lateral support of her soil, and otherwise greatly and permanently injured her property, for all of which she asks damages in the sum of \$10,000.

Answering the petition, the defendant admits plaintiff's ownership of the farm described, and that, prior to May, 1917, there was a public highway upon its south border, substantially as alleged. It also admits that it has located and constructed its railway upon said highway, and in so doing has done the cutting, excavation, and grading required for the proper performance of such work of improvement. It alleges, however, that, before the time when it entered upon said work, the plaintiff was represented by her husband and agent, J. N. Darst, who, with plaintiff's knowledge and consent, negotiated and treated with defendant concerning such occupation and appropriation of the highway, with the re-

sult that an agreement was made between them, by which the said husband, on his part, and for and in behalf of his wife, waived any and all claim for damages to their property by reason of the abandonment of the highway and the construction of the railway, in consideration of the following undertaking by the defendant company: In satisfaction of such claim or claims, defendant promised to pay the plaintiff and her husband the sum of \$600 in money, and to bind itself to stop on signal at plaintiff's crossing all such of its passenger cars as might be scheduled to stop at other public highways between Brushy and Evanston, and to install and maintain steps down the embankment on both sides of its track at that point, and to construct and maintain open farm crossings at other designated points.

It is further alleged that, after said agreement was reached, defendant reduced the form thereof to writing, and prepared a check for \$600, ready to deliver to J. N. Darst, when the writing should be executed. Defendant alleges, however, that, in reducing the agreement to written form, it omitted therefrom, by mistake, the paragraph making it the duty of the company to stop its cars on signal, and to install and maintain steps on the embankments at the crossing, and that, when the paper was presented to J. N. Darst for execution, he discovered and pointed out the omission, whereupon defendant, by its agent, immediately offered to rectify it; but Darst refused to proceed with the deal, and although defendant did correct the writing to conform with the agreement, Darst persisted, and has ever since persisted, in refusing to sign the agreement, or to accept the payment tendered, or in any other manner to carry out their oral contract.

Further, and by way of estoppel, defendant alleges that, upon the making of the oral agreement, and in reliance thereon, it proceeded to expend much time, labor, and money in the construction of its road on the highway so appropriated; that such labor has been performed and money expended with the full knowledge of both Darst and his wife, who have acquiesced therein, without protest or complaint.

It is further alleged that defendant has performed its agreement in all respects, and brings into court its said tender of \$600, for the plaintiff's use and benefit. Paragraph 11 of the answer is in the following form:

"The defendant alleges that, by reason of the facts herebefore set out, the plaintiff is not entitled to maintain its action for damages, as alleged, or otherwise; on the contrary, the defendant is entitled to a judgment and decree of this court requiring the plaintiff to perform the contract herein set out, in all as set forth herein; that the defendant is ready and willing to perform each and every provision thereof promptly, if any of them have been overlooked or omitted; alleges, however, it has in good faith performed, on its part, each and every provision thereof."

The answer concludes with a prayer that the petition "be dismissed; that judgment and decree be entered, requiring plaintiff to perform specifically the contract into which she entered by oral agreement and subsequently reduced to writing, a copy of which is attached to and made part of the answer, and such other and further relief as is just and equitable."

The above mention of a contract "reduced to writing" has evident reference to the copy or form prepared by defendant, the execution of which, it is alleged, the plaintiff refused.

Following the filing of the foregoing answer, defendant moved to transfer the cause to the equity calendar for trial, for the reason that the issues tendered by the pleadings are, properly triable in equity only. The motion was sustained, and the transfer ordered. To this ruling the plaintiff excepted, and has appealed therefrom.

The appeal presents the single question: Do the pleadings present an issue justifying the trial court in ordering the cause transferred to the equity calendar for trial?

That the cause of action stated in the petition is at law, and not in equity, is concededly not open to question. It states no claim and makes no demand which invokes an exercise of the equity jurisdiction of the court. It is a sim-

ple money demand, based upon an alleged wrongful interference with plaintiff's property and property rights. To sustain the order of which appellant complains, the appellee cites and relies upon Code Section 3435, which provides that:

"Where the action has been properly commenced by ordinary proceedings, either party shall have the right, by motion, to have any issue heretofore exclusively cognizable in equity tried in the manner hereinafter prescribed in cases of equitable proceedings; and if all the issues were such, though none were exclusively so, the defendant shall be entitled to have them all tried as in cases of equitable proceedings."

This statute has often been the subject of consideration and construction by this court during the last 50 years, and it is possible that some degree of confusion has arisen in our precedents, though we think there is no serious inconsistency. Among the more recent attempts at their review we may mention *Lynch v. Schemmel*, 176 Iowa 499; *Dille v. Longwell*, 169 Iowa 686; *Tinker v. Farmers State Bank*, 178 Iowa 972; *Eller v. Newell*, 159 Iowa 711; *Tufts v. Norris*, 115 Iowa 250. The language of the statute is not particularly obscure, but it is evident that the courts have found some difficulty in giving it practical application to concrete cases.

It is first to be observed that the authority to transfer relates to "issues," and not, necessarily, to causes. In other words, if the petition be clearly at law, and the answer pleads different defenses, some of which are legal and others equitable, the authority to remove or transfer is limited to the issues raised by the equitable defenses, leaving the others to stand for trial in the law forum. The right to demand such transfer is further limited to cases where the equitable issues raised are such as have been "heretofore exclusively cognizable in equity."

In the case before us, there is no cross or counter petition. The matters alleged are pleaded defensively, as an answer to the plaintiff's claim, and, if true, they constitute

a good defense. To the answer there is, however, as we have seen, a prayer for relief attached, and this, the appellee argues, constitutes the pleading of an equitable defense, within the meaning of the statute. But the propriety of the manner of pleading need not now be questioned. A brief analysis of the answer will, we think, demonstrate the inapplicability of the precedents relied upon in support of the ruling below.

As we have already pointed out, the petition confines itself to the simple allegation of damages sustained by plaintiff by the wrongful act of the defendant in interfering with her property and property rights by the destruction of the highway. The answer admits the plaintiff's ownership of the farm described, admits that, in the construction of its railway, it has appropriated and occupied the highway for its own exclusive use, as a right of way, excavating cuts and making fills therein; though it claims to have provided for the public use another highway, south of the one so appropriated. It denies, however, that such appropriation of the highway was wrongful, and pleads that the acts of which plaintiff complains were done under and by virtue of an agreement with her, by which she waived all claims for damages on said account, in consideration of the defendant's undertaking to pay her \$600 in money, provide certain conveniences for crossing the railway track, and make the crossing at her residence a place where certain of defendant's cars would stop on signal. It further alleges that it was in reliance on this agreement that the work of constructing the railroad in the highway was done; that said agreement has been fully performed on its part; and because thereof, plaintiff is not entitled to recover damages in any sum. In other words, the plea made by the answer is, in substance, that the acts of which plaintiff complains, were done pursuant to her agreement and consent, and that whatever damages she sustained, have been settled, adjusted, and paid. Reduced to still briefer phrase, the answer is a denial and a plea of payment, or tender of payment. By no amount of ingenuity or refinement of reasoning can such an issue be

called "equitable," and much less be classed as one "heretofore exclusively cognizable in equity." Even if we treat the answer as, in effect, a cross or counter petition, seeking equitable relief by way of specific performance, we think the books will be searched in vain for any precedent where such relief has ever been granted or rule announced justifying such relief upon a showing like the one here made.

What is the agreement which defendant wishes to be specifically performed? Turning to the prayer in the pleading, we find the demand to be that "plaintiff be required to specifically perform the contract into which she entered by oral contract." To find out what was the alleged "oral contract," we go again to the answer, and find the allegation to be, as we have before stated, that plaintiff, by her agent, entered into negotiations with defendant upon the subject of her damages by reason of the appropriation of the road for defendant's right of way, and it was then and there "orally agreed" that she would "waive any claim for damage" by reason of such appropriation, upon payment to her of \$600, and the performance of the other considerations already stated on defendant's part. This is, in substance, the agreement in its entirety. There is no allegation that a further written agreement was contemplated or promised. The very pleading asking for specific performance alleges that defendant has already performed on its part, and, according to its own version of the agreement, there is nothing left for the plaintiff to "perform," unless it be to accept the tender made her, and withdraw her claim for damages. No deed or conveyance of any kind is due from her, nor is any asked. How can a court of equity give to the defendant any aid or relief which it cannot find just as effectively in the court of law where "the action has been properly commenced by ordinary proceedings?" The plea which it makes, if sustained by the proof, is a perfect defense in any court of law or equity having jurisdiction of the parties and subject-matter.

If the views we have thus expressed are correct, they are decisive of this appeal, and there is no profit in pursuing the subject further. We have no quarrel with the statutes

or precedents cited by the appellee, but the record shown by the abstract does not present a case for their application. The action was "properly commenced by ordinary proceedings." The answer presents no "equitable issue heretofore exclusively cognizable in equity," and the order sustaining defendant's motion to transfer the cause to equity for trial was erroneously sustained. The order is reversed, and cause remanded to the trial court, with directions to overrule the motion, and for such further proceedings as may be had in harmony with this opinion.—*Reversed and remanded.*

EVANS, PRESTON, and SALINGER, JJ., concur.

KITTY ELIZABETH FAIRCHILD, Appellant, v. MARY PLANK et al., Appellees.

APPEAL AND ERROR: Effect of Naming Clients in Acknowledgment of Service. An attorney who signs an acknowledgment of service of a notice of appeal, and enters after his signature a specific enumeration of the names of the persons for whom he is attorney, does not thereby acknowledge service for a party for whom he is, in fact, attorney, but whose name does not appear, either among those to whom the notice is addressed or among those entered in connection with his signature.

APPEAL AND ERROR: Construction of Notice of Appeal. Entering after the name of an attorney to whom a notice of appeal is addressed an enumeration of names of parties for whom the attorney is, in truth, attorney, and the act of the acknowledging attorney in making a like enumeration after his acknowledging signature, may not be construed as simply an attempt to identify the attorney.

APPEAL AND ERROR: Varying Appeal Notice by Affidavit. A notice of appeal and the acknowledgment of service indorsed thereon may not be varied by a conclusion affidavit relative to the *intent* of the parties.

APPEAL AND ERROR: Notice—Disclaimer and Assignment of Interest. No notice of appeal need be served on one who has disclaimed all interest in the subject-matter of an action, and, in addition, has assigned all possible interest to appellant.

APPEAL AND ERROR: Notice—"Adverse" Party Defined. An
 5 appeal by plaintiff from a judgment in its entirety demands,
 as a matter of jurisdiction, service of notice on "the" adverse
 party, to wit: on *all* the defendants. It follows, in such case,
 that the statute relative to appeals by coparties has no applica-
 tion.

APPEAL AND ERROR: Notice—Definite Interest of Nonserved
 6 **Party.** Failure to serve notice of appeal on a necessary party
 is in no wise excused because the interest of such party is
 definite and certain on the record.

APPEAL AND ERROR: Object of Notice of Appeal. The object
 7 of the requirement that adverse parties be served with notice
 of appeal is not to protect the *interest* of such party, but to
 invest the appellate court with *jurisdiction* to determine ques-
 tions which may not be determined in the absence of such
 party.

Appeal from Delaware District Court.—H. B. BOIES, Judge.

SEPTEMBER 29, 1920.

No statement is required at this point, beyond saying that
 the jurisdiction of this court is challenged because of a fail-
 ure to serve some of the parties defendant with notice of
 appeal.—*Dismissed.*

*Thompson, Hine & Flory, Arnold & Arnold, Yoran & Yor-
 an, and Edwards, Longley, Ransier & Smith, for appellant.*

*J. H. Trewin, Fred B. Blair, Henry Bronson, and E. B.
 Stiles, for appellees.*

SALINGER, J.—I. We have to determine whether it is
 proved that one of the defendants, John Robertson, was, in
 law, served with notice of appeal, and what effect upon our
 jurisdiction it has, if we find he was not so
 served. The inquiry into whether he was
 lawfully served, involves whether the notice
 was in the form demanded by law. In stat-
 ing the title, the notice of appeal names John
 Robertson as a defendant, and addresses

1. APPEAL AND
 ERROR: effect
 of naming
 clients in
 acknowledg-
 ment of
 service.

itself to "the above-named defendants." Had it been served on John Robertson in person, there would have been effective service. But there was no attempt so to serve him. If he had notice, it was through service upon persons asserted to be his attorneys. The notice was in the alternative, addressed to Trewin, Blair, and Bronson, attorneys for named parties defendant. But the name of defendant John Robertson was not included in this enumeration of defendants. It follows that, on its face, the notice does not purport to be addressed to anyone as attorney for John Robertson. Failure of the notice to address the "party" works that we acquire no jurisdiction. *Pilkington v. Potwin*, 163 Iowa 86, at 93. And under the reasoning of that case, it might well be argued that notice served on the attorney of a party is no notice, unless addressed to the one served, as attorney for such party. But, as this question is not very fully presented, while others equally decisive are, we have concluded to rest our decision on something other than the failure to address Trewin et al., as attorneys for Robertson.

II. Waiving the form of the notice, we reach whether there is any proof that Robertson was served by means of service upon attorney. Aside from one item, to be discussed later, the only evidence of service is found in an admission written upon the notice.

The alternative address of the notice is directed to J. H. Trewin, Fred B. Blair, and Henry Bronson. Immediately following the names of these three are the words, "Attorneys for Mary Plank, W. D. Robertson, Belle M. Work, Bell Paul, Harry Robertson, Eugene Robertson, Bessie Robertson, Hulda Robertson, Frank Robertson." Following this, is this statement:

"Due legal service of the above notice of appeal is hereby acknowledged, and a copy of the same received this 28th day of June, 1917."

To this admission of service, Mr. Blair appends the following signature and the other words, to wit:

"J. H. Trewin, Fred B. Blair, Henry Bronson, attorneys for Mary Plank, W. D. Robertson, Belle M. Work, Bell Paul,

Harry Robertson, Helen Robertson, Bessie Robertson, Hulda Robertson and Frank Robertson."

The evidence shows that Blair, who signed these names to this admission, was the attorney of John Robertson, and that Trewin was; and it may be assumed, for the purpose of present statement, that Bronson was. If the signatures to the admission of service had been nakedly the name of Trewin, Blair, and Bronson, and it appeared that the signers were, in truth, the attorneys of John Robertson, such admission would have bound Robertson, even though the signers did not designate themselves as attorneys for Robertson. *Clinton Bridge Works v. Kingsley*, 188 Iowa 218. And see *Horst v. Wagner*, 43 Iowa 373; *First Nat. Bank v. Eichmeier*, 153 Iowa 154; *Mathews & Co. v. Dubuque Mattress Co.*, 87 Iowa 246; and *Farmers' Nat. Bank v. Hatcher*, 176 Iowa 259, 265. So to hold is merely to declare that, where an agent makes an admission which is within the scope of his authority, the principal is bound, though the acknowledgment made does not declare what is the fact, to wit: that the signer is agent. But is this doctrine applicable where, as here, the question is not whether an agency can be defeated by mere failure to say that the agent is agent? The question here is not what Trewin, Blair, and Bronson had authority to do, but whether they exercised the authority they possessed. If they had merely signed their names to admitting service of a notice directed to John Robertson, this would neither have affirmed nor negated that they were the attorneys of Robertson. It would have been open to proof that they were his attorneys, and the net result of such proof would have been a showing that the attorneys of John Robertson admitted service of notice upon John Robertson; and, as said, that would have bound Robertson. But the notice was not directed to them as attorneys for John Robertson, and, in admitting service, they did not confine themselves to the mere, naked signing of their names. And we are bound to give consideration to the manner in which the notice was addressed to attorneys, and also to the words additional to a naked signature, which those attorneys saw

fit to append to their signature. As said before, the question is not what these attorneys had power to do, but what they did do. They could not resist service. Had an officer served them, a showing that they were the attorneys of John Robertson would make the service binding on Robertson. But no service upon them was attempted. They were asked to waive such service by stipulating that due service had been made. It is manifest that they could limit their agreement or stipulation as they pleased; and, if the appellant was not satisfied, she had the recourse of having service made in the ordinary manner, either upon client or attorney. Whatever these attorneys had power to do, nothing can be gained from their stipulation beyond what they chose to stipulate. The vital question is, not what they might have agreed to in the way of admitting service, but what they did, in fact, agree to. They were presented with a notice, addressed to them as attorneys of specified parties defendants. The enumeration did not include the name of John Robertson. Following the signature on the admission of service, the signers style themselves attorneys for named parties defendant, and they, too, omit John Robertson from the specification. Theirs was not a naked signature, leaving it an open question whom the signers were acting for. The part of the notice addressing the attorneys asserts who is their client. The words following the signature declare what clients the signers are acting for. To say the least, the signers failed to stipulate concerning service upon John Robertson. And it may reasonably be said that there was more than a failure to act for John Robertson; reasonably be said that no action as to him was demanded, and that the signers fairly stated that they declined to act for Robertson. The reasonable construction of the face of the notice is that the attorneys were requested to admit service upon others than John Robertson; that they admitted service upon certain named defendants, and, in effect, said that service was admitted as to those named parties only. So far, then, whether we treat the case as one in which an agent declined to stipulate service upon John Robertson, or expressly stipulated

that he would admit service upon certain of his clients, excluding John Robertson, there is no evidence that Robertson was ever served with notice.

In a sense, *Pilkington v. Potwin*, 163 Iowa 86, at 93, forecloses the question. In that case, the name of the appellee was I. A. Potwin, notice of appeal was directed to I. N. Potwin, and service was accepted by counsel as attorneys for I. N. Potwin. We held that we acquired no jurisdiction. True, we put this on the ground that a notice of appeal directed to I. N. Potwin was not a notice at all as to I. A. Potwin. But we put some stress on the fact that "the service was accepted by counsel as attorneys for I. N. Potwin." If admitting service for I. N. Potwin does not bind I. A. Potwin, then surely he would not be bound by an admission which did not mention Potwin at all, or which named Jones as the client. If accepting service as attorneys for I. N. Potwin is not service upon I. A. Potwin, then surely admission of service upon Mary Plank is not an admission of service upon John Robertson.

III. The appellant makes the avoidance that the names of the clients, following the names of the attorneys at the point where notice is directed to them, and the enumeration of

the same parties, following the signature of the attorneys, is merely descriptive of who the persons addressed and signing are. It is a strain on reason to hold that these enumerations were mere description or identification.

All parties knew perfectly well who Trewin, Blair, and Bronson were, and there was no need to identify them. But if identification was intended, surely the appellant had sufficiently identified Blair, Trewin, and Bronson by describing them as persons who were attorneys for Mary Plank. Why identify further by reciting a number of defendants additional to Plank? It seems clear no mere description or identification was intended, and that the only reasonable conclusion is that the enumeration in the directing part of the notice and the one following the signature were intended to specify and limit for whom the signers were to ad-

2. APPEAL AND
ERROR: con-
struction of
notice of
appeal.

mit service and for whom they had admitted service. As said, there was right to decline stipulating that Robertson had been served, and the exercise of such right was not necessarily captious. The record in this court shows that Henry Bronson is attorney for no one but appellee W. D. Robertson; at any rate, admits of doubt whether it affirmatively appears that he was also attorney for John Robertson. Mr. Blair may well have declined to attach a joint signature, including Bronson, to an admission that John Robertson had been served. Then, too, it is matter of common knowledge in the profession that some clients are prone to be over suspicious and sensitive to any attempts by their counsel to bind them on anything which the client may do in person. It is common experience that counsel constantly decline to make stipulations which they have power to make, say for a continuance, and insist that consent must be had from the client himself. But, of course, if it is not admitted that Robertson was served, it is quite immaterial whether his exclusion from the admission of service was on or without good reason.

IV. We have reserved for discussion one other item of proof of service. The person who secured the admission makes affidavit wherein he recites, by way of conclusion,

3 APPEAL AND
ERROR: vary-
ing appeal
notice by
affidavit.

that the admission of service was intended to cover all the defendants represented by the attorneys whose signature is appended to the admission. This conclusion seems to rest on the claim that, where the typist wrote the names of the parties below the blank left for the signature of the attorneys, the name of John Robertson was omitted by mistake, and that affiant himself mistakenly believed that the name of John Robertson had not been omitted. Further, affiant says that Mr. Blair understood that the name of Robertson was written in the enumeration of the parties, and intended to acknowledge service as attorney for said Robertson. It is hardly to be expected that we can permit this affidavit, and its conclusions, to vary the admission as writ-

ten. We are not trying an issue of reforming the written acknowledgment.

V. Having found that John Robertson was not served, it becomes unnecessary, in view of the final decision of this appeal, to give any extended consideration to the claim of appellee that still other defendants were not served. It may be added that, as to the defendants Nichols, all inquiry is immaterial. The record exhibits a disclaimer on their part, and an assignment to the plaintiff, appellant. Their one-time interest in the outcome of this appeal is in the keeping of appellant, and she needs no notice of her own appeal; and it is, therefore, immaterial whether the Nichols were served with notice or not.

As to Eugene Robertson, appellees seem to misapprehend the record. He was named as a defendant in the alternate direction, addressed to the attorneys and naming their clients. And in the signature of the attorneys with the names following the same, he is once more named.

VI. Appellant urges that, even if John Robertson was not served, we have jurisdiction to determine this appeal. She relies upon some of our decisions wherein we proceeded to decision, though some parties to the litigation had not been served. These decisions were under that statute provision which requires notice of appeal to be served on co-parties. We hold that said statute does not rule the case, and that this appeal is governed by the statute which demands service of notice upon the *adverse party*, rather than the one which deals with service upon *coparties*. The governing statute, Section 4114, Code, 1897, declares that an appeal is perfected by serving notice on the clerk of court appealed from, and "on the adverse party, his agent, or any attorney who appeared for him in the case in the court below." Who is the "adverse party?" It seems to us it is all of the plaintiffs, if the defendants appeal, or all of the defendants, if the plaintiff appeals. This is emphasized by the fact that the same statute makes provision allowing appeal

4. APPEAL AND
ERROR: notice: disclaimer and assignment of interest.

5. APPEAL AND
ERROR: notice: "adverse" party defined.

either from all of the judgment "or from some specified part thereof, defining such part." There is provision to bring up part of a judgment for review, but none for perfecting an appeal from all of the judgment, and not bringing some of the opposing parties to the record into the Supreme Court. And there is this other clear distinction between the statute we have just spoken to and Code Section 4111; which regulates appeal by coparties, to wit: that, in the latter, no notice need be served on any coparty, if he joins in the appeal. On the other hand, we have held, time and again, that, as to an adverse party, notice of appeal is absolutely essential to jurisdiction, and nothing else can confer jurisdiction, and that, in the absence of such notice, we can obtain no jurisdiction, even though the party not served appears in this court and files argument. We are constrained, therefore, to hold that this court acquires no jurisdiction, where all of a judgment is brought here for review, and the party appealing fails to serve notice of appeal upon all and each of the adverse parties.

VII. But if we assume, for the sake of argument, that the rules laid down in certain decisions under the coparty statute should govern here, we are still of opinion that we have acquired no jurisdiction of this appeal.

6. APPEAL AND
ERROR:
notice: definite
interest
of nonserved
party.

The position of the appellant is that failure to serve John Robertson is immaterial, because he comes under the rule of the cases decided on the coparty statute wherein we

proceed to decision because we find that the party not served cannot be affected by a reversal. The argument is that Robertson will get one seventh, if there be an affirmance, "and if it is reversed, and the notice of appeal was defective as to him, he would still get exactly one seventh." If the naked fact that it can be definitely ascertained how much of a stake a party not served had in the judgment appealed from, saves the jurisdiction, it cannot be explained why there had been dismissals in causes wherein the interest of one not served in the judgment appealed from was definite and known. There was a dismissal for want of

jurisdiction in *McCarty v. Campbell*, 166 Iowa 129, 135. There it was known, and the opinion states, that a reversal would give him an undivided one-third interest in land, and it is said that, therefore, the proportionate amount of the one-third interest would be taken away from the appellees who were not served. It is further pointed out that these persons not brought into the Supreme Court were proper parties to the original case, were served with notice, and that "their interests were fixed and determined by the decree." There have been other dismissals for want of jurisdiction where the share of the party not served was absolutely definite. That was true in the partition suit of *Laprell v. Jarosh*, 83 Iowa 753. It was done in *Dillavou v. Dillavou*, 130 Iowa 405. It was done in the case of *In re Will of Downs*, 141 Iowa 268, where the appeal was from a judgment setting aside a will. In *Ash v. Ash*, 90 Iowa 229, a partition suit, there was dismissal because certain mortgagees on undivided interests of some of the heirs had not been served with notice of appeal. Of course, since there had been a foreclosure of these mortgages below, their amount was definitely fixed. On the argument of appellant, the court should, in all these cases, have proceeded to decision, have refused to dismiss, and, on final decision, have provided that the interests in the judgment appealed from, so far as they were interests of parties not served with notice of appeal, should not be affected by the decree in this court. Why was it not done? Why were there these dismissals? The answer is simple. There was a fatal defect of parties. Before proceeding to decision, the court found itself confronted with a challenge of its jurisdiction because of that defect. It was a jurisdictional challenge. See *Clayton v. Sievertsen*, 115 Iowa 687, 688, approving Elliott on Appellate Procedure, Section 144; *Hanley v. Elm Grove Mut. Tel. Co.*, 150 Iowa 198. In *Dillavou v. Dillavou*, 130 Iowa 405, at 406, the challenge is said to be one "to the jurisdiction of this court to entertain the appeal," and that the service of notice "is essential to our jurisdiction; wherefore, the appeal must be dismissed." In *Laprell v. Jarosh*, 83 Iowa 753,

the failure to serve is held to work that the appeal is "not valid." The argument for appellant gives no consideration to the effect of all these holdings.

The question is not what this court may do about molding a decree where it has jurisdiction to decide at all. The question is whether a court that has no right to determine

anything can give itself that right by saving
7. APPEAL AND . rights of parties not before it at the time
ERROR: ob- when it reaches the making up of its de-
ject of notice cision. If saving the definite interest of one
of appeal.

not before the court might save the appeal, the trouble is that a court without jurisdiction may not even go so far as to ascertain what that interest is, and to consider how to protect it. If it cannot decide, it cannot protect by decision. And surely, the requirement that notice be given cannot be intended for the protection of one who has an interest in a judgment which is appealed from. If he be not served with notice, and therefore not brought into the Supreme Court, all argument based upon the ability of that court to save his rights is irrelevant, because he needs no protection. The Supreme Court is not called upon to give him protection, because, without the service of notice on him, it has no power to deprive him of anything that the judgment below gave him. To carry the argument to its logical end, no coparty need ever be served with notice; for, if not served, he cannot be prejudiced by the appellate decision. No notice would ever be required, because the very failure to give it would base the argument that failure to serve was immaterial, because it could not be prejudicial. This would seem to make it plain that the requirement to serve a coparty is not for the protection of that coparty, at least not for that alone, but to bring him into court, so that those who have served him may have questions determined which could not be determined in his absence.

Another way of stating the proposition is that the requirement to serve notice is not for the protection of the party, because, as said before, he needs no protection against the action of a court that has no jurisdiction over him. The

underlying reason is that failure to serve him creates a fatal defect of parties, and that others than he can raise this jurisdictional defect; that, aside from the abstract right to protest against the action of a court having no lawful power to act, the right to a dismissal is rather for the benefit of those that have been served than those that have not been. Cases can well be conceived wherein the claimant of an estate makes 20 of the heirs defendants. Being defeated, he appeals. One alone out of the 20 is utterly without means. It so happens that, under the will, that one is given as much as the other 19 together. The appellant singles out the pauper. Failing to serve the others, their rights under the judgment appealed from cannot be affected; they have no inducement to resist the appeal; the burden of defending the substance of the judgment is thus thrust upon one who cannot discharge it. He may be too poor to serve an additional and amending abstract, or to employ counsel. But this court may reverse as to the nineteen twentieths of the judgment belonging to this poor person, because, forsooth, it declares that the 19 not brought into court shall not be disturbed in the one twentieth which the judgment below gives them. This cannot be the law.

If there be no notice, say, because only a part of the judgment is appealed from, such appeal cannot affect any rights in the part of the judgment not appealed from. Section 4113, Code, 1897. Where a party to the record is not served, the appeal cannot be prosecuted as to him, and no relief against him can be granted in the appellate court. *Baxter, Reed & Co. v. Rollins & Co.*, 110 Iowa 310. Specific provision that one not before the court shall not be affected by its judgment puts the case only where it would be if no appeal had ever been attempted. It follows jurisdiction cannot be created by the fact that the appellate court may protect something which needs no protection. Therefore, the giving of such needless protection has no bearing on whether there be power to go to the point where the decree may be molded to yield the needless protection.

Even as the right to appeal cannot be affected by a remit-

titur (Code Section 4110), the right to have an appeal cannot be created merely by remitting from the effect of the benefit given by the appealed-from judgment to one who was not served with notice of appeal—a benefit the reversal could not deprive him of, in any event.

The failure to serve one who takes something under the judgment appealed from, stops the court at the threshold. Nothing else can explain the cases to which we have adverted.

None of our decisions are to the contrary. In *In re Estate of Sawyer*, 124 Iowa 485, it is very doubtful, to say the least, whether the person not served is a party. On that, nothing appears except that he is a witness, and there was no averment against him in the petition, and it is doubtful whether he was ever served with notice of the suit. In *Capital Food Co. v. Globe Coal Co.*, 142 Iowa 134, at 136, the party not served was merely the next friend of a minor plaintiff, and “not an independent party to the action.” In *Douglass v. Agne*, 125 Iowa 67, at 69, action had been brought against a partnership, but, on coming in of the evidence, the petition was amended to charge but one member thereof, and it was held that failure to serve the other partners was immaterial.

The appeal must be and is—*Dismissed*.

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

MARY HAINES, Appellee, v. MODERN WOODMEN OF AMERICA, Appellant.

DEATH: Presumption from Seven Years' Absence. No particular
 1 standard of “search or inquiry” exists in this state in order to generate a presumption of death by reason of a person's unexplained absence for seven years. A showing of such absence usually presents a jury question.

INSURANCE: Limitation on Action. An action brought on a
 2 beneficiary certificate of insurance, some eight years and three months after the unexplained disappearance of the insured,

is not barred by a policy provision which prohibits such action after eighteen months from the death of the insured. Seven years' unexplained absence of a party generates no presumption that a party died at any *particular* time.

INSURANCE: Unreasonable Changes in By-Laws. An advance
3 agreement by an insured in a fraternal benefit certificate, to be bound by future changes in the constitution and by-laws of the society, does not authorize a change, even before the insured has disappeared, which provides:

1. That disappearance of the insured shall create no presumption of death until it has continued for a period of time equal to his life expectancy at the time of disappearance; and

2. That, in case of disappearance, no liability shall attach under the certificate, unless payments of assessments, dues, etc., are continued up to the close of such member's life expectancy.

INSURANCE: Contract Rule of Evidence. An insurer may not,
4 after the issuance of a policy, and under a reserved contract power to adopt and change by-laws, provide that "disappearance" of the insured, however long continued, shall not be evidence of death.

Appeal from Sioux District Court.—WILLIAM HUTCHINSON,
Judge.

SEPTEMBER 29, 1920.

ACTION at law to recover upon a life insurance benefit certificate. There was a trial to the court without a jury. Judgment for the plaintiff, and defendant appeals.—*Affirmed.*

Truman Plantz, George E. Perrin, and Herbert W. Brackney, for appellant.

C. E. Grant, for appellee.

WEAVER, C. J.—The defendant is a fraternal society, which provides its members with life benefit certificates. On July 14, 1905, the society admitted to its membership

one William A. Haines, and issued to him a benefit certificate, payable at his death to his mother, Mary Haines, plaintiff in this case. At the date of this transaction, Haines was about 19 years of age, living with his parents, and working with his father at the carpenter's trade. He continued in the family home and in his employment as a carpenter with his father until October 16, 1909, a period of a little more than four years, and, so far as is known, never married. The family home was in Hawarden, where he had lived from childhood, and was well acquainted with the people of the vicinity. On the date last named, he left Hawarden, simply saying he was going away, but does not appear to have made any declaration whether his departure was intended to be permanent or for some temporary purpose. He has never returned, and never communicated with his parents or friends, by letter or otherwise. Three or four days after he left, an acquaintance saw him briefly in Omaha, Nebraska, as he was taking a train to some other destination; and shortly afterwards, a niece of his mother's, residing in central Illinois, where there were some family relatives, wrote to the mother, saying that William had been there. This appears to be the last item of information concerning the young man. He left a small deposit of money in the bank at Hawarden, which he has never drawn or called for. His carpenter tools were left on the job where he last worked. One of the brothers of his mother, living in Illinois, made an effort to find him, and visited Chicago in the quest, on several occasions. His father, upon information or rumor that he was at some place in Nebraska, went there to verify the story, and found it to be a mistake. A notice was inserted in a union labor journal, published in San Francisco. There is no word in the evidence to indicate that his relations with his parents or members of the family were other than amicable and pleasant, or that he was dissatisfied with his social surroundings, or had other cause to cut off all connection with his home and the friends and companions with whom his entire life had been spent. Payments of his dues and assessments in the defendant society

were kept up by his parents from the time of his disappearance until this action was begun.

On January 18, 1918, the plaintiff, acting upon the presumption that her son was dead, made proof thereof in writing to the defendant, by evidence of his disappearance and continued absence for a period of more than seven years; but the defendant, though receiving the proofs, has refused to recognize them or to act thereon, has made no demand or request to the plaintiff to furnish other or additional proof, and has not designated or pointed out any objection on its part to the sufficiency of the proof so submitted by the plaintiff.

To the plaintiff's petition, alleging her cause of action substantially as above stated, the defendant answered, admitting the membership of William A. Haines, and that plaintiff is the beneficiary named in the certificate issued to him, but denies that said member is dead.

Further answering, the defendant pleads that, by the terms of its contract with William A. Haines, he agreed to be bound by the by-laws of the society then in force or thereafter enacted, and that among said by-laws was one providing that no action for the recovery of a death claim on a benefit certificate can be brought or maintained more than 18 months after the member's death; and it is alleged that this action was not brought within that limitation.

Defendant further pleads that, by the terms of the contract with the said Haines, he agreed to be bound by the by-laws of the society then in force, and such other by-laws as might thereafter be adopted; that, pursuant to such reserved authority, the society did thereafter, on September 1, 1908, enact a by-law reading as follows:

"Sec. 66. *Disappearance No Presumption of Death.* No lapse of time or absence or disappearance on the part of any member, heretofore or hereafter admitted into the society, without proof of the actual death of such member, while in good standing in the society, shall entitle his beneficiary to recover the amount of his benefit certificate, except as hereinafter provided. The disappearance or long-continued ab-

sence of any member, unheard of, shall not be regarded as evidence of death, or give any right to recover on any benefit certificate heretofore or hereafter issued by the society, until the full term of the member's expectancy of life, according to the National Fraternal Congress Table of Mortality, has expired, within the life of the benefit certificate in question, and this law shall be in full force and effect; any statute of any state or country or rule of common law of any state or country to the contrary notwithstanding. The term 'within the life of the benefit certificate,' as here used, means that the benefit certificate has not lapsed or been forfeited, and that all payments required by the by-laws of the society have been made."

Because of this by-law, it is insisted by the defendant that the testimony tending to show the disappearance and absence of the insured person for more than seven years is not admissible as evidence of his death, and that plaintiff's action must, therefore, fail for want of proof on which to base a recovery of the insurance.

Finally, it is alleged that, by the terms of the certificate sued upon, no action can be maintained to recover the insurance until proofs of death have been filed "and passed upon by defendant's board of directors," and that no proofs of death of the said William A. Haines have been passed upon by such board.

On the issues thus joined, the court found for the plaintiff for the full amount of the benefit provided for in the certificate sued upon, and judgment was entered accordingly.

I. It is first argued for the appellant that the presumption of death from disappearance and continued absence of seven years does not arise unless it be further shown that

the missing person has been diligently sought and inquired after without avail, and that there is in this case a failure of such proof.

1. DEATH : pre-
sumption
from seven
years' ab-
sence.

There is considerable variance in the views of the courts upon this feature of the rule.

By some, the idea expressed by appellant's counsel is ap-

proved, and the party relying upon the presumption must show a high degree of diligence in making inquiry and search. By others, it is distinctly held that proof of disappearance and continued unexplained absence for seven years, without being heard from by those with whom, in the natural course of things, the person would be likely to communicate, is all that is necessary, and that the presumption is not rebutted or overcome by a failure to show specific acts of search or inquiry. *Miller v. Sovereign Camp W. O. W.*, 140 Wis. 505 (122 N. W. 1126); *Page v. Modern Woodmen*, 162 Wis. 259 (156 N. W. 137).

In none of our cases have we gone to either extreme. We have said that:

"When the absence is shown to have continued for seven years or more, unaccompanied by circumstances which reasonably account for his disappearance on a theory not involving his death, it becomes sufficiently strong to cast the burden of rebutting it upon the party asserting a continuance of life. * * * Slight evidence may sometimes be sufficient to rebut the presumption of death; but ordinarily it is a question for the triers of fact to determine whether the presumption shall prevail. In short, the circumstances both for and against the theory of death are to be taken into consideration, and therefrom the truth arrived at as nearly as may be possible, under the established rules of law governing the adjudication of disputed facts." *Magness v. Modern Woodmen*, 146 Iowa 1, 5.

Such is also the effect of our recent decision in *Richcy v. Sovereign Camp W. of W.*, 184 Iowa 10. And see *Kennedy v. Modern Woodmen*, 243 Ill. 560 (90 N. E. 1084). The strength of the presumption so arising may, of course, be augmented or weakened by the evidence or lack of evidence on the subject of search or inquiry made for the missing person; but, when the disappearance is shown to have continued for seven years or more, without communication with his family and friends, and without any showing of circumstances which would naturally lead him to conceal his location from those to whom he is bound by ties of blood, af-

fection, and friendship, it presents at least a question of fact, on which the finding of the jury, or of the court sitting in place of the jury, cannot be set aside on appeal, as being without support. The undisputed record sufficiently sustains the plaintiff's case in this respect.

II. It is also contended that, under the limitation of 18 months provided for in the defendant's by-laws, this action is barred, without respect to any question upon the merits.

2. INSURANCE:
limitation on
action.

The same objection was raised under quite similar circumstances in the *Richey* case, and was there overruled. While proof of disap-

pearance and absence for seven years or more raises a presumption of the person's death, it raises no presumption as to the date or time after the disappearance that such death occurred. The defendant is not shown to have suggested at any time the death of Haines, but went on treating him as a living member, and receiving from his parents payment of his dues and assessments up to the time when plaintiff presented proofs on which the claim of death benefits is based; and we think the appellant is in no position to escape the obligation of its contract by a plea of the contract limitation of plaintiff's right of action.

III. We come now to appellant's main contention, which is that By-law No. 66, enacted in 1908, three years after Haines received the certificate sued upon, became a part of

3. INSURANCE:
unreasonable
changes in
by-laws.

the insurance contract, and that, by reason thereof, there can be no presumption of his death until his disappearance has continued the full term of his expectancy life, a period

of 43.3 years, during all of which time the policy must be kept alive by payment of all dues and assessments, to the same extent as would be necessary to keep the certificate in force, were the member admittedly living. On the assumption that this modification of the contract and legal rights of the parties is sustainable, it effects a most radical change in the protection which the insurance afforded to the insured and his beneficiary. It is true that the beneficiary in such a certificate

has no vested right therein during the member's life: that is, the society and the member may at will change the beneficiary, or may by agreement cancel or modify or change the terms of the contract; but it is no less true that the insurer cannot, of its own will, and without the consent of the insured, absolve itself from its contract obligation to pay the promised benefit to the beneficiary on the death of the insured. That a benefit society may, under a reserved power, such as existed in this case, make by-laws binding upon its membership, is to be conceded; but it is equally well established that such reserved authority is not unlimited. We have held that such reservation as to subsequent by-laws is limited in its effect to those matters relating to the internal government of the society, and not to matters of contract between the association and its members. *Jordan v. Insurance Co.*, 151 Iowa 73, 85; *Parish v. New York Produce Exchange*, 169 N. Y. 34. And in any event, the exercise of the power of amendment as to existing members must be reasonable in character, to be given effect, and not operate to impair the essential obligation of the society to make good its contract to pay a stated benefit, on the death of the member in good standing. *Hobbs v. Iowa Mut. Ben. Assn.*, 82 Iowa 107; *Sieverts v. National Ben. Assn.*, 95 Iowa 710; *Farmers Mut. Hail Ins. Assn. v. Slattery*, 115 Iowa 410; *Fort v. Iowa Legion of Honor*, 146 Iowa 183, 193.

The doctrine of these cases has been so often reaffirmed by us, and is so generally sustained by the great weight of adjudicated cases in other courts, that it would be a waste of time to attempt anything like an exhaustive citation of them, or to burden this opinion by extensive quotations from the opinions. They have recently been considered by us in *Richey v. Sovereign Camp W. of W.*, 184 Iowa 10, and *Olson v. Modern Woodmen*, 182 Iowa 1018, in both of which cases the appellant herein was defendant, and the effect of the same amendment, "Section 66," upon its by-laws was considered, in the light of the established precedents. In each of these cases, action was brought upon a benefit certificate issued before the amendment to the by-laws was enacted. In

each, the proof of death relied upon by the plaintiff consisted of testimony showing that the insured had disappeared from his home, and had been continuously absent for a period of seven years or more, without tidings from him; and in each, the amendment to the by-laws was pleaded, as removing or negating the presumption of death which, but for such enactment, would arise from the evidence offered. It so happens, however, that, in each of these cases, the date of the disappearance of the insured was prior to the adoption of the by-law, but before the period of seven years had elapsed. The opinions in these cases consider the merits of the defense so raised, and in both it was overruled.

To differentiate the instant case from these precedents, appellant relies upon the fact that, while the amendment was not adopted until more than three years after the certificate now in suit was issued to Haines, yet it was adopted about a year before the date when he disappeared, and from this circumstance it is argued that the defense is available. It will be seen that the issue so presented is a narrow one. In disposing of it, we need not consider or attempt to decide what the effect of such a provision would be, if it had been embodied in the by-laws existing at the time Haines became a member of the society, and we therefore confine our discussion to the effect of the after-enacted amendment upon the rights of an existing member and his beneficiary, under the contract of insurance.

To render the amendment valid, it must not be unreasonable, and must not materially impair or detract from the contract obligation of the society which enacts it. Ordinarily speaking, the right of the beneficiary to recover upon a certificate becomes perfect upon proof of death of the member in good standing. Death is a fact to be proved, and may be established by evidence which is competent and admissible under the law of the jurisdiction in which the case is tried. Ordinarily, too, it is for the court alone to say what is competent evidence, and for the jury alone, or for the court, sitting in place of a jury, to say whether the fact of death has been proven. When this certificate was issued, it

was the law of the state, and of the different states generally, that proof of the disappearance of a person from his home and of his continued absence for seven years or more, without tidings from him, raises a presumption of his death, and that, if such presumption be not rebutted or overcome, it will sustain a finding that such person has departed this life. Under the well-established rule of law, Haines's beneficiary would have made a perfect case for a recovery upon his certificate, by proof that he left his home and has been lost to the sight and knowledge of his family, friends, and acquaintances for seven years. By the amendment to its by-laws, if it is to be held effective, the defendant makes it impossible for the beneficiary to recover until she has waited 43 years, six times the period which the law of the land has settled upon as being reasonably sufficient for that purpose. Not only that, but, to preserve the right to her or her heirs, she or they must continue to pay his recurring dues and assessments to the remote end of that term. If this be not an unreasonable exercise of the reserved power of amendment, it would be difficult indeed to frame one sufficiently extravagant to fall within that category. Precisely in point is the language of this court in the *Richey* case, where we said:

"The change which the association asserts to be a binding one engrafts upon the original agreement a condition that, although the law of the state makes disappearance for a stated time presumptive evidence that the assured has died, such statute shall not be effective, and that, moreover, no payment shall be due, no matter how long the disappearance has continued, unless the premiums be paid for the number of years which form the expectancy of the insured. In the instant case, this means that, unless proof of actual death becomes available, payments under the certificate sued on by plaintiff would have to continue for nearly 40 years yet, and possibly for a time many years longer than there would have been obligation to pay under the conditions of the certificate as it stood originally. It does not seem to be strained to say that such a change is so unreasonable

as that it was never intended to be covered by the general advance agreement to be bound by future changes, and that, as plaintiff pleads, to uphold the amendment is violative of statute and public policy."

So, too, in the *Olson* case, 182 Iowa 1018, 1033, after discussing the rule raising a presumption of death after a disappearance of seven years, we said:

"Though this rule has its foundation in reason, and is founded upon a knowledge of the ways of men, yet the amendment says to the plaintiff, 'You cannot recover on such proof until 26 years have elapsed after the disappearance,' thus casting on plaintiff the burden of paying all dues and assessments during that time, and thereby making the certificate practically worthless. The rule of seven years' absence rests upon sound public policy. Those interested in the death are in no position to prove actual death. They must rest their case on the circumstance of absence, if they would prove the death at all. The fact that his whereabouts were unknown for seven years, the fact that by inquiry they could get no trace of him, the fact that they cannot prove that he is actually dead, by eyewitnesses, or those who can swear positively to the fact of death, makes it impossible to prove the ultimate fact upon which liability rests, and postpones the payment 19 years, though proof can be furnished, and is offered, which would satisfy any reasonable mind that the ultimate fact exists. We think the rule is unreasonable, and ought not to be recognized and enforced by this court."

More than this need not be said.

The reasons assigned by us in the cited cases for holding the amendment invalid are rendered no less apparent and no less persuasive because of the fact that the change was made a short time before, instead of after, Haines' disappearance. The rule against unreasonable amendments protects the member just the same, wherever he may be. True, it is said by us in the *Olson* case that the fact that the insured had disappeared before the amendment was made "emphasizes and makes certain to our minds that the by-law invoked by

the defendant is unreasonable;" and undoubtedly it does lend emphasis to the conclusion, but it is in no wise essential thereto.

IV. The application of the amendment to this case is further upheld by counsel on the theory that it is competent for the insurer to prescribe rules of evidence by which a claim against it shall be established. In sup-

4. INSURANCE:
contract rule
of evidence.

port of this position, reliance is had upon *Roeh v. Business Men's Prot. Assn.*, 164 Iowa 199. That the parties to a contract may, within limitations, and by mutual consent as a part of such contract, agree upon the probative effect of any given fact, or upon what shall be sufficient evidence of a fact, need not here be denied. The extent to which such rule, if there be one, may be upheld, we shall not pause to consider, because the record in this case does not require it. It may safely be said, however, that, until such agreement be clearly shown, the courts will be very slow to abdicate their most important function of determining the truth by the tests and rules presented by centuries of judicial experience.

The *Roeh* case furnishes no likeness or parallel to this. There, the by-law providing that there should be no liability for the death of a member by the discharge of a firearm unless the accidental character of the discharge be established by the testimony of at least one eyewitness, was not an amendment adopted after the certificate issued, but was in existence at the time, and we may assume that the contract was made with that fact in view. Had the restriction so provided upon the right to recover been an afterthought by the insurer, and engrafted upon the by-laws after the contract of insurance was made, we may be very sure that the ruling thereon by this court would have been different. The authorities cited in the *Roeh* case in support of its conclusion fairly indicate that the effect now sought to be given to it was not in the court's mind. The authorities referred to are, first, to the effect that a party may, by contract, agree to the time within which suit thereon must be brought; second, he may waive a jury trial; and third, he may waive his

right to recover damages for negligence of another: all of which may be readily admitted, for they are propositions not affording the slightest authority for a by-law providing a rule of evidence inconsistent with the established law of the state. The citation in the same case, of *Russ v. Steamboat War Eagle*, 14 Iowa 363, as a precedent upholding a contract providing a rule of evidence, appears to have been an oversight; for a reading of the opinion wholly fails to reveal any such contract or ruling.

To say the very least, the right to thus deprive the court of the exercise of its ordinary functions, and to add to or take from a proved fact the probative force and effect to which it is otherwise naturally entitled, is one which will be hedged within very narrow bounds. To hold otherwise, and permit the insurer to restrict its liability by arbitrarily enlarging or minimizing the effect of competent evidence, is to arm it with power which renders practically worthless the protection which it professes to furnish to the insured. See *Traiser v. Commercial T. E. A. Assn.*, 202 Mass. 292 (88 N. E. 901); *Noyes v. Commercial T. E. A. Assn.*, 190 Mass. 171 (76 N. E. 665); *Utter v. Travelers' Ins. Co.*, 65 Mich. 545 (32 N. W. 812); *Fidelity & Cas. Co. of N. Y. v. Crays*, 76 Minn. 450 (79 N. W. 531); *Fidelity & Cas. Co. of N. Y. v. Eickhoff*, 63 Minn. 120 (65 N. W. 351); *Hannon v. Grand Lodge A. O. U. W.*, 99 Kans. 734 (163 Pac. 169).

In the *Utter* case, *supra*, the policy provided that the insurance should not extend to any case, unless the claimant showed the death or injury and its accidental character "by direct and positive proof." The point being made that the proof offered was circumstantial only, and not "direct and positive," the court says:

"Courts will not permit the course of justice, upon trials before them, to be stipulated or contracted in such a manner as to defeat the ends to be subserved by such trials. The parties to a contract cannot agree to oust the courts of jurisdiction over such contract. The operation of this clause, requiring direct and positive proof, in many cases, would, in effect, preclude the court from jurisdiction, and bar a

recovery. If they can make this agreement, they can also stipulate that the evidence must come from certain persons, or make any agreement they see fit, controlling and directing the course of proceeding upon the trial."

Even more directly in point is the *Hannon* case, *supra*, from the Kansas court. As in this case, the plaintiff there sued upon a benefit certificate, issued to a member of the defendant society, and sought to establish the member's death by proof of his disappearance and absence for a period of more than seven years. After the certificate was issued, the society adopted a by-law in these words:

"Mysterious disappearance or unexplained absence of a member shall never be considered proof or evidence of death of such member."

There was a jury trial. The trial court, in its charge to the jury, said:

"This by-law, as far as it controls or governs the action of the A. O. U. W. in determining whether a member is dead, would be binding; but you are instructed that no by-law of the association can control or prevent the courts and juries from applying the usual rules of evidence in the trial of cases coming properly before them; and, in arriving at a verdict, you are not bound thereby, and may disregard the same."

On appeal, the Supreme Court approved this instruction, saying:

"The power of the association to make the by-law in question binding upon one who was already a member, depends upon whether or not it was reasonable, as applied to him. (*Uhl v. Life & Annuity Assoc.*, 97 Kan. 422, 155 Pac. 926). If it were to be given effect in the trial of an action brought upon the beneficiary certificate previously issued to such a member, it would amount to a declaration of a rule of evidence to be applied by the court to the determination of a question of fact—a regulation of the amount and character of evidence by which such fact might be determined. It is one of the functions of a court, where the rights of the parties to a controversy turn upon a disputed matter of fact,

to investigate and decide, for the purpose of that case, the question at issue. Its decision may be mistaken, but it is binding on the parties to the litigation, because it is necessary that some final settlement of the disagreement should be had. That the probability of correctness may be increased, rules of evidence, which experience is thought to have shown to be salutary, have been established. One of them is that the unexplained absence of a person for a period of seven years, during which time he has not been heard from, although inquiries concerning him have been diligently prosecuted, is sufficient to raise a presumption of death. The courts do not assume to say that mere absence or disappearance shall ever be given the effect of death, but that disappearance and absence for a fixed period, accompanied by certain other circumstances, may constitute prima-facie evidence that death has actually taken place. For the fraternal association to require a court to disregard that rule, in an action where one of the issues is whether a member, to whom it had issued a certificate payable at his death, is living or dead, would be substantially to impose upon that tribunal a new method of procedure, much as though it were to direct that death was not to be regarded as having taken place unless it should be proved beyond a reasonable doubt, or by the testimony of witnesses who saw the corpse and identified it from personal acquaintance with the member. We think that such a regulation as applied to existing certificates is unreasonable, and therefore transcends the power of the association."

We regard this a pre-eminently safe and sound doctrine. Once grant the insurer the right to limit its liability upon an existing contract by the enactment of by-laws which deprive the insured of the benefit of the established and settled law of evidence, and a door is opened to intolerable abuse. Under the guise of establishing a rule of evidence, the society may, in effect, absolve itself from all liability for the performance of its agreements. Such is, indeed, its practical effect in the case before us. When the contract was made, it was, and still is, competent, under the law of the state, to

establish the fact of death by proof of certain facts from which such a presumption arises. This right was a material element or factor in the value of the promised benefit to the member and his beneficiary. Permit the insurer, by its own arbitrary act, to declare that it will not pay the benefit upon such legitimate proof as will satisfy a court of justice of a member's death, nor will it pay at all, except upon performance of a condition which cannot be satisfied in an average lifetime, and then only on the further condition that, during all such period, the beneficiary shall continue to pay a burdensome tribute into the insurer's treasury, and you will leave nothing of value in a contract of fraternal insurance of which the member may not be "fraternally" despoiled, at the uncontrolled will or whim of the insurer.

It may be true, as suggested by counsel, that the society has been confronted with a large number of death claims based upon the disappearance and continued absence of members, and that this amendment to the by-laws is intended simply as a protection against fraudulent demands of that character. But the question before us here is not simply one of good faith or honesty of purpose. It is, rather, a question of power and authority and contract obligation. The society undertakes to insure payment of certain benefits on the death of the member. The contract in this case does not restrict the benefit to cases of death from certain specified causes, nor does it except from its obligation cases of death from other specified causes.

It is the death of the member in good standing which matures the contract, and vests a right of action in the beneficiary. Death may come to the member in any of its myriad forms. He may die in his bed, of disease or injury, and under circumstances which may be established by evidence of the most direct and positive character. So, too, he may be lost in a storm at sea, in a mine disaster, in a great flood, in the havoc of an earthquake ruin, or may perish in the desert or trackless forest, or among utter strangers, and his beneficiary be utterly unable to produce a single witness who saw him die, or saw his dead body, or can offer a word of

direct testimony to the fact of his decease. But death in any form matures his insurance, and fixes the liability of the insurer, and proof thereof by competent circumstantial evidence which satisfies the minds of the triers of fact, entitles the beneficiary to recover, even though there remains a bare possibility that a person so proved to be dead is, in fact, still alive. So far as that is concerned, there is room for mistake or fraud even where the evidence is wholly direct and positive; for honest witnesses may be in error, and others may commit deliberate perjury. What the law requires, and what is implied in every contract of insurance upon a human life, is that the insurer will pay the indemnity or benefit on such proof as establishes the fact, according to competent evidence, judicially tested and weighed according to the law of the land; and this contract, once made, is immune against any action by the insurer tending to its material impairment.

That there are cases tending to support the appellant's theory of the law may be freely admitted; but we are persuaded that they are unsound in principle, and that the general recognition of their authority would, in the end, work to the serious disadvantage of the insurance societies and orders, the permanent success and usefulness of which must depend upon the general confidence they inspire in the estimation of the public to which they appeal for patronage.

We are satisfied that adherence to the views we have so often expressed in our former decisions above cited, as well as others therein mentioned, compels the conclusion that the record in this case shows no reversible ruling; and the judgment of the district court is, therefore,—*Affirmed*.

LADD, STEVENS, and ARTHUR, JJ., concur.

CLARA HILLER et al., Appellants, v. MARION HERRICK et al.,
Appellees.

WILLS: Life Estate (?) or Fee (?) A devise to a wife, in words
1 unquestionably, but not *expressly*, creating a fee, if such words
stood alone, but followed by a later nonrepugnant paragraph
directing a division of all property "remaining" after the
death of the wife equally among testator's children, must, in
order to give effect to *all* that testator has declared, be con-
strued as a life estate only, with power to sell.

REMAINDERS: Vested (?) or Contingent (?) A devise of a
2 life estate, with power to sell and with direction to divide all
property "remaining" after the death of the life tenant among
named persons, creates a *vested* remainder.

Appeal from Black Hawk District Court.—H. B. BOIES,
Judge.

SEPTEMBER 29, 1920.

ACTION to quiet title to real estate. Decree for the de-
fendants, and plaintiffs appeal.—*Affirmed.*

Mears & Lovejoy, for appellants.

*E. H. McCoy, P. E. Ritz, Courtright & Arbuckle, and Pick-
ett, Swisher & Farwell*, for appellees.

WEAVER, C. J.—The case was tried below upon an agreed
statement of the facts. That statement, so far as it ma-
terially affects the questions of law presented for our con-
sideration, may be abbreviated as follows:

1. WILLS: life
estate (?) or
fee (?)

On August 24, 1895, Lorenzo Moore died
testate in this state, seized of a farm of 120
acres in Black Hawk County. He was sur-
vived by his wife, Hannah Moore, and nine children of their

marriage, to wit: Clara Hiller, Charles E. Moore, Emily Spencer, Oliver H. Moore, Kent K. Moore, Anna Holland, Mary S. Moore, Harry Moore, and Rebecca Herrick. The will left by the deceased, as originally drawn, was executed by the testator January 23, 1892, and provided for the disposition of his estate as follows:

"I give and bequeath to my beloved wife Hannah Moore, should she survive me, all property, both real and personal, of which I may die seized at the time of my death."

"I further direct that at the death of my wife all property both real and personal, shall be equally divided, share and share alike, to my legal heirs."

On August 20, 1895, four days before his death, the testator added a codicil to his will, in which he used the following language:

"At the death of my wife, Hannah Moore, I desire and direct that all the property both real and personal then remaining shall be divided between my legal heirs, share and share alike."

As already stated, the testator was survived by his wife and all of their nine children. The wife remained in the possession, use, and control of the property until her death, intestate, on February 7, 1904. In the interim between the death of Lorenzo Moore and the death of the widow, Hannah Moore, their daughter Rebecca Herrick died testate, devising all her estate to her husband, George W. Herrick, who has since died, leaving heirs. The nature of this controversy is such that further tracing of the line of descent of the property left by Lorenzo Moore is not necessary. The plaintiffs are the eight surviving children of Lorenzo Moore. The defendants are the claimants by descent of whatever title George W. Herrick acquired by devise from his deceased wife, Rebecca. It is the claim of plaintiffs that the devise by the will of Lorenzo Moore to his wife, Hannah Moore, was of an absolute fee, and that Rebecca took nothing under said instrument; and that, as she died in the lifetime of her mother, she acquired nothing from the estate of the latter. If, then, Rebecca was vested with no title or interest by the

will of her father, and is not entitled to claim anything through her mother, her own will, naming her husband, George W. Herrick, as her devisee was, of course, inoperative, so far as this property is concerned. The defendants assert title to the one-ninth interest in the land, on the theory that the will of Lorenzo Moore devised to his wife only a life estate, with added power to sell and dispose of the land (a power which she never exercised), and that the remainder, subject to said life estate and power of sale, was vested in the nine children of the testator and life tenant in equal shares, at the death of Lorenzo Moore. If this theory be correct, then Rebecca Herrick died seized of an equal one-ninth share in such remainder, which interest passed by her will to her husband, George W. Herrick, and through him to the defendants.

The trial court held with the defendants' theory of the law, but adopted the view that the devise of a life estate to the widow, Hannah Moore, was not in lieu of dower, and by its decree confirmed the defendants' title to two thirds of the disputed one-ninth share of the land in controversy. The land having, by consent of the parties, been sold, pending litigation, the decree provided for a partition of the proceeds of sale, on the basis of the finding here stated. From this adjudication, plaintiffs appeal.

I. At the threshold of their case, appellants very properly discuss the nature of the provision made by Lorenzo Moore's will for the benefit of his wife, and they insist that the clear intent of the testator was to vest his widow with the entire fee of the estate. In support of that contention, they review with much ability and force the familiar precedents which this very fruitful species of litigation has called into existence. That the intent of the testator is to prevail is conceded. It is the most familiar rule or phrase in the law of testamentary construction—but unfortunately is sometimes neglected, in the search for precedents to sustain a desired conclusion. In no other class of cases is mere precedent as to the use or meaning of human language of so little real value. No two men make their wills under precisely similar

circumstances, and words used to express a certain intent in one case may be employed with a very different intent in another. Precedents in such cases may be very properly employed as aids, but they should not lead either court or counsel to insist on a construction of a will which, in view of the situation disclosed in the particular case under inquiry, it is clear was not in the mind of the testator.

The average husband and father, in anticipation of death, desires to make such disposition of his estate as will best serve the interests of his family. Ordinarily, he makes first provision for his wife; and, subject to her needs and comfort, he provides for his children; and, in the absence of reasons influencing him to show preference between them, he treats the latter on terms of equality. To accomplish this end, one of the most common, and perhaps most reasonable, plans adopted is for the father to leave the estate, largely or wholly, to the wife for life, with remainder over to their children, in equal shares. It is also very common, and apparently increasingly common, for the testator to add to the life estate for his widow a power to sell and dispose of the property, if she shall so elect or need. In the absence of special circumstances indicating some purpose to be served by making the remainder to his children contingent on any event except his own death, the natural and inevitable conclusion in the human mind, independently of any rule of law, is that, in so providing by his will, he intends to vest his children, and each of them, with a share in his estate, of which share the child shall come into possession and enjoyment at the death of his or her mother, who is the preferred beneficiary of the testator's bounty.

The form in which this purpose is expressed is not fixed or invariable. Wills are often drawn by persons having little or no knowledge of law, and words are often employed, even by lawyers, in other than their strict, legal meaning; but the true and actual meaning of the testator will be allowed to prevail, if, in view of the instrument as a whole, and the circumstances attending its making, such intent is fairly shown. *McKemey v. Ketchum*, 188 Iowa 1081;

Rundel v. Matter, 184 Iowa 518; *Johnson v. Coler*, 187 Iowa 734; *McEachron v. Trustees*, decided March 11, 1921.

Coming directly to the will in the instant case, appellants argue, not only that the language of the instrument shows the testator's intent to devise the entire fee to his wife, but that this court is, by its former decisions, committed to such construction. They point insistently to the words, "I give and bequeath to my wife Hannah Moore, should she survive me, all property, both real and personal, of which I may be seized at the time of my death," and say that these words have always been held sufficient to devise a fee. This is doubtless true in all cases where no other language is employed in connection therewith, to limit or modify such devise. It is equally true and well settled, however, that such language is entirely consistent with the devise of a life estate, where the will as a whole makes evident the testator's intent to create such estate. It is also to be admitted that, among our precedents, cases may be found where the express or implied power given the devisee to dispose of the devised property is held inconsistent with the idea of a mere life estate; but counsel concede, as indeed they must, that a power of sale may be added to a life estate, without enlarging it to a fee.

This is the natural result of an application of the rule so frequently cited, by which courts are constrained to give effect to the testator's intent, as it shall appear to be expressed by the will as a whole, in the light of all the circumstances attendant upon its execution, without regard to technical rules of construction. Of course, where different provisions of the will are found to be irreconcilable, or so repugnant that both cannot stand, the first expression must prevail; and if, in the will now before us, the testator had clearly and expressly declared his purpose to give the property to his wife in fee, it would be given effect accordingly by the court, even though, in a later clause, he had attempted to limit or control her right to dispose of it as she should see fit. But he did *not* in express terms give her the fee. True, he did use words sufficient to carry the fee, had they

not been accompanied by other terms and directions indicating a purpose to create for her only a life estate, with power to convey the fee. It is the duty of the court, if it be reasonably possible, to so construe the will as to give effect to all its provisions, and so that nothing will be held void for repugnancy. See *Richards v. Richards*, 155 Iowa 394; *Elberts v. Elberts*, 159 Iowa 332. And this, in our judgment, is what the court below did.

If it should be thought necessary to seek a precedent so nearly parallel in its facts with the one at bar as to be fairly controlling upon the question presented by this appeal, it is to be found in the comparatively recent case of *Canaday v. Baysinger*, 170 Iowa 414. There, a husband's will provided for his wife, as follows:

"I bequeath to * * * my wife, the piece of land * * * we live on, * * *. I also wish her to have a choice milch cow. I further wish her to have * * * [another described tract of land]. * * * I also wish my wife to have all the household and kitchen furniture except * * *. After my wife's death it is my wish that the remainder of the household and kitchen furniture be sold and the land also to be sold and the money to be equally divided between my five heirs."

Except for the final clause, beginning with the words, "after my wife's death," the gift to her would, of necessity, have to be construed as absolute; but, in order to give effect to all parts of the will, we held the devise to be only a life estate. The opinion was written by our late colleague Justice Gaynor, and sets out the governing rule of law in clear and apt terms, as follows:

"The bequest to his wife creates no particular estate in the wife by its terms. There is no provision that she takes a fee or an absolute title, or that she is given the power of alienation. There is nothing to indicate the estate intended to be invested in the wife. Without further limitation upon this bequest, or rather devise, it might be construed into an absolute devise; but, with a limitation which is not inconsistent with the estate created, we are of the opinion that

the testator intended, by what he calls a bequest or a wish, to give to the wife only such an estate as would terminate upon her death, and that upon her death the land be sold, and be equally divided between the heirs. Where the will is capable of such a construction as gives to all the parts of the will the full force which the language imports, it must be so construed. Where the testator in the devising clause to the first taker has not so designated the estate intended to be devised that the remainder over would be repugnant to the devise, then both would be permitted to stand. To hold that the first part of the will gave to the wife an absolute fee, with power of alienation, would be to add to the provisions of the will itself, and would, of course, render the latter clause repugnant to such a devise; but to hold that the first part of the will, not having designated the particular estate intended to be devised, and not having by express provision indicated the estate intended to be created in the wife, from which power of alienation might be inferred, and not having, by express words or necessary implication, given to her the power of alienation,—the devise of the remainder over is not inconsistent with such provision, and therefore both may stand, and each be in force. The estate devised to the wife is indefinite and uncertain. Its scope and limitation are not fixed in the will. If the testator intended to give her a fee, with power of alienation, he has not said so in the will. In the last clause of the will, he has indicated his intent in making the devise, to wit, that, upon her death, it should be sold, and the proceeds divided among his heirs. This is a clear expression of an intent on his part to limit the estate vested in his wife to a life estate. There could be no remainder for sale and disposition at her death, if the construction contended for by the defendant were to prevail. Therefore, we would be compelled to enlarge the provisions of the will in favor of the wife, and to give it a larger scope than the testator has given it in the will itself, and we would be compelled, in so doing, to render nugatory the clear and unambiguous expression of testator's intent that, upon her death, the land should be sold, and divided

among his heirs. To hold that she had only such an estate as would continue during her life, and such as would terminate upon her death, gives to the last clause, directing the sale and division among his heirs, its full force. This gives to all the terms of the will their full force and effect, without destroying either, neither provision being necessarily inconsistent with the other."

In another very similar case, we held the devise to the wife to be a life estate, saying:

"By construing the entire will as giving to the plaintiff a life estate only, every part thereof is given effect, and the evident intention of the testator is carried out, and that is what the law demands." *Boekemier v. Boekemier*, 157 Iowa 372.

It is equally true in the case before us that to hold with appellants is to render void the provision in the original will for the benefit of his heirs, and carefully repeated in the codicil, executed as the testator was about to die; while to affirm the construction given by the trial court makes effective every part and provision of the writing. In other words, if the widow took the fee, as appellants contend, it was within her power by a will of her own to disinherit all her children, and divert the whole estate left by the father to beneficiaries outside of the family. The language of the will as a whole, and all the attendant circumstances shown, negative any such intent on the testator's part. On the contrary, subject to a life estate and power of sale in his widow, it is hardly open to serious question that he intended to give his whole estate to his children in equal shares—to Rebecca, no less than to the others.

The decision in *Bills v. Bills*, 80 Iowa 269, which is largely relied upon by the appellants, announces no rule of law which is at all inconsistent with that which the court below applied to this controversy. The rule there applied is neither more nor less than the one to which we have already expressed our adherence, and which we never have denied, namely: that, where there is an irreconcilable repugnance between two provisions of a will, the first must stand, and

the latter be rejected; and this is all which *Bills v. Bills* can fairly be said to decide. Difference of opinion may arise, and often will arise, upon the further question whether any incurable repugnancy exists; and upon that inquiry each case must be considered with respect to its own peculiar circumstances, and each provision of the instrument so construed, if it be possible, that all may be given the effect intended by the testator. So considered, we hold that the trial court did not err in holding that the widow of Lorenzo Moore took only a life estate under her husband's will.

II. As an alternative ground for their claim of title, plaintiffs further argue that, even if this court hold with the trial court that the widow, Hannah Moore, took only a life

estate, it still must be held that the interest
 2. REMAINDERS: of Rebecca Herrick in the land was only a
 vested (?) or
 contingent
 (?) remainder, and, since she died in

the lifetime of her mother, the remainder was extinguished, and plaintiffs, being all the heirs of Lorenzo Moore who were living at the death of their mother, succeeded to the entire title to all the property. The subject of remainders—when they are to be considered vested, and when merely contingent—has been so frequently and copiously discussed by this court in the last few years that we are not disposed to extend this opinion for its further treatment. *Archer v. Jacobs*, 125 Iowa 467; *Lingo v. Smith*, 174 Iowa 461; *Sleeper v. Killion*, 182 Iowa 245; *Jonas v. Weiers*, *Craig & Ray*, 134 Iowa 47, 49; *Fulton v. Fulton*, 179 Iowa 948; *Atchison v. Francis*, 182 Iowa 37; *Dowd v. Scally* (Sept. 30, 1921); *Johnson v. Coler*, 187 Iowa 734; *Putbrees v. James*, 162 Iowa 618, 625; *Mitchell v. Vest*, 157 Iowa 336; *Woodard v. Woodard*, 184 Iowa 1178. These are but few of the many cases in which we have, with more or less fullness, considered the question whether a gift over to devisees (namely, children of the testator), after a life estate in another, is vested or contingent; and it is quite rarely that we have been brought to the conclusion that such a provision is contingent, and then only when the intention to make it contingent is very clear. The language used in the will now

before us is quite like, if not practically identical with, the stock form of expression used over and over again in wills coming up for adjudication, where, after making provision for the wife for life, the testator adds, "After her death, I direct that the property be equally divided between my children," or, "between my heirs." Barring a slight tendency to wobble a little, in a very few instances, we have steadily held, in every such case, that the remainder over is vested from the instant of the testator's death. Nor is the direction to "divide" or to "sell and divide" between the "children" or "heirs" after the death of the wife, without more, any necessary obstacle to the vesting of the remainder. See 40 Cyc. 1662; and *Johnson v. Coler*, 187 Iowa 734; and cases there cited. Also, see our recent case, already cited, *Canaday v. Baysinger*, 170 Iowa 414, where the will, as we have said, is, in essential respects, quite like the one at bar, in that, while not using the words "life estate" or "for life," the intention is made clear by the direction to divide the property between the children after the wife's death. Speaking of the case there tried, we said:

"The issue, therefore, to be determined herein, and which is decisive of the controversy, is, Did Eliza Canaday (widow) take a fee-simple title in the premises under the will, or did she take only a life estate? If she took only a life estate, the fee vested in the heirs of David Canaday (testator), subject to the life estate, and vested immediately upon the probate of the will, which related back to the time of the death of David."

Such, too, was our holding in *Atchison v. Francis*, supra, *Haviland v. Haviland*, 130 Iowa 611, *Blain v. Dean*, 160 Iowa 708, and in many other like cases, and such is the great weight of authority generally.

The same subject is discussed very fully in *Johnson v. Coler*, supra, where the executor was directed to sell the testator's property and divide the proceeds between certain persons. One of these persons died before the distribution was made. The question at issue was whether the bequest or devise so made created a vested or contingent interest in

favor of a devisee who died before distribution had been made under the will. Holding the interest to be vested, we quoted approvingly the rule stated in 40 Cyc. 1662, as follows:

"Where property is ordered sold and the proceeds divided, the interests given in the proceeds are vested even before the sale, unless the legacy is in terms contingent."

The cases where we have held that a provision in a devise that property be sold and proceeds divided is inconsistent with a vested remainder, are where the limitation over is to heirs or persons *then living* at the death of the life tenant. Here, the devise of the fee or remainder is to the "heirs" of the testator; and we have held, in consonance with the authorities generally in such cases, that the word "heirs" "refers to the persons answering that description at the time of his death, unless a contrary intent is plainly manifested by the will." *Mitchell v. Vest*, 157 Iowa 336, 342.

It follows that the trial court was also correct in holding that the remainder over, after the life estate of Hannah Moore, was vested in the heirs of the testator, and that Rebecca Herrick, as one of the heirs, shared equally with her brothers and sisters in such remainder, and that, upon her death, such interest passed, under her will, to George W. Herrick.

The decree appealed from is—*Affirmed*.

EVANS, PRESTON, and SALINGER, JJ., concur.

DAVID JONES, Appellant, v. CONTINENTAL CASUALTY COMPANY, Appellee.

INSURANCE: Severance "at" Ankle Defined. A policy which provides indemnity "for loss of either foot," but defines "loss" to mean, "complete severance at or above the * * * ankle," is, in view of the manifest purpose of the policy, and in view of the varied meanings of the words "ankle" and "at," reasonably susceptible of two constructions, to wit:

1. That the severance must be at the precise point of articulation of the leg and foot; or

2. That the severance must be near to said point of articulation—so near as to practically destroy the use of the foot.

It follows that the insured is entitled to the benefit of the latter construction.

Appeal from Lee District Court.—W. S. HAMILTON, Judge.

SEPTEMBER 29, 1920.

ACTION at law to recover upon an accident insurance policy. Trial to a jury. At the close of plaintiff's evidence, the trial court sustained defendant's motion for a directed verdict in its favor. Plaintiff appeals.—*Reversed.*

E. C. Weber, for appellant.

Geo. R. Sanderson, J. M. C. Hamilton, Manton Maverick,
and *M. P. Cornelius*, for appellee.

PRASSTON, J.—Plaintiff's foot was accidentally crushed under a car wheel. He had an accident policy in defendant company. Amputation was necessary, and the severance was at the point indicated by the line in the cut here shown.

By the policy, defendant promised to pay plaintiff "in-

demnity for loss of life, limb, sight, or time, resulting from a personal bodily injury, all in the manner and to the extent hereinafter provided. * * * For loss of either foot, the principal sum of \$1,000." A later provision in the policy reads:

" 'Loss,' above used, with reference to hand or foot, means complete severance at or above the wrist or ankle."

The petition is in two counts. In the first, plaintiff claimed that he received an injury to his foot, to the extent that amputation was necessary, and that he lost the use of his foot. In the second count, he claimed that he received an injury to his foot, and that it was amputated and severed at the ankle, and that he lost the use of said foot. He asks judgment on both counts, in the total sum of \$1,000. The answer is in general denial.

Plaintiff testified that he could bear his weight on this leg, but cannot use it; that it gets weak, and turns over; that he cannot get around without a crutch, except a few steps. The surgeon who made the amputation testified that the operation is what is called the Forbes operation.

"That means the line of separation between the cuneiform and scaphoid, and through the cuboid. Cuboid bone was severed. The scaphoid is located back towards the heel, and the cuneiform bones are in front, or toward the toes. There are three cuneiform bones. The bones right above the line, and on the side of the great toe where it was amputated, is the scaphoid, and the cuboid is on the side of the little toe. Half of that remains, and half was removed. The tarsus bones are all the bones of the foot back of the metatarsus, and contains what is known as the talus, or astragalus, the talus or astragalus being known as one of the tarsal bones. The amputation of Mr. Jones' foot was probably an inch from the talus or astragalus. In my opinion, for the purpose of having an artificial foot for Mr. Jones, it would have been better if the amputation would have been made above what is commonly known as the ankle joint. Because of the amputation as made, the function of

the foot has been diminished. The amputation of the foot has changed the relation of the bones. One half of the arch is removed, and the portion of the arch remaining must tip a little, so the heel hits back a little, as he puts his weight on it. In my opinion, he could walk without a crutch or cane. The calcaneum, or the os calcis, is one of the tarsal bones, and the astragalus rests upon it. Articulation of the astragalus with the leg bone is what forms the ankle joint.

"Q. If there is a tipping back and forth of the heel bone, would it not affect the astragalus? A. The weight of the body might fall on a slightly different surface. Q. That would not be the natural condition of the astragalus? A. No, sir.

"The cuboid attaches to the os calcis and the forepart of the two small metatarsals; the astragalus, os calcis, scaphoid, cuneiform, and cuboid bones are known as the tarsal bones. The foot consists of 26 bones; 7 in the tarsus, called the astragalus, the os calcis, the scaphoid, the cuboid, and 3 cuneiform bones, and there are 5 metatarsals and 14 phalanges."

The motion to direct a verdict was on these grounds:

"(1) Because the plaintiff's petition states no cause of action.

"(2) Because the plaintiff has failed to prove facts entitling him to recover in this action.

"(3) Because the policy of insurance upon which plaintiff brings this action contains the provision that '“Loss,” as above used, with reference to hand or foot, means complete severance at or above the wrist or ankle.’ And the plaintiff has failed to allege or prove a complete severance of his foot at or above the ankle.

"(4) Because the evidence shows that the severance or amputation was made below the ankle.

"(5) Because the evidence shows that a substantial portion of plaintiff's left foot still remains attached to plaintiff's body."

1. It may be conceded at the outset that the provision

in the policy in question is valid, and that the court will not make a contract for the parties, and further, that, if the language employed is plain and unambiguous, the language used will be given force. A strained or unreasonable construction of the language used, where there is no real ambiguity, should not be indulged in. On the other hand, it is conceded by counsel for either party that, if the policy is reasonably susceptible of two constructions, and there is doubt as to the meaning, and therefore an ambiguity, the same is to be construed strictly against the company. These propositions are so well settled that we shall not enter into any extended discussion of the cases, but simply cite some of them. On the several propositions before set out, appellee cites the following: *Mitchell v. German Coml. Acc. Co.*, 179 Mo. App. 1 (161 S. W. 362); *McKinney v. General Acc. F. & L. A. Co.*, 211 Fed. 951; *Blume v. Pittsburgh Life & Trust Co.*, 183 Ill. App. 295; *Church Co. v. Aetna Indemnity Co.*, 13 Ga. App. 826; *Leshner v. United States Fid. & Guar. Co.*, 239 Ill. 502; *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452; *Standard Life & Acc. Ins. Co. v. McNulty*, 157 Fed. 224; *Delaware Ins. Co. v. Greer*, 120 Fed. 916; *Perry v. Provident Life Ins. & Inv. Co.*, 99 Mass. 162; *Perry v. Standard Life & Acc. Ins. Co.*, 59 Tex. Civ. App. 50 (125 S. W. 374); *Continental Cas. Co. v. Ogburn*, 175 Ala. 357 (57 So. 852); *Continental Cas. Co. v. Wade*, 101 Tex. 102 (105 S. W. 35); *Hall v. Hardaker*, 61 Fla. 267, 275; *Southern Home Ins. Co. v. Putnal*, 57 Fla. 199, 223; *Tigg v. Register Life & Ann. Ins. Co.*, 152 Iowa 720, 723; *Currie v. Continental Cas. Co.*, 147 Iowa 281; *Peterson v. Modern Brotherhood*, 125 Iowa 562.

It may be conceded, too, that the language used in the policy is a part of the promise, and that, to authorize a recovery, the loss must fall within the promise.

2. It is further contended by appellee that, where a policy of accident insurance promises payment for the loss of either foot by complete severance at or above the ankle, there can be no recovery for loss of a foot where it appears, from the undisputed evidence, that a substantial portion of

the foot remains. On this proposition, they cite *Wiest v. United States Health & Acc. Ins. Co.*, 186 Mo. App. 22 (171 S. W. 570); *Brotherhood of R. Trainmen v. Walsh*, 89 Ohio St. 15 (103 N. E. 759); *Continental Cas. Co. v. Bows*, 72 Fla. 17 (72 So. 278); *Hardin v. Continental Cas. Co.*, (Tex. Civ. App.) 195 S. W. 653; *Peterson v. Modern Brotherhood*, 125 Iowa 562; *Bigham v. Clubb*, 42 Tex. Civ. App. 312 (95 S. W. 675). Also, the following cases, to the same point, and to the further point that, under such circumstances, there is no occasion for the application of the doctrine of strict construction. *Mady v. Switchmen's Union*, 116 Minn. 147 (133 N. W. 472); *Stoner v. Yeomen*, 160 Ill. App. 432; *Newman v. Standard Acc. Ins. Co.*, 192 Mo. App. 159 (177 S. W. 803); *Metropolitan Cas. Ins. Co. v. Shelby*, 116 Miss. 278 (76 So. 839).

We may say, in passing, that it is possible, and some of the cases hold, that there may be a loss of a foot without any severance, that is, the loss of the use of the foot. But it may be conceded that, under the policy in the instant case, there must have been a severance. There was a severance. Under the terms of the policy, such severance must have been at or above the ankle. We shall spend no time in discussing the question as to whether the severance in this case was above the ankle, because it is not necessary that there should be such severance, in order to authorize a recovery. If there was a loss of the foot by a severance at the ankle, it is sufficient. Whether the severance was at the ankle, we shall consider later. It should be borne in mind, however, that the promise in this policy is to pay for the loss of a foot; and the later provision in the policy defines, or attempts to define, the meaning of such term.

We shall notice some of appellee's cited cases, and those most strongly relied upon to sustain its contention. In the *Wiest* case, *supra*, the policy provided for the payment of the principal sum for the loss of one hand, which was stipulated to mean loss by severance at or above the wrist joint. The plaintiff's injury necessitated amputation of the thumb and first three fingers, and a large portion of the palm.

leaving only the little finger and a part of the palm supporting it. The little finger and the portion of the palm remaining were permanently paralyzed, and of no use or service. Plaintiff lost the entire use of his hand, as completely as if it had been severed at the wrist joint. The question was whether plaintiff, having suffered the total loss of the use of the hand, was entitled to recover, without proof of the actual, physical severance thereof, at or above the wrist joint. The court said, in part:

"But here the policy provides that the loss of a hand shall mean loss by *severance at or above the wrist joint*. Not only is it provided that the loss of such member shall be by physical severance thereof, but the extent of such loss is made exact and definite by locating the precise point at or above which such severance shall take place. * * *

In the instant case, had the provision of the policy agreeing to indemnify plaintiff in the amount of the principal sum of the policy for the 'loss of one hand' stood entirely alone, and unaffected by any other provision thereof, beyond doubt plaintiff would have been entitled to recover, having lost the entire use of his hand. However, the very next paragraph of the policy provides, in unmistakable terms, what shall be meant by the 'loss of one hand,' to wit, the loss thereof by severance at or above the wrist joint. Plaintiff has not suffered a loss of his hand by severance at or above the wrist joint; and if effect is to be given to the last-mentioned provision, plaintiff's case must fail. If any ambiguity or uncertainty of meaning could be said to inhere in the pertinent provisions of the policy, it would readily be resolved in favor of the insured, and against the insurer. Such is the well-established and wholesome doctrine with respect to the construction of insurance contracts. * * *

If it appeared that the portions of the policy under consideration, when read and construed together, were at all ambiguous or of doubtful import, we should not hesitate in the least to 'blandly' resolve such ambiguity or doubt in favor of the insured. Indeed, the policy should, if possible, be construed so as to effectuate the insurance, and not to

defeat it; for the indemnity is the very object and purpose of the contract, for which the insured has paid a consideration. See *Stix v. Travelers Indemnity Co.*, 175 Mo. App. 171 (157 S. W. 870). But it appears that the defendant has chosen apt language to indicate that it does not agree to indemnify the insured for the loss of a hand, unless such loss shall consist in the actual physical severance of the hand at or above the wrist joint. It is by no means likely that the policyholder so understood, or that he would knowingly have accepted the policy with such restrictive limitations upon his right to recover the indemnity for the loss of a hand or foot; but we can find the intention of the parties only from the language employed in the contract, having regard to the rules of interpretation which may be applied to contracts of this character. We cannot 'blandly' construe the troublesome provision out of the contract, and disregard it altogether; for however great may be our inclination or duty to protect a policyholder against intricate or obscure technical provisions, designed for the avoidance of liability on the part of the insurer, we cannot make a contract for the parties. The stipulation in question, as we have said, follows immediately that portion of the policy providing for specific losses, in the same type in which the body of the policy is printed. Its meaning appears to be plain and unmistakable. It pointedly defines what shall constitute the 'loss of a hand.' "

It will be noticed that, in that case, the severance was to be at the joint. This, we think, fixes the point more definitely than would have been the case if it had been omitted. It should be said, however, that some, though not all, the definitions of ankle say it is the joint connecting the foot and the leg. This feature will be taken up later in the opinion. Though the court in that case blandly, or perhaps strictly, speaking, positively states that the policy fixes the severance at the precise point at or above which the severance shall take place, we have grave doubt whether the use of the words "at the ankle" does fix an exact, definite, or precise point. It will be observed that, in the

Wiest case, the question of the meaning of the word "at," and whether it does fix a precise point, is not discussed, but only asserted. A careful reading of that case shows, we think, that the court was interpreting the contract more especially with reference to the question whether there was a loss of the hand without a severance, as distinguished from a loss with a severance.

In *Brotherhood of R. Trainmen v. Walsh*, supra, the provision of the policy was for the severance of an entire hand at or above the wrist joint, etc. Plaintiff's thumb was amputated, but the rest of the hand was so crushed and mangled that he was permanently disabled from using the hand to perform any manual service. Construing the pleadings in that case, the court held that no severance was alleged; and that there was no amputation or severance of an entire hand at or above the wrist joint; and that there was no ambiguity. The language of the policy in that case is more precise and definite than in the case at bar, in that the words "entire" and "joint" are used.

In the *Bows* case, supra, a case against this defendant, and under a policy like the one now in controversy, where the policy provided for the loss of either hand by complete severance, at or above the wrist, it was shown that the ends of the metacarpal bones were disjointed and separated, or, in a sense, severed from the carpals. This left the thumb sticking out so far that there was no place to get the muscles of the thumb attached to anything; and one bone of the wrist was removed, so that the thumb could be set farther back, to bring the muscles down, and thus get an attachment for the muscles, and give him some use for the thumb. The court, discussing the question whether there was a complete severance of plaintiff's hand at or above the wrist, held that there was not such a severance, and denied a recovery. The question was whether there had been a severance, within the meaning of the policy. The opinion in that case cites the *Wiest*, *Walsh*, and other cases cited by appellee.

The *Hardin* case, supra, was on a policy issued by this

defendant, where the claim was for the loss of a hand by complete severance at or above the wrist. It was shown by the evidence that:

"The appellant's hand was amputated, so that all the phalanges or finger bones were gone, except the proximal one half of the first phalanx of the thumb; all of the fifth metacarpal bone is gone; all of the second, third, and fourth metacarpal bones are gone, except the proximal heads of same; and that there remain of the hand the proximal heads of the second, third, and fourth metacarpals, the proximal half of the first phalanx of the thumb, all of the first metacarpal, and all of the rest of the bones of the hand. It was agreed upon the trial of the case between the parties that the human hand is composed of: scaphoid, semilunar, cuneiform, pisiform, trapezium, trapezoides, os magnum, and the unciform bones and five metacarpal bones and fourteen phalanges."

The trial court found, as a fact, from the evidence, that plaintiff's hand was not completely severed at the wrist, in contemplation of the provision of the policy. The appellate court held that the finding had sufficient support in the evidence, and that the evidence shows that not all of the hand was severed, and that it does not show that the entire hand was severed at the wrist. The court interpolated the word "entire," which is not in the policy. There was no discussion of the meaning of the word "at."

Fuller v. Locomotive Eng. M. L. & A. Assn., 122 Mich. 548 (48 L. R. A. 86), is cited in the *Bows* case, and by appellee herein. In that case, it was held substantially that the amputation of a person's foot, so as to leave all of the heel and substantially all of the hollow of a foot, and a part of the ball, does not give a right to the full amount of the insurance, on the ground that the full use of the foot is lost, under a by-law of the association which provides for full payment in case of "amputation of a limb (whole hand or foot);" as the word "whole" applies to the foot, as well as to the hand, and the injury insured against is not the loss of the use of a hand or foot, but the amputation of a

limb, that should include a whole hand or whole foot. More of the foot remained there than in the instant case. The pivotal point in that case was whether the language used should be construed to mean a whole foot, as well as a whole hand.

The foregoing cases are more nearly in point than some of the others cited; but for the reasons indicated, they are not quite "gray horses" or "spotted mules" with the case at bar. The other cases will be referred to more briefly.

In the *Mady* case, the question was whether there was a total disability, under a policy providing for a physical separation of the loss of four fingers of one hand, at or above the third joint, and so on, where, after the amputation, the entire first finger and the thumb remained attached to and a part of the hand. It was held that the evidence showed a loss of but approximately 50 per cent in the usefulness of the index finger, and he was allowed only a part of the recovery, instead of as for total disability.

In the *Stoner* case, where it was provided for the loss of a hand by severance at or above the wrist, it was held that the loss of the use was not sufficient to establish liability.

The *Bigham* case arose out of an election contest. The statute exempted those from payment of poll tax who have lost a hand or foot. The evidence showed that the party had lost three fingers and part of the forefinger, but had not lost the palm and thumb. The court said that the loss of the members is what constitutes the exemption, and not the maiming of them; that a man may lose the use of a limb, and not lose the limb.

In the *Newman* case, the court said that the point of severance is stipulated in the contract, and must be enforced as made. The stipulation was for the loss of the thumb and index finger by severance at or above the metacarpophalangeal joints.

In the *Shelby* case, the loss of the use of a hand was not within the provision of the policy providing for severance at or above the wrist, since severance means the re-

moval of anything, the act of severing, dividing, or separating, etc.

Counsel for appellee concede that there are no cases in Iowa which are directly applicable, but they cite and rely upon, as they say the trial court did in part, the *Peterson* case, *supra*, where a recovery was sought for the breaking of a leg, which was defined to be the breaking of the shaft, and so on. It was held that the breaking of the extremity of the bone was not a breaking of the shaft. The case turned largely on the definition of the term "shaft," and it was held that there was no ambiguity, or occasion for strict construction. Two members of the court dissented; and some members of the court as at present constituted are inclined to agree with the dissent. Some of the other cases cited are upon the proposition as to whether there is an ambiguity, and we shall not review them further. There seems to be little, if any, dispute between counsel as to the rule. But the question is more whether the language in a particular case is plain or ambiguous.

Appellant's propositions and the cases cited to support them are:

The policy of insurance should be most favorably construed in favor of the plaintiff. *Meyer v. Fidelity & Cas. Co.*, 96 Iowa 378; *Kirkpatrick v. Aetna Life Ins. Co.*, 141 Iowa 74; *Simpkins v. Hawkeye C. M. Assn.*, 148 Iowa 543, 551. See, also, 14 Ruling Case Law 926. The insurance policy is to be interpreted according to its character and purpose, and in the sense in which the insured had reason to suppose it was understood. *Sneck v. Travelers' Ins. Co.* 88 Hun 94 (34 N. Y. Supp. 545); *Lord v. American Mut. Acc. Assn.*, 89 Wis. 19 (61 N. W. 293, 26 L. R. A. 741). See, also, 14 Ruling Case Law 925 *et seq.* The preposition "at" primarily signifies near to, or co-extensive with. 5 Corpus Juris 1422 to 1431; 1 Words & Phrases 594. "At a point" should be construed as equivalent to "at or near the point." 5 Corpus Juris 1435. They say further that severance at or above the ankle should be construed in the ordinary and fair meaning of the words used, and not in an

anatomical or technical sense (*Sheanon v. Pacific Mut. Life Ins. Co.*, 77 Wis. 618 [9 L. R. A. 685], 1 Corpus Juris 417); and that the provision in question is reasonably susceptible to two constructions, and that the one most favorable to the insured should be adopted. *Peterson v. Modern Brotherhood*, 125 Iowa 562; *Young v. Travelers Ins. Co.*, 80 Me. 244 (13 Atl. 896). And finally they contend that it was a question for the jury to determine whether or not plaintiff had lost the use of his foot, and whether the amputation or severance was at or above the ankle. *Moore v. Actna Life Ins. Co.*, (Ore.) L. R. A. 1915 D, 264; 1 Corpus Juris 467; *Beber v. Brotherhood of R. Trainmen*, 75 Neb. 183 (106 N. W. 168); *Sheanon v. Pacific Mut. L. Ins. Co.*, 77 Wis. 618 (46 N. W. 799, 9 L. R. A. 685). See, also, *Lord v. American Mut. Acc. Assn.*, supra.

In the *Lord* case, however, the policy did not provide for amputation or severance, but it was argued by the company that such was the meaning of the words used. The *Moore* case is as nearly in point for appellant's contention, perhaps more nearly so, than the cases cited by appellee are for its contention. The *Moore* case refers to some of the cases cited by appellee herein. The court divides the cases into three classes, and holds that the *Moore* case does not come within any of the three. In that case, the provision of the policy was for the loss of a hand by removal at or above the wrist. The bones of the hand were removed at the wrist, except the thumb, and, as we understand it, some of the wrist bones; enough of the flesh of the hand was left to cover the bones of the wrist in hardened callous, but no more than good surgery would require for protection of the bones of the wrist. The court said that substantially nothing remains of plaintiff's hand but a worse than useless fragment. The court held that the language used was reasonably susceptible of two interpretations, and that the doubt should be resolved in favor of the insured. The court said, further:

"Let us consider the relations of the parties, and the object which plaintiff had in view when he took out this

policy. He had a good hand, against losing the use of which he desired to insure. If he had been told the intent and meaning of the policy was such that if, in case of a necessary amputation, the surgeon should leave some useless shred of his hand, to be a source of annoyance and inconvenience, and thereby his policy would be practically worthless, does any sane person believe for a moment he would have taken out the policy? The substance of what he sought was insurance against the possible loss of his hand, as a useful member of his body. Substantially, he has lost his hand, by removal at the wrist. In view of all the decisions, it is apparent that the words 'by removal at or above the wrist' were introduced as a safeguard against possible fraud, and to prevent a recovery in cases where there had been no substantial removal of the injured member; but here, the hand, as a hand, is gone. Practically, the plaintiff has no hand."

The court refers to the *Sneck* case, as sustaining its conclusions. In the *Sneck* case, the provision was against loss by severance of one entire hand. The court quotes from the *Sneck* case as follows:

"To require the insured to submit to a strictly literal interpretation of the contract prepared for him by the insurer, without regard to the purpose of the contract or the understanding thereof by the parties, would be to hold that only in case of the severance of the entire hand in a most accurately anatomical or technical sense, could the insured recover, under the clause of the policy. We do not believe that such a conclusion is required in the present case. The term 'entire hand' is to be taken in its general acceptance and ordinary meaning. In construing this contract the law does not require an injury which comes within a strictly accurate and technical definition of the words employed, but one which reasonably, fairly, and practically comes within the meaning of the terms employed, in their general and usual meaning and acceptance. In a contract of insurance providing for indemnity for the loss of a limb, the compensation to be paid is not

merely for the physical pain of its amputation, but principally for the deprivation of its use as a member of the body. It would seem to be an extremely narrow and technical construction of this contract to say that only a physical removal of every particle of that portion of the human anatomy known as the hand, would entitle the insured to recover under the clause of the policy now under consideration. Is it not more reasonable and logical to conclude that, in the use of the language above referred to, the 'entire hand,' as a part of the human structure, is considered in connection with the use to which it is adapted, and the injury which the loss of such use would entail? Is it not also fair to assume that this was regarded by the parties as the sense in which the contract was to be understood, and was one of the considerations which influenced the insured to enter into the contract?"

We think the Oregon case is the better authority, and we are inclined to follow it. The *Sheanon* case is not so nearly in point. The provision there provided indemnity for the loss of two entire feet. The court held that the loss of the use of the feet authorized a recovery though there was no amputation.

There is another consideration, however, which appears to us worthy of consideration, and which seems not to have been considered in any of the cases; and that is the construction of the word "at," in the term "at or above the ankle," and what constitutes the ankle. One definition of ankle is: "The joint which connects the foot with the leg; the tarsus." Webster's Dictionary. Another: "Tarsus, the ankle; the bones or cartilages of the part of the foot between the metatarsus and the leg, consisting, in man, of seven short bones." Webster's Dictionary; Elements of Physiology, by R. T. Brown, M. D. Another: "The bones of the tarsus, or the ankle, are seven in number." Encyc. Britannica, Vol. 1, page 830 (9th Ed.). Another: "The ankle joint is formed by the tibia and fibula above, and the astragalus below." New International Encyc., Vol. 8, pages 783, 784. "The joint which connects the foot with

the leg; by extension, the slender part of the leg, between the calf and the ankle joint." 8 New International Encyc. "The joint connecting the foot and the leg; also, the prominence on either side of it. 2. The part of the leg near the ankle joint." Standard Dictionary. "The joint by which the foot is united to the leg." American Encyclopaedic Dictionary, Vol. 1.

"The ankle is the joint which connects the foot with the leg; the slender part of the leg between the joint and the calf." New Eng. Dictionary (Murray, Oxford).

"The ankle is a perfect ginglymus, or hinged joint. The bones which enter into its formation are: The lower extremity and interval malleolus of the tibia and the external malleolus of the fibula above; and the upper and lateral articular surfaces of the astragalus below." Human Anatomy, Morris (B. Blakiston's Son & Co.) 266 (1898).

"Foot: (1) The extremity of the leg below the ankle; the part of the leg which treads on the ground in standing or walking, and on which the body is supported. (2) The foot consists of many bones, viz., seven bones of the tarsus (q.v.), five metatarsal bones, and the phalanges of the toes. Essentially, they are homologous with those of the hand." 2 American Encyclopaedic Dictionary 1; Hand Atlas of Human Anatomy, Spalteholz, 147, 151.

"Foot: The segment of the limb of a vertebrate animal upon which the body rests in standing; the part below the ankle (pes) in man, or below the ankle or wrist (manus or pes) in other vertebrates. The human foot consists of three parts; the ankle, or tarsus; the instep, or metatarsus; and the toes, or phalanges." Standard Dictionary, Twentieth Century Edition.

These definitions of ankle differ. Some give it as the lower part of the leg. If this is accurate, why may it not be said to be the upper part of the foot? Some of the definitions say it is the joint. The joint, perhaps, would be more definite than the ankle; but even "joint" does not necessarily mean the exact point of articulation. Other definitions say it is the tarsus, or that part of the foot

between the metatarsus and the leg, consisting of seven short bones. It was some of these seven bones that were severed, or divided, in plaintiff's foot. Can it be said that any of these definitions fix a definite or precise point or place, when used in connection with the words "severance at the ankle?" It is very clear to us that none of them do so. Under these definitions, what is the ankle? What do the words "at the ankle" mean? Can it reasonably be said that it is plain, that there is no doubt or ambiguity as to the precise point where the severance must be, so that the language used is not susceptible of two constructions? Clearly not. The language could have been made more precise and specific. For instance, it could have provided that the severance should be at the articulation of the lower end of the leg bones, and the bone or bones upon which they rest, or could have used some such language. The use of the words "at or above" indicates quite clearly that no definite or precise point of severance was fixed. It could be at or above. From some of the definitions, the bones that are severed are a part of the ankle. If such bones at the point of severance are a part of the ankle, then clearly the severance was at the ankle. If the bones severed are a part of the ankle, they are *in* the ankle, and if in the ankle, it is, of course, at the ankle. Furthermore, we find that the word "at" is a preposition of extremely various use. Being less restricted as to relative positions, it may, in different constructions, assume their office, and so become equivalent to "in," according to the context, or "in or near," "near," "close to," etc. 5 Corpus Juris 1420, 1422.

We do not hesitate to say that, since the bones severed and the point of severance were a part of the ankle, the severance was at the ankle. Plaintiff was insured against the loss of his foot. He did lose his foot, by severance, and the severance was at the ankle. As has been said, the use of the words "at or above" negated the thought of a precise point, and we find that the use of the word "at" usually negatives the idea that precision or an exact coin-

cidence is intended, either of place or time. It is a word of great relativity and elasticity of meaning, and is somewhat indefinite, shaping itself easily to varying contexts and circumstances. It is not a word of precise and accurate meaning, or of clean, clear-cut definition, and it has been said that the connection furnishes the best definition. The word is not definitely locative, when applied to the place or location of an object, and so used is less definite than "in" or "on," having a much wider signification, and it may include all that "in" would include, and less than "in and near." Its primary idea, as applied to place, is "nearness," and it is commonly used as the equivalent of "near." 5 Corpus Juris 1422 to 1427. See, also, *Old Ladies Home v. Hoffman*, 117 Iowa 716.

Of course, the word may, under some circumstances, indicate a definite point of time or place.

We reach the conclusion that, under the evidence, plaintiff lost his foot and the use of it by severance at the ankle; at least, it was a question for the jury. We hold that the words used as indicating the point of severance are, at the most, ambiguous, and that, to carry out the purposes intended, that is, to pay indemnity for the loss of plaintiff's foot, it could properly be found that the severance was at the ankle. It follows that the court erred in directing a verdict for the defendant. The judgment is reversed, and the cause remanded.—*Reversed and remanded.*

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

HENRY READ, Trustee, Appellant, v. WILLIAM E. ROUSCH,
Appellee.

APPEARANCE: Converting Special into General Appearance.

- 1 An appearance, avowedly for the sole purpose of denying the jurisdiction of the court, and supported by a showing that defendant was a nonresident of the state, and was served with process while attending court in this state as a witness in an

action between third parties, is not converted into a *general* appearance because defendant makes an additional showing as to a matter which does not go to the jurisdiction of the court,—to wit, a showing that an action between the same parties, involving the same subject-matter, is then pending in the courts of defendant's residence,—and prays for a dismissal of the action in this state on *all* the grounds set forth in the showing.

DISMISSAL AND NONSUIT: Belated Filing of Petition—Waiver.

- 2 Defendant's right to have an action dismissed because the petition is not filed on or before the time stated in the notice of suit, is in no wise waived by the fact that defendant, in attempting to make a special appearance, made a general appearance, by pleading to matters which did not go to the jurisdiction of the court. (Sec. 3515, Code, 1897.)

Appeal from Page District Court.—E. B. WOODRUFF, Judge.

SEPTEMBER 29, 1920.

ACTION at law to recover judgment upon certain promissory notes, payment of which, it is alleged, was, for a valuable consideration, assumed by the defendant. Notice was served upon the defendant in Page County, Iowa, on September 8, 1919, to the effect that a petition demanding such recovery would be filed in the office of the clerk of the district court of said county on or before October 1, 1919. The petition was not, in fact, filed until October 2, 1919.

On October 21, 1919, the defendant, by counsel, filed a paper entitled "Special Appearance of Defendant," stating therein that such appearance was for the sole purpose of denying the jurisdiction of the trial court to entertain the action. The first reason or ground stated for such objection is to the effect that defendant was then and still is a nonresident of Iowa, having his domicile and residence in the state of Missouri, and that the original notice in the case was served upon him in the courthouse of Page County, Iowa, where he was in attendance upon the district

court of this state, to testify as a witness, in obedience to a subpoena issued in an action then and there pending between third parties; by reason of all of which he was exempt from liability to be sued in the courts of this state. In the same paper or pleading, defendant further states that plaintiff's petition was not then filed in the court below, nor was it filed at any time until after the expiration of the time fixed therefor in the original notice. Because of the matters so stated, he asked that the action be dismissed.

Further stating his objections to the authority of the trial court to hold him liable to answer the plaintiff's claim, defendant made use of the following language, to wit:

"6½. That the same identical cause of action is now pending in the circuit court of Clay County, Missouri, said suit therein being entitled, 'Henry Read, Trustee, Plaintiff, v. William E. Roush, Defendant,' a copy of the amended petition filed therein, marked Exhibit E, being duly certified to, is attached hereto and made a part hereof, together with the certificate attached thereto.

"7. That this court is without jurisdiction of said cause of action, by reason of the matters above stated and complained of, and as further set forth in the affidavits attached hereto, in support thereof, and by reason of the matters referred to herein.

"8. That defendant objects to and complains that this court does not have jurisdiction of this cause of action by reason of all of his objections and complaints, attaches the annexed affidavits, and also refers to the original notice and return of service thereof, and the notation as to the time of filing of the said petition and copy of plaintiff in said action, as noted thereon by the clerk of said court, and the entry as to the time of filing said petition and copy in judgment and Appearance Docket X, at page 7493 thereof, and also to the original subpoena served upon the said William E. Roush in said case of Grant Taylor, Plaintiff, v. A. T. Clark, Defendant, and to the return of service thereof, all as filed in said case of Grant Taylor, Plaintiff,

v. A. T. Clark, Defendant, in the office of the clerk of said district court of Page County, Iowa. Wherefore defendant asks that the court dismiss said cause of action."

On consideration of the matters so shown and conceded, the trial court sustained the defendant's objections, dismissed the action, and taxed the costs to the plaintiff. From this ruling and order, the plaintiff appeals.—*Affirmed.*

Tinley, Mitchell, Pryor & Ross, for appellant.

Shinbarger, Blagg & Ellison, for appellee.

WEAVER, C. J.—The question to be decided is very much simplified by the appellant's admission of the fact that defendant was a nonresident of Iowa, at the time original notice was served upon him, and was then

1. APPEARANCE: within the state of Iowa, in attendance upon court under subpoena to testify as a witness in another cause, and by the further concession that the petition in the present case was not filed within the time stated in the notice. Stated in the language of counsel for the appellant, the sole question now before the court is this: "Is the pleading which the appellee designated 'Special Appearance of Defendant' a special appearance or is it an answer or general appearance?" It is appellant's contention that, while the defendant's claim of immunity from service of process in this state, under the circumstances named, may be conceded, and while the failure to file the petition within the time stated in the notice may have entitled defendant to have the action dismissed, yet his allegation of another action already pending in another state, involving a determination of the same alleged cause of action, is in the nature of a plea to the merits of plaintiff's claim, and operates as a general appearance to the action and consent to the jurisdiction of the court in which such action is brought.

I. While the precedents dealing with cases of this kind

are quite numerous, and the holdings therein are involved in no little confusion, the best approved doctrine supports the reasonable proposition that a defendant cannot be heard to attack the jurisdiction of a court in which he is sued, and at the same time invoke such jurisdiction affirmatively in his own behalf.

Under our statute, a defendant may make a special appearance to an action against him, for the sole purpose of attacking the jurisdiction of the court. Such special appearance must be announced at the time it is made. It limits the objection to the consideration of jurisdictional matters only, and gives him no right to plead to the merits of the case. Section 3541, Code Supplement, 1913.

The defendant in this case unquestionably attempted to exercise this statutory privilege, and confessedly did make a showing of at least one sufficient ground of attack upon the court's jurisdiction over his person. The attempted service upon him of the original notice was a clear violation of his right to immunity from such process. He met the attempt at the threshold, in the manner prescribed by the statute, by announcing that he appeared for the sole purpose of attacking the jurisdiction of the court. Such being the declared intent and purpose of his appearance, the paper filed by him should be given interpretation and construction consistent therewith, if it can fairly be done. True, if, when so read, it pleads matter which, in fairness, must be deemed purely defensive, or as calling for the exercise of the court's judicial authority to pass upon any question except its own jurisdiction, then the fact that the paper is entitled a "Special Appearance," instead of an answer or other pleading, is immaterial, and ordinarily the appearance will be treated as general. It seems to us quite clear, in the present case, that the defendant and his counsel made a good-faith attempt to confine the attention of the trial court to the single question of jurisdiction. It may be that the allegation of the pendency of another suit involving the same subject-matter would, in an answer, amount to a plea in abatement; but it does not necessarily

follow that the inclusion of such allegation in a statement of the defendant's objections to the court's jurisdiction has the effect to convert such objection into a plea to the merits of the plaintiff's demand for judgment. And this is especially true where no petition had been filed to which he could be held to answer or plead. To say the least, the matter so included in the objection is not inconsistent with the professed and declared "sole purpose" of the defendant in attacking the court's jurisdiction. The pendency in another state of another action between the parties, involving the same subject-matter of controversy, was alleged, not as a defense, but as a fact bearing upon defendant's denial of the district court's jurisdiction to entertain the action for any purpose. Whether such objection be sound is immaterial, if the other ground of attack upon the court's authority in the premises is otherwise sustained by the record. This principle is recognized by the Illinois court in *Supreme Hive Ladies of the Maccabees v. Harrington*, 227 Ill. 511 (81 N. E. 533). There, the defendant specially appeared to question the court's jurisdiction. The objection being overruled, judgment was entered in plaintiff's favor. Subsequently, defendant moved the court to expunge the judgment entry, because of its lack of jurisdiction in the premises. On appeal, plaintiff's contention that the filing of this motion had the effect of a general appearance to the action was overruled by the court, saying:

"It was wholly unnecessary for the defendant to follow up its pleas to the jurisdiction of the court by objecting to the subsequent proceedings on the ground that the court had no jurisdiction of the person of the defendant; but, since all of these objections are entirely consistent with appellant's pleas to the jurisdiction, it is difficult to see how they can be held to amount to a waiver of the jurisdictional question."

So, also, in Wisconsin it is held that, where defendant, specially appearing, asks no relief except such as is consistent with want of jurisdiction of the courts over the defendant, there is no waiver of the objection. *Kingsley v.*

Great N. R. Co., 91 Wis. 380 (64 N. W. 1036); *Sanderson v. Ohio Cent. R. & C. Co.*, 61 Wis. 609, 611; *Blackburn v. Sweet*, 38 Wis. 578.

In determining whether an appearance by a defendant is general or special, the court will look to matters of substance, rather than matters of form. *Rogers v. Penobscot Min. Co.*, 28 S. D. 72 (132 N. W. 792).

It will also have regard to the defendant's apparent intent to make a special appearance, if such intent is evident from the record. *Crisp v. Gochmour*, 34 S. D. 364 (148 N. W. 624); *Thomson v. McMorran Mill. Co.*, 132 Mich. 591; *Board of County Com. v. Smith*, 25 Minn. 131; *Woodard v. Milling Co.*, 142 N. C. 100; *Moore v. Blake*, 98 N. Y. Supp. 233.

Defendant sought no affirmative relief. He did not plead or offer to plead defensively to the plaintiff's claim, but, on the contrary, carefully restricted his appearance, as required by the statute, to the sole purpose of denying the court's jurisdiction. The trial court so treated the appearance, and based its ruling dismissing the case on the admitted fact of defendant's nonresidence, and plaintiff's failure to file his petition within the period fixed by the notice. For the reasons already suggested, we think there was no error in the ruling.

Nor is this conclusion to be avoided because the defendant asked that the action be dismissed. A few precedents may be found to the contrary effect, but the overruling weight of authority sustains our statement. The rule to which we adhere is eminently just and reasonable, and is in clear accord with the provisions of the statute. See *Milwaukee Elev. Co. v. Feucht-Wagner*, 141 Wis. 266 (124 N. W. 264); *Kingsley v. Great N. R. Co.*, 91 Wis. 380; *Bierce v. Smith*, 2 Abb. Pr. (N. Y.) 411; *Hamburger v. Baker*, 35 Hun (N. Y.) 455; *Blackburn v. Sweet*, 38 Wis. 578, 580; *Jones v. Gould*, (C. C. A.) 149 Fed. 153; *Anderson v. Nawa*, 25 Cal. App. 151 (143 Pac. 555); *Flint v. Coffin*, 176 Fed. 872 (100 C. C. A. 342); *Franklyn v. Taylor H. A. C. Co.*, 68 N. J. L. 113; *Austin Mfg. Co. v. Hunter*, 16 Okla.

86; *Little v. Harrington*, 71 Mo. 390; and *Sallee v. Ireland*, 9 Mich. 154.

The foregoing cases are not all parallel with the one before us, in the facts considered or in the manner in which the questions passed upon have arisen; but, with many others which could be cited, they do substantially agree upon the proposition that, so long as the defendant confines his special appearance to an attack upon the court's jurisdiction over his person, and refrains from asking affirmative relief, which can be granted only on the theory of the existence of jurisdiction, he will not be held to have waived the objection in support of which he comes into court. And surely, his persistent and consistent demand to be dismissed from a proceeding to which he has confessedly never been lawfully made a party, ought not to be denied without a showing of sound and cogent reasons therefor,—a situation which is not here presented.

The foregoing discussion upon this question whether a motion to dismiss because of want of jurisdiction over defendant's person is tantamount to a general appearance, does not necessarily control the other question as to the effect of an appearance to move a dismissal for failure to file the petition. That subject is considered in the next paragraph.

II. It will be observed from the statement of facts and admissions of counsel that defendant's demand for dismissal of the proceeding against him is based, not alone

upon his nonresidence, or his immunity from a suit of this character while in attendance upon the courts of this state, but also upon the failure of the plaintiff to file his petition in accordance with his original

notice. The trial court ruled with defendant upon both propositions. These propositions are distinct; and, if the ruling may be affirmed on either ground, it is immaterial, for the purposes of this appeal, whether it may also be affirmed on the other. Counsel on either side have given but slight attention in argument to the failure of plaintiff

2. DISMISSAL
AND NONSUIT:
belated filing
of petition:
waiver.

to file his petition in proper time, and the principal discussion has centered around the question whether defendant waived his jurisdictional objection. It is manifest, however, that the right of defendant to demand a dismissal of the action against him because of the omission to file the petition, is not necessarily dependent upon his non-residence, or upon his immunity from suit while in attendance upon court; and that what might be held a waiver of his objection to jurisdiction on account of such non-residence and exemption from suit in this state, may not be a waiver of his right to demand a dismissal of the action because the petition was not filed in proper time. The right to raise the first objection exists only because of his nonresidence, but the second objection would be equally available to him, were he a resident of Page County, Iowa, and the service of the original notice upon him were in all respects regular and perfect.

The statute as to the effect of a failure to file the petition in time provides that, if the petition be not filed within the period fixed by the notice, and ten days before the term, "defendant may have the action dismissed" (Code Section 3515); and it is a settled rule that an appearance by the defendant to demand a dismissal on this ground will not operate as a waiver of the defect resulting from a failure to file the petition. *Cibula v. Pitt's Sons' Mfg. Co.*, 48 Iowa 528; *Moffitt v. Chicago Chronicle Co.*, 107 Iowa 407, 413; *Paddleford v. Cook*, 74 Iowa 433; *State v. Knapp*, 178 Iowa 25.

It follows of necessity from the admitted facts that, even if we should hold with plaintiff that defendant did waive his right to immunity from suit in the courts of this state, and did voluntarily submit himself to the jurisdiction of the trial court in this case, he did not waive his statutory right to have the action dismissed on his motion because of the failure to file the petition. He did make such motion, and the court did not err in sustaining it.

For the reasons stated, the ruling appealed from must be, and it is,—*Affirmed*.

EVANS, PRESTON, and SALINGER, JJ., concur.

HATTIE S. RICHMOND, Appellant, v. FIRST NATIONAL
BANK OF PLEASANTVILLE et al., Appellees.

BANKS AND BANKING: Conversion of Deposit Certificate. The
1 wrongful act of a bank in retaining certificates of deposit
and refusing payment thereon to the owner amounts to a
conversion, yet all damages are satisfied by returning the
certificates to the owner, with interest thereon for the period
of wrongful detention.

GIFTS: Unnatural Gift as Bearing on Mental Competency. While
2 a certain showing of mental weakness due solely to physical
infirmity of the donor may be insufficient to present a jury
question on the issue of mental competency, yet such showing
may be amply sufficient when aided by a showing that the
gift in question was most unreasonable and unnatural.

Appeal from Marion District Court.—LORIN N. HAYS,
Judge.

SEPTEMBER 29, 1920.

APPELLANT, Hattie S. Richmond, claims that the defend-
ant bank converted certain certificates of deposit trans-
ferred to her by her father. The administrators above
named intervened, claiming, among other things, that the
certificates belonged to the estate of the plaintiff's father,
because he was mentally incapable to make the transfer.
There was verdict and judgment against the plaintiff, and
she appeals.—*Affirmed*.

W. H. Lyon, for appellant.

Vander Ploeg & Johnson, for appellees.

SALINGER, J.—I. The appellant bases her claim that the bank was guilty of conversion on the fact that her father, W. A. Scott, by indorsement transferred to her certain certificates of deposit issued by the defendant bank; that the bank refused to pay the same when presented by her; and that it has refused to return same to her, and still retains them.

If she was lawfully the owner of the certificates, and the bank has done what she charges, its acts would constitute a technical conversion, and create the possibility of

nominal damages. They would be nominal only, because, on payment of interest for the time the certificates were wrongfully detained, there could be no substantial injury caused by the detention. The defendant stands as if an interest-bearing note were wrongfully detained, but finally surrendered. For all practical purposes, the bank stands indifferent between the real contenders; for it is willing to return the certificates to the one who shall be found by the court to be entitled to them, on determination of intervention.

II. The widow of W. A. Scott, as administratrix, and Metcalf, as administrator, have intervened, and say that the certificates belong to the estate of the decedent, W.

A. Scott, because, even if it were conceded that he indorsed the same to the plaintiff, he was, at the time, mentally incompetent. If, then, the jury can be sustained in finding, as it did find, that Scott was, at said time, incapable, that ends the controversy. In that event, plaintiff cannot maintain conversion, because she does not own the certificates; and the bank is content with said finding, and stands ready to satisfy the interveners, by turning said certificates over to them.

Holding, then, that the jury could find such alleged mental incapacity would, since it is not claimed the transfer was on consideration, and since no innocent purchaser is involved, be decisive; and whether the jury can be sus-

1. BANKS AND BANKING: conversion of deposit certificate.

2. GIFTS: unnatural gift as bearing on mental competency.

tained in making such finding is, therefore, the inquiry first in order.

We agree with appellant that the mere impairment of physical powers by age, and the incident loss of mental vigor, are not enough to show incapacity to direct the business of determining the disposition of property among one's children (*Slaughter v. McManigal*, 138 Iowa 643); and that, as a general rule, the decreased bodily and mental powers incident to advanced years do not, in the absence of abnormal conditions, constitute unsoundness of mind, within the meaning of the law (*McGuire v. Moorhead*, 151 Iowa 25); and that mere mental weakness, not due to mental disease, but solely to physical infirmity, does not constitute mental unsoundness (*Speer v. Speer*, 146 Iowa 6); and that physical weakness would not incapacitate, unless mental weakness is shown as a resultant condition of the physical weakness (*In re Estate of Workman*, 174 Iowa 222).

But, applying these rules of law, is there not enough to make mental capacity a jury question? Grant, that, up to the time this controversy was initiated, the competency of W. A. Scott to transact his own business affairs had never been questioned by the defendant bank or anyone else; grant that the bank cannot be its own jury, and defend its refusal to surrender the certificates to the plaintiff by declaring that her father was mentally incompetent,—and still the question remains whether the evidence was such as that we may not disturb the finding that W. A. Scott was mentally incapable to make an effective transfer.

Intervenors have the burden of proof on this. Witnesses called by them said that, a few days before his death, Scott was in bed; that his voice and he himself were weak; and that his physical condition was poor. One witness says Scott was sick, a good deal of the time, and she had seen him fall, and helped him up. Two of the witnesses said they had seen Scott fall, and had to help him up. Another witness saw him fall once; but this time, he got up without help. Neither of these witnesses, however, said any-

thing with reference to mental weakness or impairment. Though Scott was 86 years old, it may be granted that all preceding will not sustain the finding of mental inability to make a gift to a daughter, by indorsing certificates of deposit to her. But, in addition, there was testimony from which, if believed by the jury, it could find that Scott was, for a year before his death, unable to dress himself, or care for himself in any manner; that, if he went outside the house, he would fall, and it was necessary for his wife or neighbors to come to his assistance; that he would get lost in his own home, and, at the time when plaintiff was at his home, he was so weak that he was unable to feed himself, or raise his hand for that purpose; that he was as helpless as a child; that, during this time, he was unable to write; and that this condition had existed for some two or three weeks prior to his death, and during all the time that his daughter was with him.

There was testimony upon which the jury could find that, for six months prior to the transaction involved here, Scott had been confined to the house, most of the time in bed, from which he could not arise without assistance; that, when the witnesses went into his room, he had so far lost consciousness and mind that he did not realize they were in the room; that, shortly before plaintiff's visit, one of the neighbors went to assist his wife in bathing him, and, although he was in a filthy condition, he refused to permit this, and the effort was abandoned, because of his struggles, and because they did not want to wear him out. This was shortly before the time plaintiff arrived at his home.

Grant, for the sake of argument, that all that precedes still does not make a jury question of mental capacity to make the alleged gift. But what shall be said of unreasonableness and the unnatural character of the gift? True, one who is competent may make an unreasonable, and even an utterly unnatural, disposition of his property. But that is so only if he is competent. But, when the question is whether he is competent, then the fact that he deals with his property in an unnatural manner will, when added to

such testimony as has been adverted to, warrant a jury in finding that the party was incapable of transacting business and of disposing of his property. An unnatural and unreasonable disposition of property may be shown, as bearing on the issue of mental condition. *Manatt v. Scott*, 106 Iowa 203; *Bever v. Spangler*, 93 Iowa 576.

What warrant had the jury for concluding that the alleged gift was both utterly unreasonable and unnatural? If it believed the testimony, it could find that Scott had no property, except the certificates and an undivided half of a small homestead, worth about \$600. It could find that the daughter who now claims all of the father's property was never at the home, never assisted in caring for her father until a few days before his death, and that the transfer to her was made a few days after her arrival. Her father had seven children other than plaintiff, and there is nothing to show that she had a different or other claim upon him than had any of his other children. He left a widow, who had married him when he was a very old man; and the jury could find that the wife cared for him as a nurse, during the last six or seven years of his life, when he required almost constant nursing and care. This gift gave none of the other children anything. Not a dollar went to his widow from his estate, and not enough was left in the estate to pay the decedent's funeral expenses.

It would be truly a usurpation of power for this court to disturb the finding of the jury on this record.

As said, if this finding must stand, the conversion action fails for want of title in the plaintiff. It follows, judgment below must be and the same is—*Affirmed*.

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

JOHN D. SPITLER, Appellee, v. PERRY TOWN LOT AND
IMPROVEMENT COMPANY, Appellant.

VENDOR AND PURCHASER: Delay as Barring Rescission. The
1 right of a purchaser of property, even though it be non-
perishable—real estate—to rescind the contract for false repre-
sentations, howsoever reprehensible, is waived, as a matter
of law, by a delay of a full year after acquiring full knowl-
edge of all material facts.

TRIAL: Submission of Established Defense. The vice of submitting
2 to the jury an unquestionably established defense is not cured
by the fact that the instructions were correct in form.

VENDOR AND PURCHASER: Rescission—Nonprejudice as Avoid-
3 **ing Delay.** Vendee's failure to attempt rescission of a con-
tract of purchase for a full year after securing full knowledge
of all the facts, may not be avoided by the fact that vendor
has not been prejudiced by the delay. For a much greater
reason, there is no avoidance when vendor has, in the mean-
time, lost the rent of the property, and, in case of rescission,
must lose the "wear and tear" on the property, for which
rent vendee makes no money tender until after suit brought.

VENDOR AND PURCHASER: Ratification of Contract. A vendee
4 may not rescind a contract of purchase on which he has made
a payment at a time when he knew, or ought to have known,
the truth of all relevant facts.

Appeal from Perry Superior Court.—W. W. CARDELL,
Judge.

SEPTEMBER 29, 1920.

Suit to rescind on account of fraudulent representa-
tions, alleged to have induced plaintiff to purchase certain
town lots. He has recovered the purchase price, and de-
fendant appeals.—*Reversed.*

Dugan & Dugan, for appellant.

Thos. M. Tiernan and W. H. Winegar, for appellee.

SALINGER, J.—I. We shall assume that the representations which the appellee relies upon are actionable, false representations. These seem to be that the defendant com-

1. VENDOR AND PURCHASER: delay as harring rescission.	pany falsely represented to plaintiff, when he purchased the lots: (1) that, within two years thereafter, a street railway would be constructed and operated between the main business portions of Perry and the
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Dilenbeck Addition, lying to one side of the city; (2) that a contemplated steel plant, then in the course of construction, would be finished, and would employ a certain number of men that would live in the addition; (3) that a college would be constructed and in operation on a definite location in said addition. We shall further assume that, in reliance, the plaintiff purchased at a price the lots would be worth with said improvements constructed, and in operation. The avoidance presented by defendant is that plaintiff has forfeited the right to rescind, because he has waited an unreasonable length of time after discovering the alleged fraud, before he attempted to rescind. The appellant complains that this avoidance was submitted to the jury, and says said defense was established, as matter of law. Appellee answers that whether there had been such unreasonable delay was fairly a jury question, and that the jury could find, as it did find, that notice of rescission was served soon after plaintiff learned definitely that said representations were not to be complied with. Appellee tells us there might be some merit in the claim of appellant if it had clean hands, but that the defense or avoidance is not available, because the cry of "unreasonable delay" is made "in order to cover the dirt and grease of fraud and deception upon his own hands," that appellant should receive slight consideration, "blackened as it is with its fraud and deception, with no other defense than simply that its victim did not act with the same promptness and

capacity that a captain of industry like the president of the appellant company might have used."

In every case where it was held rescission was barred for delay, it may, perhaps, have been possible to say that it enabled the other party "to enjoy the fruits of its fraud and misrepresentations simply because its victims did not realize as quickly as the other party did, that he was being defrauded." The remedy of *rescission* may not be availed of even though the thing sought to be rescinded is a fraud committed by the other party. It must necessarily follow, then, that, if there was unreasonable delay, that will defeat rescission although the other party does not have "clean hands." The existence of such uncleanness will not bar the *defense* of unreasonable delay in rescinding. With what the effect of a fraud may be where he who commits it is seeking *affirmative* relief, is a question we do not have to deal with on this appeal.

1-a

Appellee argues that appellant cannot complain that his defense was not submitted to the jury, because the question of reasonable time, waiver, and estoppel, urged

by appellant in answer, were submitted in proper instructions. How does that sustain submission to the jury? If the defense was established as matter of law, it should not have been submitted to the jury at all. And it is no answer that the instructions which submitted it were correct in form.

II. It is elementary that any acts on part of the buyer which clearly indicate an attempt to abide by the contract of sale are evidences of affirmance of the contract, and work a waiver of the right to rescind. 39 Cyc. 1292. But whether such acts are sufficient to establish either affirmance or waiver is ordinarily a jury question. We have held that the question of reasonable time is always for the jury, where there is a dispute in the facts, if under circumstances the jury would be warranted in holding the rescission to be within a reasonable time. *Mattauch v. Riddell Auto.*

2. TRIAL: submission of established defense.

Co., 138 Iowa 22, 24. We do not challenge the correctness of the statement in *Duetzmann v. Kuntze*, 147 Iowa 158, 162, that "what is a reasonable time necessarily depends on circumstances." But most fact issues on the law side are for the jury. Nevertheless, any fact question may, in the absence of conflict, become a law question. And we have held that, on some states of evidence, the very question at bar will become one for the court. In *Moore v. Howe*, 115 Iowa 62, 65, we said:

"Sometimes this question as to what is a reasonable time is for the jury; but we have no hesitancy in saying, as a matter of law, that the retention of the retail stock of goods, and the sale therefrom in the ordinary course of business and appropriating the proceeds thereof, for nearly four months after acquiring knowledge of the alleged fraud, will preclude a subsequent rescission of the contract. Such treatment of the property is an unequivocal election to accept the goods and carry out the contract. Taking any benefit or changing the condition of the property bought after learning of the fraud, has been adjudged a waiver of the right to rescind."

In *Mattauch v. Riddell Auto. Co.*, 138 Iowa 22, appellant bought an automobile in August, 1905. In September following, he had made up his mind the machine was not satisfactory, and didn't work; in December, he offered to rescind, by tendering a return, and this court said:

"Counsel for appellant contend that the question as to reasonable time is for the jury; but, where there is no conflict in the evidence as to the facts, and it appears that the time which has elapsed between a knowledge, on part of the buyer, of the defects in the article warranted, and the time of the attempted rescission, is so great that under no circumstances appearing in the evidence the jury would be warranted in holding the rescission to be within a reasonable time, the court may decide the question as a matter of law, and deny plaintiff relief on the theory of rescission."

And we do not deem it to be controlling, but merely

adventitious, that, in the cases where such delay has been held to be unreasonable as matter of law, there was most often involved property that was more or less perishable; nor that the ownership was constantly changing, for which reason it was impossible to place the parties *in statu quo*. We rule there may be cases wherein it may be held, as matter of law, that the delay was unreasonable, even though the property was not perishable, and was not constantly changing hands.

III. This brings us to the substance of the appeal. Appellee says that these representations were not as to existing facts, but statements as to what was to occur in the future. He concedes that, if the representations had been as to existing facts, then, immediately on discovery of their falsity, it would have been his duty to rescind promptly. But he argues that, as these representations deal with the future, it might, in certain circumstances, remain an open question, even after discovery of falsity, whether the thing represented might not still come true later. Appellee concedes that two years was the time limit for testing out. He says one of the representations was that a street railway would be built and in operation within two years from the time of the contract. He concedes this time has expired about a year before the rescission. His attempted avoidance is that the railway company had some material on the ground, and that he "no doubt hoped each day to see the operation of construction begin, and, naturally relying upon the integrity of the officers of the appellant company, would delay rescinding, giving them all the chance possible."

Surely, all this did not justify waiting a year after it was known that the railroad was neither built or in operation. The representations as to the steel plant, appellee meets by saying that the building was actually constructed, "and was still upon the premises, being operated more or less in the winter of 1916, a very short time before rescission, and the evidence shows that there was no attempt to wreck the steel plant construction until the winter of 1916."

If the building was "actually constructed," there was no false representation. If it was not constructed,—if there was no "steel plant" within the meaning of the representation (a plant employing 200 men),—then action was delayed much too long to justify rescission, even though there was no attempt to wreck what construction was on the ground. With another representation, the one that a college would be erected, constructed, and in operation, appellee deals in like manner. He says:

"The lots upon which it was represented the college was to be constructed, were still there, and apparently still owned by Jones, who was to construct the college. The appellee would have in mind many things that might delay the construction of a college, and would naturally, under the circumstances, wait until all hopes had vanished."

The most remarkable avoidance is this:

"Certain persons who had purchased lots brought suit in the Supreme Court for damages on account of the same alleged fraudulent representations. Opinions in these suits were handed down in the Supreme Court in October, 1916, some six months after the rescission by this appellee. As the appellant company in each case was disputing the question of false representations and the right of rescission, this appellee could not be positive that he had a suit upon that ground until the Supreme Court had handed down its opinion, which was some six months after rescission by this appellee."

In other words, appellee should be excused for delaying a rescission because he was moved to wait on a decision of this court as to what his rights were. Unfortunately, he did rescind some six months before he had that information. If he was moved to rescind six months before the opinion was filed, why was he not moved to act, say, a year before the opinion was filed? We are firmly persuaded that, if the plaintiff had knowledge that the alleged and so-called representations were false, he delayed action so long as that the particular remedy of rescission is not available to him.

IV. What of knowledge?

In the spring of 1915, both plaintiff and his wife knew that suits had been begun against this present defendant to recover damages for buyers of lots, on the ground that said railway had not been built, and that there were misrepresentations as to the college and the steel plant. One Kirkwood is a close, personal friend of plaintiff's. In January, 1915, and during the spring of 1915, Kirkwood and others sued, as aforesaid, and asked return of their purchase money. At the time stated, Kirkwood talked these matters over with plaintiff. He told plaintiff the grounds on which he (Kirkwood) would ask a recovery. These suits were tried, and had newspaper publicity. In them, Jones testified he had no intention to build a college, and had given up the plan. At the time of the talks with Kirkwood, it was commonly known that the steel plant had shut down; commonly known that a receiver for it had been appointed, about August or September, 1914, and on the grounds of insolvency; that the so-called plant was operated by the receiver until the early part of November, 1914, and was at that time advertised for sale.

There is controversy on whether the attempt to rescind was made April 6, 1916, or in May, 1917. Appellee made no offer to make allowance for use of the property occupied by him, or to account for any rent, until the first trial of the cause. On this theory is founded the claim that no rescission was attempted until May, 1917. At all events, rescission was not attempted earlier than April 6, 1916, and there is good ground to claim that no proper attempt was made until May, 1917.

V. Appellee says the property was real estate; that it was used only as a residence; that the evidence shows it was in as good condition when the offer to rescind was made as it would have been in if appellee had acted sooner; that it appears that, when appellee left the premises, he locked the house carefully, and that his wife swept it all over, and left it in a clean condition. But, while appellee claims that the premises, at the

3. VENDOR AND
PURCHASER:
rescission:
nonprejudice
as avoiding
delay.

time when rescission was attempted, or when he abandoned the premises, were in the same condition in which he received them, he does make the qualification, "except usual wear and tear." Upon this comes the ultimate argument:

"The appellant was in the same position if the offer of rescission had been accepted at the time the rescission was made, as at any previous time."

Appellee argues that, in some of the cases cited by appellant, personal property more or less perishable, and the ownership of which was constantly changing, were involved. To that argument we have just spoken. He argues further that, because he locked the house when he left it, and it was swept and left clean, and because there was no depreciation except usual wear and tear, therefore appellant cannot claim that he had been put in worse position by delay, or that he had not received the property back in the condition that it was when appellee took possession of it. The concluding assertion is:

"The appellant was in the same position he would have been if the offer of rescission had been accepted at the time the rescission was made as he has been at any previous time."

The alleged fraud was discovered early in the year 1915. No tender of rent was made until May, 1917, and then only after suit had been begun by plaintiff. No offer to pay for wear and tear was ever made. There was, therefore, no offer to place the defendant *in statu quo*. If the argument made is sound, it might be made with equal force if plaintiff had retained possession for five or six years more, making no change except such as is occasioned by "usual wear and tear." Not only is prejudice presumed from such long delay as exists here, but it is self-evident that there was prejudice. First, there was the usual wear and tear. Second, the retaining the property was necessarily an interference with the right to sell, or exercise dominion over it.

And, so far as waiver is concerned, the basis of the law is not prejudice. The rule there rests on the reasoning that, where one voluntarily elects to carry out a contract, and to

retain possession or benefits under it, he has conclusively elected to seek compensation for the fraud by suit for damages; has elected to affirm the contract, and to place himself, with reference to the fraudulent representations, precisely as though he had accepted his bargain and demanded that he should have the full benefit of it by retaining the property, and have added to this such damages as will put him in the same position he would have been in had the representation been true. See *Bean v. Bickley*, 187 Iowa 689.

On March 31, 1915, when plaintiff made the last payment of \$100, he knew, or ought to have known, of all the facts and things of which he is now complaining; and, if this is so, there is both ratification and waiver.—*Reversed*.

4. VENDOR AND
PURCHASER:
ratification
of contract.

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

WESTERN FRUIT & CANDY COMPANY et al., Appellants, v.
HARRY J. McFARLAND et al., Appellees.

NEW TRIAL: Petition for New Trial—Discretion. Conceding,
1 *arguendo*, that the court has a discretion in granting a new trial *on petition*, yet such discretion may not be carried to the extent of granting a new trial, in the absence of *substantial proof of the allegations of the petition*. Evidence held wholly insufficient to establish either fraud in obtaining a default or a custom alleged to have been violated in entering the default.

CERTIORARI: Judgment as Adjudication. A judgment, on cer-
2 tiorari, that a default had been set aside in an improper manner—without application or hearing—is no impediment to the setting aside of such default in a proper manner.

APPEAL AND ERROR: Law of Case. A finding that a petition
3 stated a cause of action is conclusive on appeal from an order setting aside a judgment by default.

NEW TRIAL: Fraud in Obtaining Default. A statement by coun-
4 sel, when obtaining a default, (1) that, if good cause were

thereafter shown why said judgment should be set aside, he would expect the court to set it aside, and (2) that the defendant had been dilatory, furnishes no basis for granting a new trial on petition, especially when it does not appear that the court entered the default in reliance thereon.

Appeal from Scott District Court.—M. F. DONEGAN, Judge.

SEPTEMBER 29, 1920.

ON the petition of the appellees, a default judgment entered against them was set aside. The holder of the canceled judgment appeals.—*Reversed.*

Sharon, Harrison & McSwiggen, for appellants.

Betty & Betty and Isaac Petersberger, for appellees.

SALINGER, J.—I. This is an appeal because a petition to set aside a judgment was sustained. The judgment set aside and vacated was entered on default, for want of answer.

It will be helpful to dispose of certain matters urged for and against the ruling below, before entering upon the main question. We hold that the petitioners reasonably excused having made default. We agree with the trial court that no laches or negligence on part of the applicants barred them from the relief they obtained, and that there was no laches in moving to set the default aside. We do not agree with the appellant in its claim that, because the petition asked merely that the judgment be set aside and vacated, and did not, in terms, pray for a new trial, this is ground for reversal. Appellee argues that, this being an equitable action against more than one defendant, although one defendant *might* have been in default, still there could be no default judgment as to both, jointly or severally. We think the contention rather irrelevant to the determination of the questions presented by this appeal. We may grant that

appellees had a valid defense in the cause in which judgment by default went against them.

Neither can we agree with the position of appellees that a discretion reposed in the trial court controls on this review. This is not a motion for a new trial. It is a petition

1. NEW TRIAL:
petition for
new trial:
discretion.

which the statute provides for the time when it is too late to proceed by motion for new trial. It would be idle to cite the numerous cases which hold that the filing of such petition in a sense initiates a suit, and that whether it shall be sustained or overruled must depend wholly upon an application of the ordinary rules requiring sufficient allegation and proof thereof. As to this petition, the statute provides (Code Section 4092) that "the facts stated in the petition shall be considered as denied without answer, and tried by the court as other actions by ordinary proceedings." See *Kelly v. Cummins*, 143 Iowa 148. Granting some discretion, that will not sustain setting aside a judgment, without substantial evidence in support of the petition.

It seems that this same judgment had earlier been set aside, without application or hearing. This action was annulled on certiorari. We do not agree with appellant that

2. CERTIORARI:
judgment
as adjudica-
tion.

this annulment works an adjudication. It was not a holding that the default judgment might not be set aside at all, but that it had been set aside in an improper manner.

One avoidance attempted by the appellees is that there was no error in setting aside the judgment, because the petition upon which it rests fails to state a cause of action.

3. APPEAL AND
ERROR: law
of case.

As to this, the court found against the appellees, and on this appeal, that finding is the law of the case. The court expressly held that it was not prepared to sustain the assertion that said petition, "taken by itself alone, did not state a cause of action."

II. The default was entered on the last day of the term.

E. M. Sharon, one of the attorneys of the party obtaining the default, applied to the court to enter same. The first charge is that this was in violation of an established custom in that court not to enter judgment by default, without notice to the adverse party.

Appellant contends the existence of the alleged custom is immaterial, because Sections 3555 and 3788 of the Code entitle him to the default judgment "on demand." We need not pass upon this contention. Whether custom be effective in the premises or not, it must be established, and shown to cover what is claimed for it. 12 Cyc. 1057. There is no evidence that such a custom existed, unless it be an inferential statement in the opinion of the trial judge which does recognize the existence of such a custom. But it is a truism to say that, on a complaint that evidence fails to sustain a finding, the fact that the finding is made furnishes no evidence in its support. Moreover, the undisputed testimony indicates that, though the judge who entered default judgment may have been aware of said custom, he elected to disregard it; for it appears, by such undisputed evidence, that the judge suggested a notification that default was being asked, and, on a protest against this, entered judgment in disregard of the alleged custom. To say the least, no concealment of the custom operated to induce the entry of judgment. Granting, then, again, that the opinion of the court affirms the existence of the custom, it is still true that its existence was not shown by any evidence in the case.

III. The evidence shows a statement by Mr. Sharon to the effect that, if good cause were thereafter shown why said judgment should be set aside, he would expect the court to exercise its right to set it aside, and

4. NEW TRIAL:
fraud in ob-
taining de-
fault.

that it would be its duty to do so. This surely is no ground for canceling said judgment. Surely, it is no fraud to make such a promise, not even in equity,—and this, though promisor may have had no intention, at the time, of redeeming such a promise, and never did redeem it. *Lumpkin v. Snook*, 63 Iowa 515. In like case is the fact that Mr. Sharon took

the position that the defendants had been dilatory, and in the habit of ignoring the orders of the court in said cause. There is not the slightest evidence of any fraudulent intent in making this statement, and it can reasonably be said that, whether it be literally a true statement or not, Mr. Sharon had reasonable cause to believe it to be true.

IV. One ground for sustaining such a petition is, "for fraud practiced in obtaining" the judgment. Code Section 4091. The petition charges that the aforesaid statements and representations by Mr. Sharon were by him known to be false when he made them, and that, in reliance upon them, the court refrained from examining the pleadings, to ascertain whether the representations were true, and that this induced it to enter the default. There is not a particle of evidence that these representations so induced the court to refrain from such examination. And there is an affidavit by Mr. Sharon, in which he says that all he said to the judge was true. The only evidence of any fraud is found in statements made in the opinion filed by the trial judge, and that opinion negatives, rather than affirms, fraud. It is therein stated it may be that Mr. Sharon "possibly felt some irritation on account of what he considered dilatory tactics and unreasonable delay practiced by defendant," and therefore "stated no more than what he felt to be the truth at the time," and further, that "the court will assume that no fraud was actually intended, but is still of opinion default was entered as the result of representations which amounted to fraud in law, so far as the rights of these defendants are concerned."

The allegation of fraud is not sustained.

What we have said foreshadows clearly our holding that, granting a discretion, it was abused, and that the petition was without substantial support in the evidence. It follows that the order appealed from must be—*Reversed*.

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

W. H. WULKE, Appellee, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

EMINENT DOMAIN: Access to Premises. Evidence held to show
1 that the building of a viaduct had, in *some* degree, interfered with access to adjoining property, and therefore that a jury question on the issue of damages was presented.

EMINENT DOMAIN: Authorized Improvement. Statutory au-
2 thority to a railway corporation to construct a viaduct over its tracks, does not absolve the corporation from the duty to pay resulting damages to abutting property. (See Sec. 2017, Code Supp., 1913.)

Appeal from Marshall District Court.—B. F. CUMMINGS, Judge.

SEPTEMBER 29, 1920.

PLAINTIFF OWNS a narrow strip of land, adjoining the right of way of defendant. His suit is for damages done said property, through the construction of an overhead crossing on a highway that crosses defendant's right of way, and which extends from that right of way past and in front of plaintiff's property. Plaintiff had verdict, and defendant appeals.—*Affirmed.*

Hughes, Sutherland & O'Brien and *E. N. Farber*, for appellant.

F. E. Northup, for appellee.

SALINGER, J.—I. On the west end of plaintiff's land, there once existed a public highway, which extended across the track of the defendant. In 1913, it constructed an overhead crossing, and it built the approach thereto in front of the plaintiff's land. Appellant contends the court should have ruled that, as a matter of law, no damages were

1. EMINENT
DOMAIN:
access to
premises.

due, and that it erred in giving an instruction which permitted the jury to find damages. One ground of this position is that the evidence shows the lands affected were used generally for nothing but a pasture, and that a house at the east end was a small house. Appellee responds that the tract was suitable as well for use as a residence and for agricultural purposes. Appellant argues that, before the construction of the overhead crossing, plaintiff had access to said house from a private crossing, and that that crossing has always been and is still open. The jury could find that the overhead crossing had forced the abandonment of part of a heretofore existing public highway, and has interfered with the access of appellee to such highway, and with access generally.

It must suffice for us to say, without going into further details, that, in our opinion, the court did not err in refusing to hold that, as matter of law, no damage had been caused the appellee.

1-a

The important defense is that the construction of this overhead crossing was authorized by law, and that, therefore, the defendant is not responsible, even if the crossing caused damage. That the construction of the crossing was authorized, cannot be and is not questioned. But does it follow from such authorization that defendant must not respond in damages from constructing?

2. EMINENT
DOMAIN:
authorized
improve-
ment.

We think it does not follow. No condemnation proceedings were instituted. There was no authorization by ordinance, if that be material. But Section 2017, Code Supplement, 1913, did give authority to construct this crossing. Is there anything in that statute which relieves from paying resulting damages? We think not. On the contrary, the statute itself indicates that compensation shall be made, or rather, that the right to construct is not absolute. For it is provided in this statute that, "in such cases, such corporation shall put such road, as soon as may be, in as good repair and condition as before such alteration;" and there is fur-

ther provision indicating that it may be required that condemnation proceedings be instituted.

It is, of course, conceded that no private property may be taken for anything but a public use, unless compensation be first made. That is a constitutional provision, and the legislature could not abrogate it if it desired to. We find nothing, however, to indicate that it did desire to, or has done so; and we are of opinion that appellant has failed to establish any exception to the general rule (assuming, once more, that it would be competent for the legislature to make such an exception). The reliance of appellant is *Milburn v. City of Cedar Rapids*, 12 Iowa 246; *Gates v. Chicago, St. P. & K. C. R. Co.*, 82 Iowa 518; *Northern Transportation Co. v. City of Chicago*, 99 U. S. 635 (25 L. Ed. 336); *Tate v. City of Greensboro*, 114 N. C. 392 (24 L. R. A. 671); *Creal v. City of Keokuk*, 4 G. Greene 47; *Cole v. City of Muscatine*, 14 Iowa 296; *Dalzell v. City of Davenport*, 12 Iowa 437.

All that is ruled in *Northern Trans. Co. v. City of Chicago*, 99 U. S. 635, is that whatsoever the law authorizes cannot be a nuisance, such as to give a common-law right of action, and that, therefore, a municipal corporation authorized by law to improve a street by building on the line thereof a bridge over or a tunnel under a navigable river, where it crosses the street, incurs no liability for the damage unavoidably caused to adjoining property by obstructing the street or the river, unless such liability be imposed by statute. Logically, to somewhat the same effect is *Tate v. City of Greensboro*, 114 N. C. 392 (24 L. R. A. 671), which holds that the destruction of shade trees standing on the outer edge of the sidewalk in front of a residence, because the municipal authorities regard them as an obstruction of the walk, and injurious to health, does not render the city or its authorized agents liable for damages to the abutting proprietor. The case of *Creal v. City of Keokuk*, 4 G. Greene 47, holds that, where a city is authorized to establish and regulate the grade of the streets, it is not liable for damages growing out of the proper exercise of

that authority. In *Cole v. City of Muscatine*, 14 Iowa 296, it is held that there is no common-law liability for damages, as against a municipal corporation which changes a grade of a street; but that, when a statute gives a right and creates a liability which did not exist at common law, and at the same time points out a specific method by which the right can be asserted and the liability ascertained, that method must be strictly pursued.

The essential effect of all these is a holding that, where a municipal corporation does an authorized act, to which the statute attaches no liability, it cannot be made to respond in damages caused by the doing of that act. If that be applicable to acts done by a private corporation merely because a statute authorizes them to be done, it contravenes that provision of the Constitution of the state which declares that private property may not be taken for a public use, without payment of compensation.

We construe *Gates v. Chicago, St. P. & K. C. R. Co.*, 82 Iowa 518, to come close to being express authority for the proposition that, though the construction of the crossing be permitted, the corporation must respond to damages caused thereby. The utmost that can be claimed for *Milburn v. City of Cedar Rapids*, 12 Iowa 246, is that, where the construction is authorized by statute, the corporation cannot be dealt with as having created a public nuisance. But though a construction is authorized, and, therefore, not a nuisance, that does not settle that the erector is absolved from compensating. The sanction by statute relieves the corporation from being a trespasser, but does not relieve it from making proper compensation for damage caused. One may be damaged by the erection of a permanent structure though same be lawfully erected. *Fowle v. New Haven & N. Co.*, 107 Mass. 352.

Dalzell v. City of Davenport, 12 Iowa 437, is irrelevant to any matter in issue here.

In our judgment, there must be an affirmance.—
Affirmed.

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

ALEXANDER BROTHERS, Appellant, v. HAWKEYE & DES
MOINES INSURANCE COMPANY, Appellee.

PLEADING: Unchallenged Pleading—Effect. An insufficient but
1 *unchallenged* pleading, if proven, will sustain a recovery, but
this challenge may be made (1) by motion to direct verdict,
or (2) by motion for judgment.

INSURANCE: Copy of Premium Note. Record reviewed, and held
2 to show failure to attach to a policy copy of premium note,
as required by statute. (Sec. 1741, Code, 1897.)

INSURANCE: Nonpayment of Premium Note—Avoidance. A plea
3 that a policy was, at the time of loss, suspended because of
the nonpayment of the premium note, presents a full defense,
in the absence of any showing at that time that a copy of the
note had not been attached to the policy. Plaintiff, if he
admits the truthfulness of the plea, must plead in avoidance,
i. e., *that no copy of the note was so attached.* (Sec. 1741,
Code, 1897.)

*Appeal from Madison District Court—*LORIN N. HAYS,
Judge.

DECEMBER 15, 1919.

REHEARING DENIED OCTOBER 2, 1920.

SUIT on policy. Defense that same had become
suspended for nonpayment of premium note. Verdict di-
rected for defendant. Plaintiff appeals.—*Affirmed.*

Robbins & Bonn, for appellant.

Read & Read, for appellee.

SALINGER, J.—I. The petition stops with alleging is-
suanee of the policy sued on, and the loss of the property

covered by the policy. The defense is an affirmative plea that the policy was in suspension when the loss occurred, because the premium note was unpaid, and that the necessary steps required by the statute had been taken to work such suspension. No reply was filed. Nowhere in pleading was the sufficiency of this answer challenged. Appellee says this brings the matter within the settled rule that, if a pleading be not challenged, it will sustain a recovery, if proved, even if, on challenge, it would be held that no recovery could be had on such plea. We adhere to the rule, but hold it has no application, because, though the pleading was not attacked by any other pleading, it was specifically attacked, both in a motion to direct verdict and by motion for judgment. See *Frum v. Keency*, 109 Iowa 393, at 397. Any method that advises the trial judge that the sufficiency of the pleading is objected to, will prevent an estoppel to urge the defect in the pleading.

II. The next contention by appellants is that they are entitled to recover because of the requirement of the statute that a copy of the premium note must be attached to the

policy, if the insurer desires to base any rights upon that note. They contend that no copy was attached. The appellee responds that, while no copy of the note was

attached, either to the application or the original policy, it constructed a duplicate policy from the application, and attached a true copy of the note to this duplicate policy. It adds that the copy attached to the duplicate policy did not purport to be, and was not, an exact copy of the original note, and that the duplicate policy was introduced, merely to show the usual manner of indorsing premium notes on policies, and that the copy of the note attached to the duplicate policy was simply a "reconstructed" copy of the policy, made up from the *application*.

We have to say that a copy of a premium note "reconstructed" from an application which has no copy of such note, is not the copy that the statute demands.

If we shall be constrained to hold, then, that failure to attach a copy is fatal to the defense, then there must be a reversal. No copy was attached. This relieves us from settling the dispute over what is a true or what is a substantially true copy. Having held, for reasons other than failure to make a true copy, or substantially true copy, that *whatever* was attached is ineffective, it becomes immaterial whether the thing attached was or was not such copy.

III. The important question is one of pleading and of burden of proof. The petition stopped at the issue of the policy and the loss. The answer alleges that defendant took the steps required to effect a suspension of the policy, and we may assume that so the policy did become suspended. And defendant pleaded truthfully that the contract of insurance authorized a suspension during all time in which the premium note was due and unpaid.

3. INSURANCE:
nonpayment
of premium
note:
avoidance.

Section 1741 of the Code of 1897 provides: .

"All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy, or indorse thereon, a true copy of any application or representation of the assured which, by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy. The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of this section, it shall forever be precluded from pleading, alleging or proving any such application or representations, or any part thereof, or falsity thereof, or any parts thereof, in any action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option."

Defendant says that, where it is answered that the policy was suspended at the time of the loss, the fact that a true copy of the premium note is not attached to the policy is a mere avoidance of the suspension pleaded, and

that, to avail himself of such avoidance, *plaintiff* must plead such avoidance by a reply, and prove such reply; that said statute does not require the insurer to plead affirmatively the attachment of copy; that defendant was not required to plead or prove that the note was attached to the policy, as a condition precedent to the right to prove the fact of a suspension; that failure to allege in answer that a copy of the premium note was attached to the policy is not such fatal defect in pleading as to warrant either a directed verdict or the sustaining of motion for judgment against defendant. Plaintiff responds that, on account of said failure to plead in answering, they are, as matter of law, entitled to recover on the policy; and that if, under ordinary rules, it were for plaintiff to plead the fact that the note was attached, yet they are relieved from this burden because of said statute provision that "the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation."

It is possible that, if the statute be construed too literally, it could happen that the question whether a copy was or was not attached could not get into the suit at all. Too literally construed, the statute would forbid the insurer to plead or prove that there was a suspension for nonpayment, if it were the fact that a copy of the note was duly attached, and the statute gives the insured a mere option to plead on the point. We hold that the true construction is this: If it comes properly before the court that a copy of a premium note given was not attached, then the insurer cannot avoid payment, though he both plead and prove that the loss occurred at a time when, both under statute and under contract, the policy was in suspension. But, while this is so, the statute has not interfered with the general rule that, if a forfeiture or suspension be admitted to exist unless something omitted by the one asserting the suspension makes the suspension ineffective, the one who urges such omission must plead and prove it. It results that plaintiff cannot get the benefit of the failure to attach

a copy, for the simple reason that he was bound to plead that omission by way of avoidance, and, having failed so to plead, cannot win on an issue not raised by him. It seems to us the case of the plaintiffs resolves itself into whether defendant must pay on a suspended policy because its plea of suspension is futile for not having pleaded in addition that nothing had occurred which would make ineffective its plea of suspension. We hold that the somewhat cryptic words of the statute, that plaintiff shall not be barred of a recovery because he has neither "pleaded nor proved said application or representation," do not command the insurer to "keep its tender good"—to plead what is a good defense, and at the same time plead that it has done nothing to destroy that defense. The nonpayment does effect a suspension, when the proper notices, etc., are given. The fact that copy was not attached does make the insurer liable, notwithstanding the suspension. The policyholder has that document. At any rate, the insurer has delivered it to him, and does not have it. Not only is the plea of avoidance necessary, under the rules of pleading, but, by reason of having the policy, the insured is the better qualified to show that that policy is in such condition as that the suspension for nonpayment is no defense. We are of opinion, therefore, that judgment rightly went against plaintiffs; that it was right to deny them a recovery on the suspended policy, because they had failed to plead in avoidance of the suspension. That a failure to attach copy of the note will nullify the suspension, is true. But, where the suspension is established,—nay, admitted,—such suspension remains a defense to paying the loss, unless and until failure to attach copy,—or, for that matter, anything else that might avoid a suspension,—is urged in plea, as a reason why the confessed suspension should not avail to the one who is asserting it.—*Affirmed.*

LADD, C. J., EVANS and PRESTON, JJ., concur.

A. W. ALLEN, Appellee, v. NORTHWESTERN MANUFACTURING
COMPANY, Appellant.

CORPORATIONS: Purchase of Stock as "Loan." A purchase
1 of preferred stock may, in view of the subscription contract
and articles of incorporation, constitute a "loan" to the cor-
poration, with consequent right on the part of the certificate
holder to surrender the certificate and recover the amount
thereof as a general creditor.

CORPORATIONS: Retiring Stock Prior to Paying General Cred-
2 **itors.** A corporation which has lawfully issued its preferred
stock under agreement to repay the sum paid for the stock
at a named time, on surrender of the certificate, may not avoid
its obligation under the plea that to enforce the obligation
would, in effect, compel the company to retire said stock
prior to the payment of its general creditors. (Sec. 1621, Code,
1897.)

Appeal from Woodbury District Court.—W. G. SEARS,
Judge.

OCTOBER 2, 1920.

ACTION to recover judgment against defendant upon its
written obligation to pay a certain sum of money, with in-
terest. Trial to the court, and judgment against defendant
for \$117.80 and costs. Defendant appeals.—*Affirmed.*

Sears, Snyder & Gleysteen, Vail E. Purdy, and H. C.
Harper, for appellant.

O. E. Martin, for appellee.

PRESTON, J.—The case was tried, for the most part, on
the pleadings, and upon certain admissions by both parties
at the trial.

1. CORPORATIONS: purchase of stock as "loan." It appears that, on December 21, 1914, plaintiff purchased of the defendant one \$100 share of the preferred capital stock of defendant company. In the purchase of said share of stock, it was agreed between plaintiff and defendant that the certificate evidencing the purchase was issued and received upon the conditions indorsed thereon, and signed by the president and secretary. There was indorsed thereon the following:

"The within certificate of stock is issued and received on the following terms and conditions: It shall bear interest at eight per cent per annum, payable annually, on the 28th day of October of each year, out of the net profits of the business of the company, and before any dividends or surplus are declared or paid on the common stock. * * * This certificate, with interest, shall be paid in full, to the lawful holder thereof, at the expiration of two years from date, upon demand therefor, and surrender of this certificate. This certificate shall not draw interest after maturity."

Signed by the president and secretary of the company.

Some other provisions are in the certificate and indorsement, both of which are here set out:

"This certifies that A. W. Allen is the owner of one share of one hundred dollars each of the preferred capital stock of Northwestern Manufacturing Company, fully paid in cash and nonassessable. Transferable only on the books of the corporation by the holder hereof in person or by attorney, upon surrender of the certificate properly indorsed.

"This certificate is issued and received upon the conditions indorsed hereon and signed by the president and secretary.

"In witness whereof, the said corporation has caused this certificate to be signed by its duly authorized officers and to be sealed with the seal of the corporation at Sioux City, Iowa, this 21st day of December, A. D. 1914.

"Jno. B. Johnson,
"Secretary.

H. K. Hansen,
President."

(Corporate Seal)

EXHIBIT B.

"The within certificate of stock No. 8 is issued and received on the following terms and conditions:

"It shall bear interest at eight per cent per annum, payable annually on the 28th day of October of each year out of the net profits of the business of the company and before any dividends or surplus are declared or paid on the common stock. The company reserves the right to pay to the lawful holder hereof the principal sum of, and accrued interest on, this certificate at any time after one year from date hereof, upon giving the person in whose name this certificate stands on its books, thirty days' notice of its election so to do, and on surrender of this certificate. Notice of intention to redeem this certificate shall be given by mailing the same to the person in whose name the certificate stands on the books of the company at the last known post-office address of said person, or to the address given on the books of the company. After thirty days' notice of intention to redeem have elapsed, this certificate shall cease to draw interest. This certificate with interest shall be paid in full to the lawful holder thereof at the expiration of two years from date, upon demand therefor and surrender of this certificate. This certificate shall not draw interest after maturity."

Sixteen dollars interest has been paid, but no further payments of either principal or interest. On February 26, 1918, and again on March 14th, plaintiff demanded of defendant, and its president, secretary, and treasurer, payment of the principal sum, with unpaid interest, and offered to surrender, and tendered to the defendant and said officers, the said certificate, in accordance with the terms of the contract. Plaintiff, in his petition, tendered and offered to surrender said share of stock. The defendant admits the purchase, under the terms and conditions alleged. Appellant contends that the agreement of defendant, to take up the stock at the end of two years, was restricted, in the event of liquidation, dissolution, or winding up of the corporation, under the provisions of Article 5 of the articles of

incorporation. A part of Article 5, and so much as appears to be material, follows:

"The preferred stock of this corporation shall be issued and sold from time to time as the board of directors may elect, and upon such terms and conditions as the board of directors may prescribe; such terms and conditions to be indorsed upon said stock. The corporation shall redeem and retire its preferred stock at the par value thereof, plus the accrued, unpaid portion of the accumulated dividend on its preferred stock, at the time of such redemption, as the board of directors may elect, not inconsistent, however, with the conditions and requirements prescribed by the board of directors at the time the stock is issued. Before retiring any preferred stock, the corporation shall give thirty days' written notice to the owner thereof, as shown upon the corporation books, of its intention so to do. The holder of the preferred capital stock shall be entitled to receive, when and as declared, from the surplus or net profits of the corporation, yearly dividends at the rate of eight per cent per annum, and no more. The dividends on all of said preferred stock shall be cumulative. Whenever all cumulative dividends on said preferred stock for all previous years shall have been declared and paid, the board of directors may declare dividends on said common capital stock, payable then and thereafter, out of any remaining surplus or net profits, in such amount as it may deem best; it being the intent that the said preferred capital stock shall have its full dividends before any profits are divided upon the said common capital stock. No dividends shall be paid on either preferred or common capital stock except out of the surplus or net profits. In the event of liquidation, dissolution, or winding up, whether voluntary or involuntary, of the corporation, and after payment of all just debts, the holders of the preferred capital stock shall be entitled to be paid in full, both the par value of their shares and the unpaid dividends accrued thereon, before any amount shall be paid to the holders of the said common capital stock, and after the payment to the holders of the said preferred capital stock of the un-

paid, accrued dividends thereon and the full par value of all of the shares of the said preferred capital stock, the remaining assets and funds of the corporation shall be divided and paid to the holders of the common capital stock, according to their respective shares, as hereinbefore provided. The preferred capital stockholders shall have no right to vote at any regular or special meeting of the stockholders of this corporation, and shall have no voice in the management of the corporation, and only the owners and holders of the common capital stock shall be entitled to vote their stock in the management of the corporation. No stock shall be issued until the corporation has received payment in full therefor."

The by-laws provide, among other things:

"Sec. 1. Dividends shall be declared and paid out of the surplus profits of the corporation as often and at such times as the board may determine. No dividend shall be declared or paid that tends to curtail the effective operation of the business."

The defendant alleged in its answer that it is not actively engaged in business, and that it has been, for some time, in the process of liquidation and winding up of its affairs; that no dividends have been declared or paid on either the common or preferred stock, because they have not been earned; and further, that plaintiff is not entitled to maintain this action, by reason of the provisions of the articles of incorporation and by-laws, and the financial condition of the company, and the laws of Iowa. It was stipulated and admitted that plaintiff received \$16 to apply upon the interest, under the obligations evidenced by his share of stock, and that plaintiff made demand, as alleged by him. Plaintiff admitted that the company is in the process of voluntary liquidation, and that the company was insolvent; admits that the general creditors of the corporation have not been paid. The trial court found that the stock was sold under the agreements before set out; that there was a demand and tender by plaintiff, as before stated; that the company was in process of liquidation; and that, from the

date of the maturity of said certificate, as evidenced by the indorsement thereon, and the demand made by plaintiff, prior to the commencement of this action, plaintiff ceased to be a stockholder, and became a general creditor of defendant, under the provisions of the certificate and indorsements. It also required plaintiff to surrender said certificate of stock, and deposit it with the clerk of court, for the use and benefit of defendant; and decreed that plaintiff has no further interest therein; and rendered judgment against the defendant; and found that plaintiff was entitled to have his judgment established as a general claim against the company from the date of the demand and his tender, plaintiff having deposited the certificate with the clerk for the use and benefit of the defendant.

We take it that the real question in the case is whether, under the agreement, plaintiff was a stockholder in the company, and bound by the rights and liabilities of a stockholder. The defendant contends that he was such, and that the \$16 paid as interest was a dividend, rather than interest, and that there could be no dividends under the circumstances. But the record shows that the \$16 paid was paid as interest, and seems to have been paid, recognizing the defendant's obligation to so pay, under the contract. It is doubtless true, as contended by appellant, that dividends, as such, could not be paid. The errors assigned are that the court ignored the provisions of the articles of incorporation and by-laws; and that the court erred in holding that plaintiff had become a general creditor of the company; that the company is prohibited by law from retiring said stock while insolvent; and that the court erred in entering judgment for dividends, when there were no net earnings or surplus from which the same could be paid; and that this was in violation of the articles of incorporation and the laws of the state. It may be true, as contended by appellant, that, in the absence of the agreement under which the defendant sold the stock to plaintiff, the defendant could not retire its preferred stock at par. But the articles of incorporation, in regard to such retirement, provide that this

must not be inconsistent with the conditions and requirements prescribed at the time the stock was issued. As we have seen, it was agreed, at the time plaintiff paid the money to the defendant, that the certificate, with interest, should be paid in full at the expiration of two years from date, upon demand therefor and surrender of the certificate. The plaintiff made the demand, and surrendered the certificate, thus complying with all he was required to do. It appears to us that the transaction was a loan by plaintiff to the defendant, by which defendant agreed to pay, with interest, at the end of two years, and that he was not, strictly speaking, a stockholder. Appellant says that plaintiff was a stockholder at the time of the commencement of the action, and at the time the judgment was entered, and that such statement proves itself, and needs no citation of authority.

Appellant contends further that, at the time of the commencement of this action, and the entering of the judgment, defendant was owing general creditors, and that its capital stock was impaired, and that, therefore, the company could not legally retire its preferred stock at par, before the payment of general creditors, and then only *pro rata* with other stockholders of the same class, under Section 1621, Code of 1897, which reads as follows:

2. CORPORATIONS:
retiring stock
prior to pay-
ing general
creditors.

"The diversion of the funds of the corporation to other objects than those mentioned in its articles and in the notice published, if any person be injured thereby, and the payment of dividends which leaves insufficient funds to meet the liabilities thereof, shall be such fraud as will subject those guilty thereof to the penalties of the preceding section; and such dividends, or their equivalent, in the hands of stockholders, shall be subject to such liabilities. If the directors or other officers or agents of any corporation shall declare and pay any dividend when such corporation is known by them to be insolvent, or any dividend the payment of which would render it insolvent, or which would diminish the amount of its capital stock, all directors, of-

ficers or agents knowingly consenting thereto shall be jointly and severally liable for all the debts of such corporation then existing, but dividends made in good faith before knowledge of the occurring of losses shall not come within the provisions of this section."

And they contend that to retire said share of stock by the company was prohibited by law, under the circumstances, and would subject the corporation to a forfeiture of its charter, under Sec. 1622, Code of 1897, which reads:

"Any intentional violation by the board of directors or the managing officers of the corporation of the provisions of the two preceding sections shall work a forfeiture of the corporate privileges, to be enforced as provided by law. If the indebtedness of any corporation shall exceed the amount of indebtedness permitted by law, the directors and officers of such corporation knowingly consenting thereto shall be personally and individually liable to the creditors of such corporation for such excess."

The plaintiff did not ask, nor did the court hold, that the share of stock in question could be retired; but the claim was, and the holding of the court was, that there was a contract, by which defendant agreed to pay. Of course, defendant could not be required to pay unless the stock was surrendered; so that, conceding defendant's claim that the stock could not be retired, the defendant could be required to pay its debts, or have a claim therefor established against it, as for a debt. Appellant argues that the rights of the plaintiff are subject to the articles of incorporation and by-laws. We understand appellee to so concede, and they claim that all that was done, was done in accordance therewith, and with the agreement between plaintiff and defendant. We are cited to no authority by appellant other than the statutes before set out. Appellee contends that the articles of incorporation permitted and authorized the defendant to enter into the contract, and we have seen that this is so. Appellee further contends that defendant is bound by its contract. He cites *Matson v. Bauman*, 139 Minn. 296 (166 N. W. 343). The citation may not be directly

in point. In that case, the action was not against the corporation. Appellee also cites *Burt v. Rattle*, 31 Ohio State 116, 130, to the proposition that a person who advances money to a corporation, and accepts its agreement for its repayment, and who, by express agreement, takes no interest or risk in the concerns of the company, is a creditor of the company, and to call him a stockholder is a simple misnomer. They cite, further, *Field v. Eastern Building & Loan Assn.*, 117 Iowa 185, and *Hammerquist v. Pioneer Sav. & Loan Co.*, 15 S. D. 70 (87 N. W. 524), to the proposition that, where a shareholder in a corporation had paid in full the stipulated sum, in consideration of which he was to receive, at the expiration of two years from date, a repayment of the sum paid, together with interest, the company issuing the share could not avoid such payment by pleading that the contract was *ultra vires*, being forbidden by the laws of the state under which it was organized. Appellant makes no answer to these authorities.

We are of opinion that the trial court rightly decided the case, and its judgment is—*Affirmed*.

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

EMIL A. ANDERSON, Administrator, Appellee, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

NEGLIGENCE: Smoke-Enshrouded Condition of Crossing—Belated

1 **Train—Instinct to Protect Self.** The smoke-enshrouded condition of a double-tracked railway crossing, coupled with the fact that no train was then due on the track where the fatal accident occurred, all aided by the recognized instinct of a human being to protect himself, may be sufficient to absolve the deceased from guilt of contributory negligence, as a matter of law.

RECEIVERS: When Claims Barred—Earnings Devoted to Better-

2 **ments.** When the earnings of a corporation under receivership are devoted solely to the betterment of the corporate

property, claims against the receiver become claims against the corporation upon the retransfer of the property, at least as to the extent of the betterments.

RECEIVERS: Order for Filing Claims—Noncompliance—Effect.

3 Claims against the receiver of a corporation, not filed within the time provided by court order, are not, upon the discharge of the receiver, barred against the corporation by reason of said order, when there has been no sale and distribution of the corporate property. It is immaterial that, when the claims are sought to be enforced, there has been a change of stockholders.

NEGLIGENCE: No Eyewitness Rule—Presumption (?) or Infer-

4 **ence (?)** An instruction to the effect that, in the absence of eyewitnesses, the law "*presumes*" that an injured party exercised reasonable care, is inaccurate, but not to such extent as to constitute reversible error, when other instructions definitely place the burden on plaintiff to *show want of contributory negligence*.

SALINGER, J., dissents.

Appeal from Washington District Court.—K. E. WILLCOCKSON, Judge.

JANUARY 15, 1920.

REHEARING DENIED OCTOBER 2, 1920.

ACTION for damages for the wrongful death of plaintiff's decedent. There was a verdict for the plaintiff, and defendant appeals.—*Affirmed*.

F. W. Sargent, J. G. Gamble, and Eicher & Livingston, for appellant.

S. W. & J. L. Brookhart, Chas. A. Dewey, and W. H. Butterfield, for appellee.

EVANS, J.—I. The decedent was Charles Norberg. He and his companion were instantly killed, at about 6 P. M.

on January 25, 1917, by one of defendant's trains. As found by the jury, the accident occurred on the crossing at North Marion Avenue, in the city of Washington, Iowa. There were no eyewitnesses to the collision. The bodies of both men were found beside the track, a short distance west of North Marion Avenue, within a few minutes after a west-bound passenger train had passed. Two main lines of track ran parallel for some distance westward out of the Washington depot. On the northerly one, the Oskaloosa train moved westward from the depot on time, going about 12 miles an hour. Within a few moments thereafter, the Kansas City train started from the depot in the same direction, moving at 25 miles an hour or more. This train was some hours behind time. It overtook and passed the Oskaloosa train, at or about the North Marion crossing. North Marion Avenue is a north and south street. A few minutes before the accident, Norberg started for his boarding place. His ordinary course would take him across the railroad tracks on the crossings of North Marion Avenue. He was seen approaching North Marion Avenue while walking on a line parallel to the railway tracks and north thereof. The circumstances proved, warrant the inference that he approached the railroads from the north, walking along the avenue. He had crossed the northern track. He was undoubtedly killed by a collision with the Kansas City train on the parallel track, 8½ feet farther south. Both trains were running in excess of ordinance speed. For that reason, the question of negligence of the railway company is not disputed on this appeal. The defendant moved, however, at the close of all the evidence, for a directed verdict on the ground of the contributory negligence of the decedent. The same point is urged here. The general purport of the argument is that the circumstances appearing in evidence disclose that the decedent could not have come into collision with the defendant's train at such time and place, without contributory negligence on his part. The burden was, of

1. NEGLIGENCE :
 smoke-en-
 shrouded con-
 dition of
 crossing: be-
 lated train:
 instinct to
 protect self.

course, upon the plaintiff to prove care upon the part of the decedent. He was a mere pedestrian, and had, therefore, full command of his own action, without any of the distractions of a frightened horse or a stalled automobile. He was familiar with the location and with the train schedules. On the other hand, the immediate circumstances had their confusion. The smoke of the Oskaloosa train covered the track of the Kansas City train. The presence of the Oskaloosa train also blanketed the Kansas City train from the view of Norberg, while he was on the north side of the Oskaloosa train. No train was due on the Kansas City track at that time, the train in question being several hours late. Norberg must have crossed the north track in front of the Oskaloosa train. The overtaking and passing of the Oskaloosa train by the Kansas City train at this point was an important circumstance. It may be that he did not, and even with diligence could not, have discovered the presence of the Kansas City train until after he crossed the north track. In view of the absence of eyewitnesses, the jury did have the right to consider the instinct of self-preservation, as a fact bearing upon the question of care. Just how much weight should be given to this fact would be also a jury question, in the light of all the circumstances. We are of the opinion, therefore, that the circumstances appearing in evidence were not conclusive, as a matter of law, upon the question of contributory negligence, and that the plaintiff was entitled to go to the jury thereon.

II. At the time of the accident in question, the railroad of the defendant corporation was being operated by its receiver, Jacob M. Dickinson. The original liability, if any, therefore, was that of the receiver, and not

2. RECEIVERS :
when claims
barred : earn-
ings devoted
to better-
ments.

that of the corporation. It appears, also, that certain orders were made in the receivership proceedings by the Federal court having jurisdiction of the same. One of these provided that all claims against the receiver should be presented to the receiver on or before July 14, 1917, and that all claims not so presented should be thereafter barred.

The claim of the plaintiff was not thus presented. It is urged, therefore, by appellant that it has been fully adjudicated against the plaintiff, and that such order of the Federal court is a bar to further prosecution of the case. It further appears that, although the receivership proceeding was pending for some months, during which time the railroad was operated by the receiver, yet the receiver did not, at any time, sell the property of the corporation, nor convert it into cash or liquid assets; nor did he purport to distribute the property in his hands to the payment of creditors. The only distribution made by him was that of the receipts from the operation of the road. This was the status of the receivership proceedings when the corporation applied to the court for an order directing the receiver to restore to the corporation all its property. The basis of this application was, in substance and effect, a declaration of solvency on the part of the corporation, and an assurance of its ability to finance its assets in such a way as to satisfy or pay all its creditors. Such application was sustained by the court, and pursuant thereto, the receiver surrendered to the corporation all the assets in his hands. It will be seen from the foregoing that, although the receiver was in the first instance alone liable for the damages, if any, claimed herein, yet, as such receiver, he would have been entitled to pay such damages out of the moneys realized by him in the operation of the road. None of the moneys so earned were applied to the payment of such damages. On the contrary, the moneys realized in such operation were, to the extent of more than \$1,000,000, applied to betterments of the road. In the restoration of its property, the corporation received the full benefit of these betterments.

Upon the state of facts here indicated, the United States Supreme Court has spoken fully. *Texas & Pac. R. Co. v. Bloom's Admr.*, 164 U. S. 636; and *Texas & Pac. R. Co. v. Johnson*, 151 U. S. 81. See, also, *Gray v. Grand T. W. R. Co.*, 156 Fed. 736; also anotation following *Carlson v. Mid-Continent Dir. Co.*, L. R. A. 1918 F, 318, 320 to 324.

3. RECEIVERS:
order for fil-
ing claims:
noncompli-
ance: effect.

The substance of the holding in the cited authorities is that, when the property, without sale thereof, is restored to the corporation, with the betterments made by the receiver, the corporation must be deemed to assume the liability of the receiver, to the extent, at least, of the betterments caused by the receiver out of the operation of the property. It is held, also, that the order entered by the Federal court, fixing a date within which this claim must be presented against the receiver, is not, in the absence of the sale of the property and a distribution of the assets to creditors, a bar to the litigation of plaintiff's claim. It is needless that we should add argument or discussion to these holdings by such court. They are decisive of the question before us.

It is urged by the appellant that a large amount of new stock was issued and sold to new stockholders, who were in the nature of innocent purchasers, and who will be prejudiced by the recognition of this liability. There was no change in the organization or entity of the corporation. The property was restored in its entirety to the same corporation from which it was taken. The realizing of a large amount of money by the sale of new stock was only a method of finance, and it was a recognition by the purchasers of the solvency of the corporation, and was the assurance to the court that the company was solvent, and financially able to manage its property as a going concern. Without such assurance, the court would not have restored the property. In brief, we do not think that the sale and purchase of new stock of the corporation is a fact which entitles the corporation to claim the status of an innocent purchaser of its own restored property.

III. The trial court gave the following instruction:

"And, on the question of the deceased Norberg being guilty of contributory negligence, as is alleged by defendant, you are instructed that, where there are no eyewit-

4. NEGLIGENCE: nesses as to the manner and way in which
no-eyewit- the deceased was conducting himself at and
ness rule: immediately prior to the time he received
presumption the injuries, the law presumes that he was
(?) or infer- exercising such care and caution as men of
ence (?) ordinary prudence, judgment, and discretion would exer-
cise, under like or similar circumstances, and in relation to
the same matters, unless the facts and circumstances shown
upon the trial negative such presumption; and you should
indulge in such presumption in favor of the deceased, unless
the facts and circumstances developed on the trial negative
such presumption."

Appellant complains of this instruction on the ground that the necessary effect thereof was to cast upon the defendants the burden of proof on the question of contributory negligence. The difficulty presented by the instruction is its use of the word "presumption." Ordinarily, a presumption furnishes a resting place to the party otherwise having the burden of proof, and shifts upon the other party the burden of overcoming such presumption. We have held that the so-called presumption which obtains in the absence of eyewitnesses, that a decedent exercised due care, is a mere inference of fact, which is wholly for the consideration of the jury as an item of evidence; that the weight thereof is to be determined wholly by the jury, in the light of all the evidence.

There is room for the argument that the instruction under consideration herein runs counter to our holding in *Bell v. Incorporated Town of Clarion*, 113 Iowa 126. In the cited case, the inaccuracy of speech involved in the use of the word "presumption" for the word "inference" is pointed out. It was, nevertheless, recognized therein that the word "presumption" is not infrequently used as the equivalent and synonym of the word "inference." It is undoubtedly true that the word "presumption" is popularly used in such sense, and that such use thereof presses itself with great persistency upon lawyers and judges. Such use of the word has been very persistent in the instructions of

trial judges; and we have ourselves recognized the qualified meaning of the word in such case as is here presented. *Lunde v. Cudahy Packing Co.*, 139 Iowa 688, 695; *Gray v. Chicago, R. I. & P. R. Co.*, 160 Iowa 1; *Sanderson v. Chicago, M. & St. P. R. Co.*, 167 Iowa 90; *Merchants Trans. & S. Co. v. Chicago, R. I. & P. R. Co.*, 170 Iowa 378, 390.

In the last-cited case, the inference which may be drawn from the instinct of self-preservation, in the absence of eye-witnesses, is characterized as an "inference of fact," as a "presumption of fact," and as a "rebuttable presumption." This does not mean that these terms are all necessarily synonymous, or that they may not be distinguished; but it is a recognition that they all may be used in appropriate connection to denote the same thing. The instruction under consideration herein is quite an exact copy of the instruction approved in *Lunde v. Cudahy Packing Co.*, 139 Iowa 688, 695. This may be a form of surrender to the persistency of the use of terms in a popular sense, as distinguished from a strictly legal one.

On the whole, we think that the use of the word "presumption" in such qualified meaning is not misleading to the jury, if such use is accompanied with proper qualification pertaining to the burden of proof.

In this case, the jury was charged specifically and repeatedly, in Instructions 6, 10, 13, and 15, that the burden was at all times upon the plaintiff to prove that the decedent did exercise ordinary care.

Whether the *Lunde* case runs counter to the *Bell* case involves a construction of the opinion in the *Bell* case. Our own discussion therein is not free from ambiguity. It is not clear therefrom whether the reversal ordered therein was based upon the use of the word "presumption," or whether it was based upon the burden imposed upon the defendant by the instruction to the effect that such "presumption would be overcome by evidence that satisfies the minds of the jury that she was negligent." In the *Lunde* case, we put the latter construction upon the opinion in the *Bell*

case. We think such construction is fairly invited by the discussion therein.

Following the *Lunde* case, we think that the use of the word "presumption" in the qualified sense of an inference of fact was sufficiently guarded in the instructions as a whole so as to properly advise the jury of the sense in which it was used, and to advise it, also, that the burden of proof as to contributory negligence remained upon the plaintiff, and was not shifted to the defendant. The judgment below must, accordingly, be—*Affirmed*.

WEAVER, C. J., LADD, GAYNOR, PRESTON, and STEVENS, JJ., concur.

SALINGER, J. (dissenting). The majority opinion is, as to one point, put on the ground that, while the present holding is in conflict with *Bell v. Incorporated Town of Clarion*, 113 Iowa 126, it is in accord with the later cases of *Lunde v. Cudahy Pkg. Co.*, 139 Iowa 688, 695, and *Gray v. Chicago, R. I. & P. R. Co.*, 160 Iowa 1. In effect, the present holding is that the *Lunde* case and the *Gray* case have overruled the *Bell* case. I agree that it is proposed now to overrule the *Bell* case, but I am not satisfied that that case has before been overruled, nor satisfied that it should ever be overruled.

It cannot be seriously disputed that it is proposed to affirm the giving of an instruction, despite the fact that one in substance like it was disapproved in and reversed for in the *Bell* case. I am unable to see any substantial distinction between the instruction disapproved in the *Bell* case and the one it is now proposed to approve. In the case at bar, the following instruction is complained of:

"And on the question of deceased Norberg being guilty of contributory negligence as is alleged by defendant, you are instructed that, where there are no eyewitnesses as to the manner and way in which the deceased was conducting himself at and immediately prior to the time he received the injuries, the law presumes that he was exercising such

care and caution as men of ordinary prudence, judgment, and discretion would exercise under like or similar circumstances, and in relation to the same matters, unless the facts and circumstances shown upon the trial negative such presumption; and you should indulge in such presumption in favor of the deceased, unless the facts and circumstances developed on the trial negative such presumption."

In the *Bell* case, the instruction disapproved of was as follows:

"You are instructed that it is a recognized rule of human conduct that persons in their sober senses naturally and instinctively seek to avoid danger. The law, therefore, presumes, until the contrary appears, that the deceased, prompted by this natural instinct, did exercise care in approaching and stepping upon the sidewalk in question, where the injury occurred. But such presumption would be overcome by evidence that satisfied the minds of the jury that she was negligent."

In effect, this instruction was condemned in the *Bell* case because of the loose use of the word "presumption;" and it was said, while it might properly be charged that the instinct of self-preservation may be considered by the jury, and that such consideration might militate against the claim that there was no evidence of freedom from contributory negligence, yet "that is a very different thing from saying to the jury that a presumption arises therefrom requiring evidence to the satisfaction of the jury to overcome it." It seems to me that precisely the same may rightfully be said of the instruction at bar.

The remaining question, then, is whether the *Bell* case has been overruled by *Lunde v. Cudahy Pkg. Co.*, 139 Iowa 688, at 695. The decision in *Gray v. Chicago, R. I. & P. R. Co.*, 160 Iowa 1, at 14, 15, does not particularly change the question; because it is said in the *Gray* case that it is treated as being "framed in language approved by this court in *Lunde v. Cudahy Pkg. Co.*" The instruction in the *Lunde* case was this:

"Upon the question of plaintiff's intestate's contribu-

tory negligence, you are instructed that, where there are no eyewitnesses as to the manner in which he was conducting himself at the time he received the injuries, the law presumes that he was exercising such care and caution as men of ordinary prudence, judgment, and discretion exercise under like circumstances, and in relation to the same matters, unless the facts and circumstances shown upon the trial negative such presumption; and you should indulge in such presumption in his favor, unless the facts and circumstances developed on the trial negative such presumption."

It seems to me to be true that this instruction does not, in any substantial respect, differ from the one at bar, nor from the one condemned in the *Bell* case. And my answer to the *Lunde* case is that it should be overruled, because it is in conflict with the *Bell* case; and the *Gray* case should also be overruled, for the same reason. But one is not limited to that position. Whatever the *Lunde* case may in fact do, it does not profess to overrule the *Bell* case. It attempts to place the decision on peculiar and narrow ground which is not for consideration on the record now before us, and it expressly disclaims any conflict with or desire to overrule the *Bell* case. The ground of the decision in the *Lunde* case is stated to be that it is "now well settled that this burden may be met and the fact of due care may be established *prima facie* by showing that, when last seen, he was acting in the line of his duty, without any apparent negligence, and that there is no living witness or direct testimony as to the manner in which his death occurred. * * * The instruction in the present case not only does not relieve the plaintiff from the operation of the ordinary rule, which requires her to prove by competent evidence both the negligence of the defendant and the absence of contributory negligence by the deceased, but, on the contrary, the charge given the jury is carefully framed to prevent any confusion or misunderstanding on this point."

And the *Bell* decision is differentiated as follows:

"It is not inconsistent with the instruction now being considered. The instruction there held to be erroneous was to the effect that, in such cases, the burden of proof, on the question of contributory negligence, is shifted to the defendant, and that the deceased would be held to have exercised due care until the conclusion is 'overcome by evidence that satisfies the jury that he was negligent.'" *Lunde v. Cudahy Pkg. Co.*, 139 Iowa 688, at 696.

I think the instruction at bar does just what the *Lunde* case says the *Bell* case rightly reverses for.

And if it comes to mere counting of noses and keeping track of the chronology of decision, *Sanderson v. Chicago, M. & St. P. R. Co.*, 167 Iowa 90, at 103, expressly approves the reasoning set forth in the *Bell* case.

All I can find in *Merchants T. & S. Co. v. Chicago, R. I. & P. R. Co.*, 170 Iowa 378, at 391, is that an instruction holding that the so-called presumption arises in the absence "of direct evidence" as to whether proper care was exercised, is fundamentally erroneous, and that the so-called presumption may be for consideration, though there be an absence of *direct evidence* on whether proper care was exercised.

It is suggested that, since the charge of the court repeatedly tells the jury that the burden of proof on showing freedom from contributory negligence is on the plaintiff, it may fairly be said that, if the instruction complained of be erroneous, the error is rendered harmless by these broad and specific instructions as to the burden of proof. Juries are more apt to follow what is specific, narrow, and definite than generalities which may, in fact, include a specific matter. When the juror is advised that the plaintiff has a presumption in his favor, then, though it is possible, on close analysis, to ascertain that, notwithstanding the indulgence of such presumption, the general burden rests on the party for whom the presumption is indulged, the broad charge will not remove the definite statement that the party who has the burden also has a presumption in his favor. Indeed, it might well be understood

that, though the plaintiff had the burden of proof throughout, he discharged that burden, at least *prima facie*, when it is shown that no eyewitnesses were present. Moreover, it is fairly to be doubted whether the broad instruction as to burden of proof thus relied on, instead of curing the charge as to the presumption, is not, in fact and at best, the creation of a conflict in instructions.

LILLIE BAILEY, Appellee, v. CITY OF LEMARS, Appellant.

MUNICIPAL CORPORATIONS: Negligence—Depression in Walk.

- 1 The maintenance in a sidewalk of a depression with ragged and dilapidated edges, even though the depression is of slight depth,—some two inches,—may present a jury question on the issue of negligence.

NEW TRIAL: Newly Discovered Evidence—Failure to Investi-

- 2 **gate Known Facts.** Diligence in the matter of newly discovered evidence as ground for new trial demands that a party proffering the new evidence follow up and investigate during the trial suggested facts brought to light during the trial.

TRIAL: View of Premises. The court is within its discretion in

- 3 refusing to permit the jury to view the scene of an accident at a trial over two years after the accident, and at a time when the condition of the walk had materially changed.

NEGLIGENCE: Defining Reasonable Condition. The court need

- 4 not "define the condition in which a walk must be in order to be in a reasonably safe condition," especially in the absence of a request.

NEGLIGENCE: Evidence—Condition After Injury. Evidence of

- 5 physicians reviewed, as to the physical condition of an injured party as late as two years after an injury, and held properly received, over the objection that it was too remote.

Appeal from Plymouth District Court.—WILLIAM
HUTCHINSON, Judge.

OCTOBER 2, 1920.

ACTION to recover damages for injuries alleged to have been caused by a defective sidewalk. Trial to a jury, and verdict and judgment for plaintiff. Defendant appeals.—*Affirmed.*

Nelson Miller, for appellant.

Roseberry & Roseberry, for appellee.

PRESTON, J.—1. Plaintiff claims to have caught the heel of her shoe on the jagged and overhanging edge of a defect in a cement sidewalk, as she was walking south, after dark. Her evidence tends to show that she was violently thrown forward to the pavement, which caused a miscarriage, and injuries to her limb, arm, side, pelvis, and the reproductive organs. In addition to the general verdict, the jury returned answers to interrogatories, which we understand to have been submitted by the defendant, as follows:

“1. Was the city negligent because of the existence of the break in the sidewalk involved in this case? Answer. Yes.

“2. How much higher, if any, was the edge of the walk south of the break than the edge of the walk north of the break? Answer. One inch.

“3. What was the depth of the break below that portion of the walk which lay north of the break? Answer. One and three-fourths inches.”

The issues, as stated by appellant, and adopted by appellee, were whether the defect in the walk was of such a character that it could be said to be negligence in the city to permit it to exist; whether the accident actually happened; and whether the walk was in a reasonably safe condition. As to whether the injury occurred, we think there is no dispute in plaintiff's evidence, and we understand appellant to so concede, in connection with their

1. MUNICIPAL
CORPORATIONS:
negligence:
depression
in walk.

argument as to whether the motion for a new trial should have been granted on the ground of newly discovered evidence, which will be referred to later. As to the other two propositions, appellee contends that it was a question for the jury as to whether the defect in the walk constituted negligence, and whether it was in a reasonably safe condition; while appellant contends that, as a matter of law, the walk was in a reasonably safe condition, and that there was no negligence. We insert here a photograph, which was introduced in evidence.

The evidence of the photographer does not show the position of his instrument, but it seems to be conceded in argument that the view in the photograph is looking south, the direction in which plaintiff was walking. She was walking on the inside of the walk: that is, the side towards the buildings. The photograph was taken in March, 1917, about three months after the injury, which was on December 23, 1916. According to the evidence, the walk was

covered with snow, a part of the time during the winter, and it is not claimed there was any material change in the walk in that time, although it appears that there was a change, and that the depression was deeper, when some of the measurements were made by defendant, some, a year, and some, two years, after the accident. The trial was had in 1919. It is not seriously disputed, if, indeed, there is any dispute in the evidence, that the south edge of the break, the edge against which plaintiff caught her foot, is higher than the north edge, and that the south edge was the broken edge of the break, and had been raised up above the original level of the walk. The evidence tends to show that the cement under the top hard surface had rotted away back under the edge. It is thought by appellant that the special findings of the jury are not sustained by the evidence. We think they are. True, there is a conflict in regard to this between the witnesses for plaintiff and those for defendant. Plaintiff testifies that, after she fell, she lay there a few minutes; that it knocked the breath out of her, and made her feel faint; that, while she was down on the walk, she put her hand down and felt the walk, and estimates the depth at $3\frac{1}{2}$ inches, by the measurement of her finger; that she didn't feel the bottom; that it went kind of under; that she simply reached over, to see what caused the fall; that she never saw the broken place in the walk. There is evidence that there is a tree, practically opposite the hole, and an electric light in the center of the street intersection, and that these caused a shadow across the defective walk. A witness who was a carpenter, and testifying for plaintiff, says he measured the defect in the walk in March, 1917; that, at that time, the narrowest place was 6 inches wide, and the widest, 14 inches; that the shallowest place was 1 inch deep, and the deepest, 2 inches, and that the walk is 1 inch higher on the south side than on the north; that the hole was deepest in the center, and sloped gradually to the sides. Other witnesses give their estimates of the depth, some from observation, and some from measure-

ments, but at different times. There is evidence tending to show that there was sand and debris in the hole, which would somewhat affect the measurements, and that it would depend somewhat on the precise place where the measurement was made, since it was not the same clear across. Some of the witnesses, however, say that there was no debris in the hole. There is evidence that the south edge of the break was rough and jagged, with projections of about three fourths of an inch. Plaintiff testifies that it was her heel that caught, and not her toe; that she caught her foot under the broken walk; that "my heel didn't break loose, but it just scraped the heel; it is like it caught when I was raising my foot up, not when I was setting it down;" that she examined it, and it was "kind of under a bit, and there was where I caught my heel." Her shoe was examined, after she returned home, and it showed that the walk had scraped the heel; that there was a small crumb of cement on the heel. We deem it unnecessary to go into the evidence in further detail. It was shown by the evidence that this defect was a short distance from the business part of town, extensively traveled, and had existed for a year or a year and a half prior to the accident. It is shown that another party tripped at this same point, but it is not claimed that actual knowledge thereof was brought home to the city.

Appellant cites numerous cases from other jurisdictions where it has been held that a break in the surface, of 2 or 3 inches, is in a reasonably safe condition, as a matter of law, and that there was no negligence. The Iowa case relied upon is *Johnson v. City of Ames*, 181 Iowa 65. That case was distinguished in *Welsh v. City of Des Moines*, (Iowa) 170 N. W. 369 (not officially reported). The same distinction may be made in the instant case. The facts in the instant case are more nearly like the *Welsh* case. We think the instant case is ruled by the *Welsh* case. In the instant case, it is not so much a question as to the depth of the hole, but is a question whether the hole was danger-

ous because of the condition of the jagged, overhanging edge, and the other circumstances. See, also, *Geer v. City of Des Moines*, 183 Iowa 837.

The trial court did not err in submitting the case to the jury.

2. Appellant states in argument that, at the trial, defendant had no evidence whatever going directly to disprove that the plaintiff suffered any injury at the point in question, and that the newly discovered

2. NEW TRIAL: newly discovered evidence: failure to investigate known facts.

evidence went directly to that point. Defendant filed, as a part of the motion for new trial, the affidavit of one Barnes, in which it is stated that, about 8 o'clock in the evening of December 23d, he was pass-

ing south, along the walk in question, and saw a woman with two children, passing south at a point described, which would be at the place in question; that she was about 100 feet ahead of him; that he couldn't say whether the woman stumbled or not, but she dropped some things,—packages,—but that she did not fall; that he noticed nothing the matter with her, as he passed; that he went on south to the home of Ewers, where he turned in; that he thinks Ewers was with him, but is not positive; that he did not stop and offer any assistance, because there did not seem to be anything the matter, except the dropping of the packages. No affidavit by Ewers was filed. Defendant's attorney filed his affidavit, stating that he consulted with every person as to whom he had received any information, or who might know of anything which could be used as evidence in the case; that he did not receive any information that Barnes knew anything of it; that the matters in Barnes' affidavit did not come to his knowledge until after trial; that it was impossible for him to personally interview every citizen of the city as to what they might know. Barnes does not identify plaintiff as the woman he saw, but defendant claims that the proper inference to be drawn from his testimony is that it was she. Plaintiff testifies that her two children were with her, but she says

she had no packages; that she had only a book which she had just secured at the library, and with which she was returning home. From her testimony it appears that the accident must have happened about 7:30 o'clock; that she lay or sat on the walk a few minutes; and that she was at her home about 8 o'clock, the time Barnes claims to have seen her. She says that one man passed her, a little after she fell, and that she saw no one else in the vicinity, other than this man. Plaintiff's 13-year-old daughter, who was with her, testifies that the man who passed, went into Stockberger's, whose home is about at the place of the defect; so that, at the trial, counsel for defendant had knowledge, from the above testimony, in regard to a man who was passing. There is no showing that there was any inquiry made at Stockberger's house, or of Ewers. It is not shown how counsel learned of the Barnes testimony. It appears that there were a great many people on the street, doing their Christmas shopping. Appellee argues that the alleged newly discovered evidence is not material, and is cumulative. It appears to us, however, that it is more a question of diligence; and besides, the evidence is somewhat indefinite. The trial court did not err in overruling the motion on this ground.

3. The court did not abuse its discretion in denying defendant's request that the jury view the walk and defect.

3. TRIAL: view of premises. The trial occurred more than two years after the injury, and the evidence shows that the conditions had changed, and that the hole was deeper.

4. It is assigned as error that the court erred in not giving an instruction defining the condition in which a walk must be, in order to be in a reasonably safe condition,

4. NEGLIGENCE: defining reasonable condition. and that it was the duty of the court to instruct upon all issues with reasonable fullness, and so on. Defendant did not request any instruction in regard to this. The court did instruct that, if the jury

should find that the walk, at the time and place, was out of repair, in the manner claimed by plaintiff, and was dangerous and unsafe for public travel, etc. And again:

"Par. 8. You are instructed that a municipal corporation such as this defendant is not an insurer of the safety of those who travel upon its streets, but it is bound to use ordinary care to keep its sidewalks in a reasonably safe condition for travel. If it does this, it has done all the law requires of it."

Ordinary care was defined in another instruction. It might be somewhat difficult for a court to attempt to "define the condition in which a walk must be, in order to be in a reasonably safe condition." Appellant cites a number of authorities; among them, *Overhouser v. American Cereal Co.*, 128 Iowa 580, 585, from which defendant quotes at some length. In that case, there was a question in regard to an independent contractor, and the court held that, under such circumstances, where negligence was claimed, there should have been a definition, or a description of an independent contractor. It was also said in that case:

"Now, while the words and terms in ordinary use, and therefore presumably within the general understanding of men, need not be defined in instructions, yet, in all cases where words or terms are used in a legal or technical sense, differing from that which the common use of the words imports, it is at least proper, and it is not going too far to say that, in many cases, it may be necessary, to give definitive or explanatory instructions."

It occurs to us that, in this case, there is nothing particularly difficult for a jury to understand about reasonably safe condition. We think the court covered this point sufficiently, especially in the absence of a requested instruction. The court is not required to instruct as to issues of fact, which involve their common experience, and the common experience or understanding of the average man. Appellee cites at this point *Stanley v. Cedar Rapids & M. C. R. Co.*, 119 Iowa 526; *Taylor v. Chicago, St. P. & K. C. R.*

Co., 76 Iowa 753; *Bever v. Spangler*, 93 Iowa 576, 610; and other cases which we shall not take the time to discuss.

5. It is thought by appellant that the court erred in overruling defendant's objections to some of the testimony of physicians, in which they described plaintiff's health and physical condition a year, and, in another

5. NEGLIGENCE: evidence: condition after injury. instance, two years, after the injury; because it was too remote. Plaintiff claimed that her pain and suffering and injury continued up to the time of the trial, and alleges that she will suffer in the future. Doctor Mammen testified, over defendant's objection:

"Q. What condition did you find Mrs. Bailey in at that time [a few days before the trial]? (Objected to as too remote from point of time to throw any light upon an injury suffered two years ago.) A. Her arms seemed to bother her. The irregular surface, you might say, at the point where it was bruised, and the right limb was drawn up by muscles over on the pelvis, making an apparent shortening of the limb. The uterus was fallen down, and out of its normal condition. Q. What would be the effect of a condition as you have described? (Objected to, as calling for a conclusion. Overruled.) A. It would be very apt to produce nervous conditions. Her arm would give her pain. The condition of the leg would produce a slight limp. The uterus will not correct itself, but might correct it by some operation. She has been menstruating too frequently."

This evidence was given in chief. On cross-examination, the doctor said that the misplacement of the uterus was not caused by the fall or miscarriage. Thereupon, the court sustained defendant's objection as to the conclusion, and struck out the answer. The objection is somewhat indefinite, and refers to the condition of her arm and limb, as well as to the misplaced uterus. The objection was not specific. A part of the evidence was competent and proper, enough to show the condition of her limb and arm at the time of the trial, and the circumstances. Dr. Cole testified that he did not remember whether there was a misplacement

of the uterus, and his testimony was somewhat different from that of Dr. Mammen. Dr. Cole says that a misplaced uterus may cause a miscarriage, and more often the reverse; that discharge of the womb causes a tendency to enlarge, and to remain enlarged, and that, if enlarged, it is heavy, and will tilt on its weight. We think there was no error at this point.

We find no reversible error in the record, and the judgment is, therefore,—*Affirmed*.

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

J. E. BROOKER et al., Appellees, v. CARRIE E. LUDLOW et al.,
Appellants.

SCHOOLS AND SCHOOL DISTRICTS: Consolidated Districts—
Enlarging Proposed District. The county board of education, on appeal to it *in re* petition for a consolidated school district, has no jurisdiction to order the *inclusion* of territory not already embraced within the boundaries as set forth in the petition. (Sec. 2794-a, Code Supp., 1913, as amended by Ch. 149, Acts 38 G. A.)

Appeal from Madison District Court.—LORIN N. HAYS,
Judge.

OCTOBER 2, 1920.

ON October 21, 1919, plaintiffs filed in the district court a petition for certiorari, against defendants, asking that the proceedings of the county board of education, in sustaining the objections to the boundaries of the proposed consolidated independent school district of Jefferson, be annulled and set aside. Trial was had, under stipulation that it be tried under Section 4160 of the Code. The trial court found that the plaintiffs were entitled to the writ as prayed, and that the proceedings of the board of education in sus-

taining the objection to the establishment of the independent school district, as established by the county superintendent, be set aside and annulled, and taxed the costs to the defendants. The defendants appeal.—*Affirmed.*

J. E. Tidrick and Phil R. Wilkinson, for appellants.

W. S. Cooper and J. P. Steele, for appellees.

PRESTON, J.—The issues and statement of facts, as stated by appellants, and conceded by appellees to be correct, follow:

THE ISSUES.

"1. Whether or not the county board of education of Madison County, Iowa, had jurisdiction to hear and determine an appeal taken from the ruling of the county superintendent in fixing and determining the boundaries of a proposed consolidated independent school district.

"2. Whether or not the said county board of education had jurisdiction, on an appeal taken by objectors from the ruling of the county superintendent on objections to the boundaries of the said proposed consolidated independent school district, to change said boundaries of said proposed consolidated independent school district so as to exclude territory within the said proposed boundaries, and include territory lying outside said proposed boundaries.

"3. Whether or not the said county board of education in its ruling on said objections was acting legally."

THE FACTS.

"Jefferson Township, one of the political townships of Madison County, Iowa, together with Sections 6, 5, and a small portion of Section 4 in Union Township, constitutes the school township of Jefferson. The said school township of Jefferson is divided into nine subdistricts. Subdistricts 1, 2, and 3 extend from east to west across the north side of said school township. Subdistricts 4, 5, and 6 extend from

west to east through the center of said school township, and Subdistricts 7, 8, and 9 extend from east to west along the south side of said school township. The southern boundary of Subdistrict No. 9 extends south, so that it embraces Sections 6, 5, and a portion of 4, of said Union Township.

"On September 15, A. D. 1919, a petition directed to the county superintendent of schools of Madison County was filed with said superintendent, asking the establishment of a consolidated independent school district, to be called the Consolidated Independent School District of Jefferson Township, in the county of Madison, and state of Iowa, containing certain territory therein described, and said territory embracing the said subdistricts Nos. 2, 4, 5, 6, 7, and 8 of said school township of Jefferson. Notice of limiting time to file objections was duly published. Thereafter, certain residents and property owners filed with the said county superintendent objections to the boundaries of the said proposed consolidated independent school district, and in said objections asked the said county superintendent to change said boundaries so as to include Subdistrict No. 9, and exclude Subdistrict No. 2. That said objections were overruled by the said county superintendent, and two objectors took an appeal to the county board of education. The board of education, on appeal, made a ruling, and entered the same of record, that the objections so filed with the county superintendent should be sustained. That the said Subdistrict No. 2 should be cut out of said consolidated independent school district, and said Subdistrict No. 9 should be included."

The objections filed are as follows:

"Such proposed consolidated district separates the common school district of Jefferson Township into three separate parts.

"2. The same amount of land can be secured in a more compact form, reducing the distance from the center of such district, and leave the remaining territory in better form for school purposes.

"Therefore we ask:

"First. That Subdistrict No. 9 of the school district of Jefferson Township be included within the boundaries of the proposed consolidated school district.

"Second. That Subdistrict No. 2 of the school district of Jefferson Township be excluded from within the boundaries of the proposed consolidated school district."

A plat has been certified, and we may say, in passing, that there is nothing else in this record but the plat which bears at all upon either of the objections, or which shows that the objectors, or any of them, would be injuriously affected, or that the two persons who appealed to the board of education were aggrieved by the decision of the county superintendent. There is no evidence to show that the boundaries of the district which the board attempted to fix, were better for the district or adjoining districts, or that the board fixed other boundaries than those described in the petition because of meandering streams, irregular boundaries of existing school corporations, or the location of highways, and so on. There is no evidence as to the residences of the pupils who will attend the school, or the center of school population, or that the district, as the board attempted to fix it, would be accessible to or accommodate more pupils than the one petitioned for.

As to the first objection, the plat shows, as we understand it, that the common school district of the township would be divided into three separate parts, by the boundaries attempted to be fixed by the board. As to the second objection, the plat shows that the amount of land taken in by including Subdistrict No. 9 is about the same as or a little more than that contained in Subdistrict No. 2, which was excluded. The distance from the southwest corner of No. 9 to the center of the district is about the same as from the extreme north end of Subdistrict No. 2. There is a highway from the north end of Subdistrict No. 2, to and past the center of the district, and there is a highway from near the southwest corner of No. 9, running diagonally to the center of the district, and these are of about the same length. There is no evidence, other than the plat, that, by

including No. 9 and excluding No. 2, it would leave the remaining territory in better form for school purposes. It appears that the petition to the county superintendent was signed by 46 persons, which is shown to be more than one third of the qualified voters residing within the territory in the proposed consolidated district. Plaintiffs, or some of them, were signers of said petition. Subdistrict No. 1 was not included in the petition, because of its proximity to a town; Subdistrict No. 3 was not included, because of its proximity to another town; petitioners did not include Subdistrict No. 9, which embraced the southwestern corner of Jefferson Township, and Sections 5, 6, and a portion of 4, in Union. After the petition was filed with the county superintendent, notice was duly published. The two objectors who appealed from the county superintendent to the board of education did not reside within said Districts 2 or 9, nor did they own property therein. None of the objectors to the proposed boundaries, who seek to bring in Subdistrict No. 9, live in that subdistrict, but they are persons in the proposed consolidated district who, appellees contend, are opposed to the consolidation, and are seeking to bring in No. 9 for the purpose of defeating the consolidation; but they concede that that fact has no bearing on the legal proposition involved.

The errors relied upon are that the court erred in granting the writ and annulling the proceedings, and that:

“As a matter of law, the county board of education had full and complete power and jurisdiction to sustain the objections to the establishment of the consolidated independent school district in Jefferson Township, Madison County, Iowa, which were brought before them on appeal from the ruling of the county superintendent of Madison County, Iowa, on said objections. The court erred in not returning this case to the county board of education for further consideration; the court erred in passing upon questions not raised by the issues in this case; the court erred in permitting the plaintiffs to take an appeal in this cause by means of a writ of certiorari, losing sight of the fact that

the only question involved was whether or not the county board of education had jurisdiction to sustain the objections brought before them on appeal from the ruling of the county superintendent."

The question presented is the consideration of some of the provisions of Chapter 149, Acts of the Thirty-eighth General Assembly, and specifically, as appellees state it, whether or not the board of education may add to a consolidated independent district, in process of organization, territory which is not included within the boundaries set out in the original petition, and the notice limiting the time for filing objections to the proposed boundaries which the statute requires to be published. We shall refer to such portions of the act above cited as seem to bear upon the question before us. It is provided:

"When a petition describing the boundaries of contiguous territory containing not less than sixteen sections, within one or more counties, asking for the establishment of a consolidated independent school district and signed by one third of the qualified voters residing therein, is filed with the county superintendent * * * he shall within ten days give public notice of the place and date when all objections shall be filed. Such petition shall be accompanied by an affidavit showing the number of qualified voters in the proposed consolidated district. * * * Such affidavit shall be made by some qualified voter residing in the proposed district."

This provision was complied with.

"All notices under this act shall be by one publication in a newspaper published within the proposed district, or if there be none, then in a newspaper having general circulation within the proposed consolidated district."

The notice limiting the time for filing objections to the formation of the district was so published.

"Objections may be made by any person residing upon or owning land within such proposed boundaries or who would be injuriously affected by the formation of the proposed district and shall be on file not later than twelve

o'clock noon of the day fixed for receiving objections."

Objections were so filed. In regard to the duty of the county superintendent after objections are filed, the statute provides:

"Within five days after such filings the county superintendent shall review all papers filed in his office and after careful review and investigation of their merits shall overrule or sustain the objections filed and fix and determine the boundary lines of the proposed consolidated district. In determining these boundaries he shall so locate the boundary lines as will in his judgment form the best possible consolidated district, having due regard also to the welfare of adjoining districts."

The statute provides for an appeal from the county superintendent to the county board of education, and such provision as to the duty of the board of education is as follows:

"Any person having filed objections and being aggrieved by the ruling of the county superintendent may appeal from his decision to the county board of education within ten days after the decision is rendered, by serving written notice on the said county superintendent. Within five days after said notice has been received, the county superintendent shall file with the county board of education all of the original papers together with his decision and fix the time and place where such appeal will be heard and shall give notice to appellants by registered letter as heretofore provided. The time fixed for such hearing shall be not less than ten nor more than fifteen days from the date his decision is rendered. The county board of education shall determine such appeal within five days after the submission thereof which decision shall be final as to said boundaries. If no objections be filed or if the objections be not sustained, it shall be the duty of the county superintendent with whom said petition has been filed to call an election in the proposed consolidated district, legal notice of which shall be given as hereinbefore provided. At the election all qualified voters residing in the proposed con-

solidated district shall be entitled to vote by ballot for or against the establishment thereof. * * * In the formation of such consolidated school corporation the boundary lines shall conform to those of school corporations or sub-districts already established, provided however that the county board of education on hearing, may fix other boundaries than herein prescribed, when because of meandering streams, irregular boundaries of existing subdistricts or school corporations or the location of highways, the welfare of the consolidated district and adjoining districts may be better served."

The county superintendent testified that she was proceeding to the organization of the district, with the boundaries fixed as determined by the board of education, and that she had called an election. Both parties concede that the authority of the county superintendent and that of the county board of education are the same, so far as changing boundary lines of the proposed district is concerned; but appellees contend that neither one has power to enlarge the boundaries of the district so as to take in territory not included within the petition and notice, at least without giving persons residing upon such outside territory the same opportunity to make objection which those residing within the territory originally proposed to be included, are given, as provided by the statute. Appellants state, in argument, that the only question in the case is whether or not the county board of education acted illegally, or exceeded its jurisdiction, when it sustained the objections brought before them on appeal. The argument is that the action of the board of education was legal, and within the authority of the board, because, as they say, under the provisions of the statute before set out, the board has plenary power to fix and determine the boundary lines of the proposed district by omitting a part of the proposed district described in the petition, or by including additional and outside territory not described in the petition. This claim is made because of the language which says that the superintendent shall fix and determine the boundary lines, and that, in de-

termining the same, he shall so locate the boundary lines that they will, in his judgment, form the best possible consolidated district, having due regard for the welfare of the adjoining districts; and because the statute provides, on appeal, in the formation of the consolidated corporation, that the boundary lines shall conform to those of school corporations or subdistricts already established, provided that the board may fix other boundaries than those prescribed, when, because of meandering streams, irregular boundaries of existing subdistricts or school corporations, or the location of highways, the welfare of the consolidated district and adjoining districts may be better served. It is possible that, for sufficient reasons, and upon a proper showing, Subdistrict No. 2 could have been excluded, since it was included in the petition, and the notice given would include the residents of No. 2. No notice was given to the people in No. 9. The power to exclude is claimed by appellants under the provision of the statute that the board may fix other boundaries when, because of meandering streams, and so on, the consolidated districts and adjoining districts may be better served. But there was no objection to including No. 2, and no request to exclude it, as a separate proposition. The exclusion of 2 and the inclusion of 9 were coupled up as one proposition; and, in excluding 2 and taking in 9, the board balanced one against the other. This being so, we are not called upon to determine whether the superintendent or the board had power to exclude No. 2, a part of the proposed district originally petitioned for.

There is no power,—at least, no express power, and we think none is implied,—under the statute, authorizing the superintendent or the board to enlarge the boundary lines by taking in territory not included in the petition, when the residents are not notified, and when they have no opportunity to make objections, or to be heard. We think the provisions of the statute requiring the boundaries of the proposed district to be described in the petition and published notice, and requiring one third of the qualified voters to sign the petition, are jurisdictional. Until these pro-

visions are complied with, the county superintendent could not take jurisdiction of the matter, and until the notice was published, could not fix the boundaries. Only those persons residing within the territory described in the petition, and notice are advised of the proceedings. This being so, neither the superintendent nor the board could go outside of the proposed districts, and include a large amount of other territory. If this be not so, there is nothing to prevent one third of the voters residing upon a tract of land from petitioning the county superintendent for the organization of a consolidated district, publishing the notice describing the 16 sections, and then enlarging the tract, on the hearing, to include the entire 36 sections of the township, or even territory in adjoining townships. If such right is conferred upon the superintendent or the board, the result would be that less than one third of the legal voters within a district might cause these proceedings to be instituted, for the very purpose of having the superintendent or board bring in territory where the legal voters would not ask for or consent to their being brought into the district, and that, too, without being notified. The statute gives the right to file objections, but does not confer the right to amend the proceeding so as to bring in additional territory. We think it is more reasonable to believe that the legislature intended to give the superintendent and the board authority to change the boundary within the proposed district described in the petition and notice, for the purpose of enabling these officers to make a somewhat different adjustment within the proposed territory, when, because of meandering streams, or the location of highways and so on, the consolidated district and adjoining districts might be better served, rather than to think that they had authority to reach out and include territory not contemplated by the original proceeding. These provisions limit the power of the board in changing the territory described in the petition presented to the superintendent. There is nothing in the record to show that the people in Subdistrict No. 9 were asking to come in, or

that they were desirous of coming in. Again, the statute provides:

"If no objections be filed or if the objections be not sustained, it shall be the duty of the county superintendent * * * to call an election in the proposed consolidated district, legal notice of which shall be given as hereinbefore provided. At the election all qualified voters residing in the proposed consolidated district shall be entitled to vote by ballot for or against the establishment thereof."

This is the only provision of the law authorizing the completion and establishment of such a district, and this provision is limited to cases where no objections are filed, or cases where objections are filed, but not sustained. In the instant case, there were objections filed, and they were sustained by the board of education. Not only were objections to the district as established by the superintendent filed, but the application was, in effect, amended, by way of objection, so as to bring in an entire district not within the boundary of the proposed district. If this right existed, and the board had authority to sustain the objections, and add additional territory, then there would seem to be no authority for submitting the proposition to the voters.

We reach the conclusion, and hold, that the county superintendent has the right to establish the boundaries for consolidated school districts within the lines set out in the petition, and, if no objections are filed, they become the absolute boundaries, and the superintendent may proceed to submit the matter to the voters for their ratification. If objections are filed, he may overrule or sustain them, as the board of education may do on appeal, but neither may go outside and take in additional territory, or establish a consolidated district out of territory not embraced within the petition. We see no reason in the record for remanding the case to the board of education, even though it could be done in this certiorari proceeding. We are of opinion that the trial court rightly decided the case, and its judgment is —*Affirmed.*

EVANS and SALINGER, JJ., concur.

WEAVER, C. J.—I concur in the result reached in this foregoing opinion, but think the argument made use of unduly limits the authority of the county superintendent and board of education to settle and fix the district boundaries of school districts.

C. L. CHAPMAN, Appellee, v. PETER LAMP, Appellant.

TRIAL: Verdict—Passion and Prejudice. Even though appellant
1 can demonstrate that the verdict is, on *his* theory of the evidence, the result of passion and prejudice, yet he must fail if the record reveals substantial support for the verdict on appellee's theory of the evidence.

TRIAL: Excessive Verdict. Verdict for \$700 for assault and bat-
2 tery sustained, as having substantial support in the evidence.

Appeal from Monona District Court.—GEORGE JEPSON, Judge.

OCTOBER 2, 1920.

C. L. CHAPMAN, plaintiff's decedent, has verdict and judgment as damages for an assault committed on him by defendant, Peter Lamp. Defendant appeals.—*Affirmed.*

C. E. Underhill, for appellant.

Prichard & Prichard, for appellee.

SALINGER, J.—I. The sole contention on this appeal is that, even if any damages were due for the assault charged, they were nominal damages only, and that the allowance of substantial damages by the jury is so unsupported by the evidence as that the verdict should be interfered with for being the result of passion and prejudice. To put it in the language of the brief, the appellant contends that (a)

1. TRIAL:
verdict:
passion and
prejudice.

the damages were excessive; (b) the injuries received by plaintiff were slight, and of little consequence; (c) the assault was provoked and induced by an assault by plaintiff on defendant, and by vile and insulting language used by plaintiff toward defendant; and that (d) opprobrious and insulting language used at the time, and which caused the assault, may be shown and should be considered in mitigation of the damages,—wherefore, the verdict is contrary to the evidence, is not sustained by it, and is the result of passion and prejudice. The verdict awards \$700.

II. There is no dispute over the law that governs the case. It is conceded (a) that, while words will not justify an assault, opprobrious or insulting language used by the assaulted party should be considered on mitigation; (b) that a challenge to combat will not defend an assault upon the challenger (*Lund v. Tyler*, 115 Iowa 236); and (c) conceded that, in protecting against assault, no more force is permissible than will reasonably work such protection. Nor is there any dispute over the scope of appellate review of a verdict on conflicting evidence.

III. Grant, for the sake of argument, that, if the jury believed the testimony given by the defense, aided, if you please, by some given by witnesses for the plaintiff, the verdict is too large. Grant even that, if the jury believed these, its verdict indicates passion and prejudice. But all that will, here, neither set aside or reduce the verdict, if the jury believed the testimony of plaintiff as a witness, or believed some of his witnesses, or believed both the plaintiff and his witnesses.

On giving credence to what was adduced for plaintiff, the jury could find this:

Plaintiff took his cattle to a railroad yard. They were taken into the scale yard, to be weighed. Defendant was there at work, sorting his own cattle. Defendant did something with the scale that made plaintiff feel he (plaintiff) should rebalance the scale, and he did so. In the scale yard, some of the stock of the plaintiff became wild, and plaintiff had trouble in separating them. It was a warm day,

and plaintiff was working very hard in handling the wild cattle, and he became excited. Then defendant commenced to tell him that he (plaintiff) was a crazy fool; that, if he knew anything about handling the cattle, he would have no trouble with them. Between wild cows on one side and this talk on the other, plaintiff got angry, and said something to defendant, but does not now remember what he said. At this time, defendant was sitting on the yard fence, and was outside the yard, and he responded to whatever plaintiff had said with the statement, "I won't take that off of nobody." Then he got off the fence, and came along the outside of the fence to the gate leading into the scale yard. Plaintiff had turned his horse, and had started to face his cattle. As defendant came through the gate into the scale yard, plaintiff turned his horse about. Plaintiff did not watch defendant very closely, when the latter was coming into the yard and walking toward plaintiff, and at this time, "had no idea of an assault." At this point, somebody hollered in a very wild, quick voice, "Look out;" and he immediately turned around in his saddle, to see if the wild cow was attacking him. The next he knew,—he does not know how,—defendant took hold of him, and he had plaintiff by both hands, stretched out at full length, with plaintiff's right foot on top of the saddle, and his left in the left-hand saddle stirrup. Plaintiff lost consciousness at that time, and didn't know what happened for a few moments. When he regained consciousness, he was lying on his left side, with his feet to the north, in exactly the opposite direction from which he was in when he became unconscious. He found defendant on top of him, and defendant had the cattle whip, which had been in plaintiff's right hand, in his (defendant's) right hand; and the first sight plaintiff got "with my eyes opened, was him with the cattle whip raised, as though he was going to whip me." Here plaintiff closed his eyes. As the blow didn't come, he opened them. Defendant "repeated it," and plaintiff started to get on his hands and knees. As he did so, he noticed his glasses and his case had fallen out on the ground. He got away from

NEGLIGENCE: Evidence—Sufficiency. Evidence held to present
4 a jury question on the issue whether a manufacturer of food
for human consumption was negligent in its preparation.

FOOD: Negligence in Manufacturing—Prima-Facie Case. One who
5 shows that he was made sick by eating an article of food which
was intended for human consumption, makes a prima-facie
case of negligence on the part of the manufacturer of the
article, when the processes of manufacturing are unknown to
the injured party, and are wholly within the knowledge of the
manufacturer.

EVIDENCE: Similar Facts—Impure Food. On the issue of ne-
6 ligence on the part of a manufacturer in the preparation of an
article of food, evidence of the impure condition of other pack-
ages of the same kind of food and the same consignment, is
admissible.

Appeal from Webster District Court.—R. M. WRIGHT, Judge.

FEBRUARY 16, 1920.

REHEARING DENIED OCTOBER 2, 1920.

ACTION at law to recover damages by reason of sickness
on the part of Alfred Davis, alleged to have been caused by
the eating of Van Camp's pork and beans. At the close of
all the evidence, there was a directed verdict for defendant.
Plaintiff appeals.—*Reversed.*

Price & Hanson, for appellant.

Healy & Faville, for appellee.

PRESTON, J.—The original petition alleges substantially
that, on July 24, 1916, a can of Van Camp's pork and beans
was eaten by certain members of the Davis family, of which

1. SALES : implied war- ranty in sale of human food.	Alfred Davis, plaintiff, was a member; that, as a result of eating said beans, plaintiff sustained damages by reason of ptomaine poisoning; "that the said defendant was guilty of negligence, false representations, and breach of implied and expressed warranty, in placing
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in the said can and container said pork and beans, containing poisonous, deleterious, noxious, and unwholesome substances, which rendered the contents of said can unwholesome and dangerous to human life and health."

The petition was assailed by motion, because of a combination of actions, based upon different grounds. There was no ruling on the motion, but appellant amended his petition, and alleged:

"That, as a result of the negligence of the defendant in preparing said food, and in the inspection thereof, and in the packing thereof, the said food contained poisonous and noxious substances, and, as a result of the eating of the said food, said Alfred Davis was poisoned, became sick of said poison, and suffered great bodily, mental pain and anguish."

Appellee admitted its corporate capacity, and that its principal place of business was at Indianapolis, Indiana, and denied other allegations of the petition.

At the close of plaintiff's evidence, defendant moved that plaintiff be required to elect whether he would proceed upon the theory of breach of warranty, express or implied, or upon the grounds of negligence in tort. Plaintiff was required to elect, and at first elected upon breach of implied warranty and tort, but was further required by the court to elect, and he then elected to stand on a tort action.

The main issue in the case is whether or not there was sufficient evidence to take the case to the jury, and incidentally, whether the case should have been submitted upon breach of warranty and tort, and whether plaintiff should have been permitted to show that other cans of goods, purchased from the same consignment by other consumers, were also defective. Appellee contends that the evidence is not sufficient to show that the eating of the pork and beans caused, or was the proximate cause of, plaintiff's sickness; that, under the law, there is no warranty; and that the evidence shows that there was no negligence.

There is but little dispute in the evidence. Defendant is engaged in the manufacture of pork and beans. Each can bears a label as follows:

"Van Camp's Pork & Beans. Prepared with tomato sauce. The meat contained herein has been inspected and passed at an establishment where Federal inspection is maintained. The contents of this can are ready for the table and can be served hot or cold.

"To serve hot, place the can in boiling water or empty into frying pan.

"Net contents two pounds, two ounces.

"Prepared by the Van Camp Packing Company, Indianapolis, Indiana."

The can itself bears the word "Sanitary," stamped upon the end. The evidence shows that the word "Sanitary" is stamped by the manufacturer of the can, as their trademark, and applies to the can, rather than to the contents. This was not known to the consumer. The entire label would have a tendency to lull the purchaser into a sense of security. Defendant is engaged in the manufacture of canned goods, including pork and beans, for human consumption. Their goods are dispensed to the consumer principally through jobbers. Defendant, in July, 1916, was jobbing canned pork and beans to the Fort Dodge Grocery Company, for distribution to retailers and consumers. This was known to defendant company. On July 4, 1916, the can of beans in question was received by said grocery company, in a consignment from the defendant company. On July 12th, the grocery company sold to Munn, a retail grocer at Gypsum, five miles east of Fort Dodge, the can of beans in question, with others. On July 24, 1916, this can of beans was sold by Munn to the mother of plaintiff. This was Monday. The can appeared to be all right. The beans were eaten for the evening meal, within an hour after they were brought by Mrs. Davis to the home. When the beans were opened, they were emptied into a bowl. They were not left standing in the can. This evening meal consisted of crackers, bread and butter, potatoes which had been dug that morning from the garden, boiled for dinner and fried for supper, also the can of beans in question, and nothing else. Witnesses describe what they had for the other meals

on that day and the next day. The meals consisted of ordinary food. Some canned peaches were eaten at some of these meals. No canned beans had been eaten for a month before. The family consisted of the father and mother and seven children. Three of the children were not at home for the meal at which the beans were eaten, and did not partake of any of the beans, nor did the father and mother. One of the younger children ate nothing but beans for that meal. This one subsequently died from ptomaine poisoning, and the other three children who ate of the beans were taken sick soon after. Some of them were seriously ill for several weeks. All who ate of the beans were sick after eating. The father and mother and the three other children who did not eat of the beans were not sick. Some time before the date in question, the family had purchased a case of canned peaches. Some of them were eaten at about the time of the eating of the beans, and before and after that date. All the family had partaken, and there were no ill effects. The peaches were not allowed to stand in the can after they were opened. Some of the children had access to the orchard, and had eaten apples. The exact time of this is not shown, but the evidence does show that the apples were about gone at this time. The well was about 60 feet from barn, and near the stock pens. It was hot weather. Plaintiff, 17 years old, had been working in the harvest field, and with others, had drunk the well water from a jug. He had not been ill before eating the beans. There is no evidence that the water was impure. The medical witnesses do not give their opinion that the sickness of plaintiff and the others was caused by any of these other things. They say that ptomaine and metallic poisoning would be caused by contaminated pork and beans, or contaminated peaches. The usual causes of ptomaine poisoning are food contamination. It is food poisoning. It is a poisoning as the result of the introduction into the system of contaminated food. Some of the symptoms from metallic and ptomaine poisoning are the same. In plaintiff's case, the symptoms were more for ptomaine poisoning. The

symptoms of the different ones are given in detail. They varied somewhat in the different individuals. The manner in which they are affected depends somewhat upon the quantity eaten, and other things. The vomit and bowel action of the affected persons, or some of them, showed the presence of beans. A few were whole. The vomiting was beans and a green-colored substance. The medical witnesses give it as their opinion, on the facts shown, that the illness was ptomaine poisoning, from eating the pork and beans in question. Canned goods must be hermetically sealed, to maintain the nontoxic condition. It was shown that the tomato sauce put up in these cans of pork and beans is a combination of tomatoes, vinegar, and spices. The evidence is that the presence of an acid, such as vinegar, or any other acid, attacks the metals of the container, and not the food product. Some vinegar, as fruit vinegar, would have a tendency to increase the rapidity of decomposition of food. Fruit juices are frequently contaminated with ptomaine. Nitrogenous food products are more likely to contain ptomaine than acidulous products. One of defendant's assistant managers, having personal knowledge of the operation of defendant's plants at Indianapolis and Crawfordsville, testifies in detail as to the operation of canning pork and beans; of the purchase, shipment, sorting, etc., of the beans and the pork; also, the raising of tomatoes on their farms in Indiana, the preparation and shipment of the pulp or juice in sealed cans, to the factory; also, the sanitary conditions in the factory, and precautions taken to prevent contamination; that, if the employees are not in good health, they are discharged. The sterilization of the filled cans is at a heat of 240 degrees, for an hour and 50 minutes. The purpose of the sterilization is to kill any micro-organisms that might be in the product, and make them sterile. He states that they realized that the cans go out of the plant as sealed packages; that the consumer has no opportunity of examining them until they are used as food; that there was a government inspector at the plant, to see that these things were done, and that he was there for the pur-

pose of protecting the public; that they had inspection of all the products that go into the can. He testifies to the inspection of the different things before they go into the factory, and of the method of inspection during the process of manufacture and canning. He testifies that, in 1916, the defendant company was behind in its orders; that it had practically no stock on hand; that it was selling pork and beans as fast as it was made, and the company was manufacturing to the limit; that the plant where pork and beans are packed is at Indianapolis. At the factory there, they employ from 750 to 1,000 people. They use about 150,000 bushels of beans per year. They have 6,000 or 7,000 acres of tomatoes that they raise each year. They send out each year approximately 35,000,000 cans of pork and beans. When a car of beans arrives, their sampler takes a composite sample of 10 per cent of the beans in the car. These samples are sent to the laboratory, for analysis and inspection. Other examinations are made, and, after the beans are parboiled, they are turned into a wagon or truck, holding 248 pounds. These wagons or trucks pass by a girl, about five minutes apart. The contents of the trucks are inspected by this girl with a paddle. She stirs them up with a paddle, and inspects them to discover any bean that has a spot. She is looking for spotted beans. He says:

"Once in a while, we are bound to have a little trouble with the co-ordination. If one machine breaks down, we start up another. There are times when our co-ordination of this system doesn't work out perfectly; that is bound to happen anywhere. It is essential that the pork and beans and tomato sauce all arrive at the filling machine to be put in the can at the same time. This is regarded as one of the essentials in the making of the high-grade Van Camp products. The care that is required in making a safe product is the care in sterilization. * * * The making of tomato sauce requires particular care and attention. There is no danger that any of the contents of the can will spoil, where only proper methods are followed. There is more danger of the pork spoiling than the beans."

The chemical department makes no chemical or microscopical examination of the finished product.

He recalls one occasion when some of the finished products were taken out of the warehouse and withdrawn from the market. That was because they were off-color. They were afterwards sold to the employees. There was something in the method or system on that occasion that wasn't perfect, or that batch would have come out with the same uniform color as the others. In so far as he knew, they never had the laboratories make a chemical or microscopical test. He describes the washing of the tomatoes, to knock off the dirt, the sorting out of the bad ones, and the cutting out of the bad spots. The preparation of the beans, pork, and tomato sauce is all handled in co-ordination; all timed to come together at the right time. The cans are sealed hot, and the machines seal the lid on, clamp the lid on so it is air-tight. There are two operations in this, called the first roll and the second roll. One roll clamps the lid down, and the second operation folds it under. There is no solder, lead, or zinc used in fastening the lid on the can; nothing but the pressure of the tin, the lid on the can. The cans are then sterilized in a large, iron, round crate; and he gives the number of cans in each crate. After they cool, they are inspected by taking one can from three rings or crates, and opened and inspected for coloring and general appearance. The cans are then put into ricks, labeled, and put in cases. He testifies that the government inspector does not check up the tin cans each day, nor does he check up the laboratory each day; he does not check up every job lot of pork that comes in there each day. Says he doesn't see how any mistakes could happen, in the way they check them up, not if everybody did their duty as he described; but if there is neglect along that line somewhere, there is a possibility of it. He does not attempt to describe the history of any particular can of beans, except as it follows the general method. He testifies that there are times when they are short of help, and they are replaced as soon as they can get more; that, in any system or method of business, there

are always little hitches, from time to time, which cannot be avoided. The cubes of pork are handled with the hands of the employees when they put it in the can. The company and the government recognize that there is a possibility of contamination from the hands of human beings, coming in contact with food products, and that is why the company has a regulation that the employees must always wash their hands before they handle the food. Twenty to twenty-five barrels of pork are used each day. The government inspector looks at the barrels, as they are opened up, and sees if they are covered with brine; then he takes a piece out of the barrel, to see that each piece is the same. During the day, he walks through the plant and stops at the tables to see what they are using. Witness says, "There might be a possibility of a piece of pork getting by him that wasn't right." Another employee of defendant's, an analytical chemist, in charge of the laboratory work at the factory, describes the different tests that are made by his department of the ingredients which enter into the cans of pork and beans. He relates the general system followed by the company, but does not give the history of any particular can of beans, nor does any of the evidence purport to give a history of the particular can of beans in controversy. That, of course, would be difficult for either the defendant or the plaintiff, and less possible for plaintiff, since he had no opportunity to know anything about the process of manufacture. He testifies that the system and method were the usual and ordinary system used throughout the country in canning, and that he knows of no other method more improved, more sanitary, or more modern. The state chemist, medical men, and others testifying as experts, say that the method described by defendant is recognized as being a sanitary and proper method of preparing and canning food products. They say, however, that there are occasions, where the method has the approval of the state department, when the finished product itself is not up to the standard required for food consumption; that, though the general method is the best, most improved, and scientific, when the

method is operated by hundreds of employees, deleterious or unsanitary products might emanate from such a factory; that the success of the method depends upon the care, skill, and efficiency of the employees; that it is always possible that sometimes the method is not applied with the highest skill, and the high standard of the food product is not maintained; that they know of instances where proper methods have been adopted, and yet the products of the plant adopting them have not always been perfect; that they recognize the distinction between the adoption of a method and the practical carrying out of that method by a host of employees in the plant; that the product might be harmful, if the methods were not complied with. They base their opinion that the defendant's method is scientific and proper upon the assumption that the testimony of defendant's manager is a verity. Their evidence is that, after a can of food has been sterilized, it must remain absolutely air-proof; that, if the crimping machine didn't do a good job of fastening the lid on, there might be danger of reinoculation, and in that case, decomposition might set in; that, if it did set in, and progressed for any length of time, the food might become deleterious; that it is necessary to keep the food sterilized; that these bacteria are dangerous; that, in the case of putrefaction, there would be a gas formed in the can, which would cause a swelling, and press against the can; that the swelling would not be noticeable, until the pressure had reached such an extent that it overcame the resistance at the top and bottom of the can; that there might be gas in the can before there would be any external evidence of swelling.

There may be some other circumstances having a bearing, but the foregoing is a summary of the testimony.

Appellee says that, for the purpose of this appeal, in so far as the system itself is concerned, this court may find that defendant's system is as good as is customary, usual, and ordinary, in the method of performing such services, provided that the court or a jury is absolutely bound to believe the testimony of defendant's manager, even though un-

disputed, as to the details of the system which he described; and that, for a like purpose, the system and material used were the usual, general, and ordinary system used throughout the country in 1916, if the testimony of defendant's chemist, interested as he is, must be believed; and that there was no other more modern or sanitary method than that described. But it is argued that it may be inferred from the record that these beans were defective, either because of the failure on the part of defendant's employees to maintain all of the sanitary rules of the plant; or because the can was not hermetically sealed before sterilization; or because, subsequent to the sterilization, a small air hole may have existed in the top of the can, where the crimping machine failed to perform its function; or because, by reason of negligence in preparing the tomato sauce, the acid assailed the metal of the tin; or because the proper temperature was not maintained while the same was being sterilized; or because the different ingredients of the can of beans were not handled in co-ordination; or because, notwithstanding defendant's method of canning, the employees may not have always followed the method, and, therefore, there was opportunity for contamination of the contents before or after sterilization, and before the product left the plant. They argue, too, that the jury could properly have found from the evidence that plaintiff's illness was the result of ptomaine poisoning, and that the cause thereof was the eating of the beans. The contention is that, because of this and all the circumstances, plaintiff made a prima-facie case; and that, notwithstanding the defendant's evidence, there was a question for the jury as to whether plaintiff's prima-facie case had been negatived or overcome by defendant's evidence. They say, too, that if, under the evidence, defendant's liability is based upon a breach of warranty, express or implied, plaintiff would not be required to show negligence on the part of the defendant in the selection, preparation, and marketing of its product. Numerous cases are cited, holding that, in cases similar to this, the case should go to the jury on both questions of implied warranty

and negligence. Appellant claims further that the label on the can contained an express warranty, and that the implied warranty was that the contents of the can were fit for human consumption, and that they would not injure or kill the consumer, and that the warranties were breached, to plaintiff's damage. Appellees admit and concede as follows:

"That there is a duty resting upon all manufacturers and producers of food, to exercise a very high degree of care in the selection, preparation, cooking, canning, packing, and handling of their merchandise. In fact, many cases go so far as to hold that such manufacturers and canners are required to exercise the highest degree of care."

We think such ought to be and is the rule, that the highest degree of care must be exercised.

1. Without restating the evidence, we are of opinion that the jury could properly have found therefrom that the eating of the beans by plaintiff was the proximate cause of

his illness. As before stated, the medical testimony is to that effect. The circumstance that all those who ate the beans were made sick, while those who did not partake, were not ill, is to our minds significant. There is doubtless a possibility, or it could be surmised, that it was from the drinking of the well water, or from eating canned peaches. The circumstances in regard to these matters have been before set out, and will not now be repeated. As to this feature of the case, we think there was a jury question.

2. Counsel for appellee argues at considerable length that there was no express warranty. They argue, too, that there can be no warranty, express or implied, because there

is no privity of contract between the defendant and the plaintiff. They cite authorities, some of which are by this court, to the further point, holding, as appellee claims, that there cannot be both an express and implied warranty, involving the same subject-matter, to wit, quality or character of goods sold; that, when the express

2. FOOD :
proximate
cause of
sickness.

3. SALES :
express war-
ranty :
canned
goods.

warranty does not provide as to the same obligation, it excludes the implied. The Iowa cases cited on this point were not cases involving food products. One was the sale of a threshing machine; another, piling; and the other, the sale of sheep, and the warranty had to do with the breeding, health of the sheep, etc. For reasons appearing later, we do not determine this point. The cases cited by appellee, for the most part at least, hold that the action sounds in tort. We understand their argument to be that it is a tort action; but they contend that, under the record, there was no negligence shown, and that their evidence shows there was no negligence. Without citing the cases on the question as to express warranty, it seems to us that the language on the label does not constitute an express warranty that the food is wholesome and fit for use. The substance of it is that the can contains Van Camp's pork and beans, prepared with tomato sauce; that the meat has been inspected and passed at an establishment where Federal inspection is maintained; and that the contents are ready for the table. Directions are given how to serve hot, the quantity is given, and where it is prepared. From appellant's argument, we think they do not seriously contend that there is an express warranty. The part of the printing on the label relied upon as an express warranty is, "The contents of this can are ready for the table, and can be served hot or cold." This, we think, means no more than that the beans may be used without cooking. Doubtless it should be construed to mean that it is for human consumption. But it is shown in other ways that it was so prepared, and that defendant knew it was to be sold for that purpose. We think we should spend no more time on this phase of the case.

3. It must be admitted that there is much confusion in the authorities as to the theory of the liability of defendant, if any, in this class of cases. Some of the cases hold that the action is bottomed upon negligence alone; others, that there is an implied warranty; and still others, that there is an implied warranty, and that if, in addition, it is found that the seller was negligent in selling food products

that were dangerous to those who ate them, he would be liable for the consequences, if, by proper care, he could have known of the condition. There is a conflict in the decisions. We shall refer to appellee's cases first. It cites *Crigger v. Coca-Cola Bottling Co.*, 132 Tenn. 545 (179 S. W. 155, L. R. A. 1916B 877). This case is also cited by appellant. Appellee cites the case to sustain its contention that the liability, if any, is based upon negligence. Appellant cites the same case to the proposition that there is an implied warranty, regardless of any question of negligence, and, as we understand the argument, to also show that actions of this kind sound in tort. In that case, a bottle was sold by the defendant to a local dealer, and by him sold to plaintiff. In the bottle of coca cola was a decomposed mouse. The opinion states that the case is briefed by defendant on the question as to whether there is an implied warranty, regardless of any question of negligence; that the declaration, liberally treated, will admit the question; and that the case must be determined upon that standard. The opinion refers to the case of *Boyd v. Coca-Cola Bottling Wks.*, 132 Tenn. 23 (177 S. W. 80), as holding that want of contract, or privity, between the defendant and the person injured, constituted no defense, and that, for a negligent breach of the duty to exercise care, the defendant was liable. The court said further:

“In the present case, we are to inquire a step further. Does this duty exist regardless of negligence, and is it in the nature of an implied warranty? Some of the cases seem to so hold. * * * From a careful consideration of the subject, and after mature thought, we are of opinion, as follows:

“1. That one who prepares and puts on the market, in bottles or sealed packages, foods, * * * owes a high duty to the public, in the care and preparation of such commodities, and that a liability will exist regardless of privity of contract to anyone injured for a failure to properly safeguard and perform that duty.

“2. This liability is based on an omission of duty or an

act of negligence, and the way should be left open for the innocent to escape. * * * Negligence is a necessary element in the right of action, and the better authorities have not gone so far as to dispense with actual negligence as a prerequisite to the liability. In fact, there is no logical basis of liability for personal injury, without some negligent act or omission."

That case was tried to a jury, and was submitted to the jury on the theory of negligence, and the jury found for the defendant. The case was affirmed, because there were sufficient inferences that might be drawn from the facts in the case to sustain the finding of the jury. The case is cited in a note to *Swank v. Battaglia*, L. R. A. 1917F 472, 474, as holding that there is no implied warranty. The note in the L. R. A. citation just given, at page 472, states that the late cases on the subject are to the effect that the sale of an article for food raises an implied warranty that the article is fit for food, and is not in an unmerchantable condition, or in a condition rendering it dangerous to be used for food (citing a number of cases). The *Crigger* case is also cited in *Friend v. Childs D. H. Co.*, 231 Mass. 65, 71 (120 N. E. 407). See, also, *Walters v. United Grocery Co.*, (Utah) 172 Pac. 473 (L. R. A. 1918E, 519). As we have said, as we understand appellee, its cases are cited to the proposition that there is no implied warranty, but that the case is bottomed upon negligence. The next case they cite is *Bishop v. Weber*, 139 Mass. 411 (1 N. E. 154), where the court said that liability does not rest so much upon an implied contract as upon a violation or neglect of a duty voluntarily assumed. In that case, the action was brought as an action of tort, and the court disregarded an amendment in regard to an implied warranty. In *Tomlinson v. Armour & Co.*, 75 N. J. L. 748 (70 Atl. 314, 316, 19 L. R. A. [N. S.] 923), the court assumed, without deciding, that there is no implied warranty, but that there was a duty resting upon the manufacturer to exercise care, etc.

Nelson v. Armour Pkg. Co., 76 Ark. 352 (90 S. W. 288), is cited as holding that:

"In the sale of provisions by one dealer to another in the course of general commercial transactions, the maxim *caveat emptor* applies, and there is no implied warranty or representation of quality or fitness; but when articles of human food are sold to the consumer for immediate use, there is an implied warranty or representation that they are sound and fit for food. *Howard v. Emerson*, 110 Mass. 320; *Giroux v. Stedman*, 145 Mass. 439. * * * Unlike covenants as to the title to land, a warranty upon the sale of personal property does not run with the property. There is no privity of contract between the vendor in one sale and the vendees of the same property in subsequent sales. Each vendee can resort, as a general rule, only to his immediate vendor. *Boyd v. Whitfield*, 19 Ark. 447; *Bordicell v. Collie*, 45 N. Y. 494. In this case, there was no privity of contract between the appellant and appellee, and no warranty passed with the property from appellee to appellant through his vendor."

Appellee also cites, as sustaining its claims, Benjamin on Sales (7th Ed.) 661; 2 Mechem on Sales, Section 1356; Tiedeman on Sales, Section 191; *Flessher v. Carstens Packing Co.*, 93 Wash. 48 (160 Pac. 14); *Winsor v. Lombard*, 18 Pick. (Mass.) 57; *Meshbesher v. Channellene Oil Co.*, 107 Minn. 104 (119 N. W. 428). Appellant also says that the action sounds in tort, and cites the following cases to support the claim: *Crigger v. Coca-Cola Bottling Co.*, 132 Tenn. 545 (L. R. A. 1916B, 877); *Tomlinson v. Armour & Co.*, 75 N. J. L. 748 (19 L. R. A. [N. S.] 923); *Thomas v. Winchester*, 6 N. Y. 397 (57 Am. Dec. 455); *Bark v. Dixon*, 115 Minn. 172 (3 N. C. C. A. 106); *Pantaze v. West*, 7 Ala. App. 599 (61 So. 42, 44); *Doyle v. Fuerst & Kracmer*, 129 La. 838 (40 L. R. A. [N. S.] 480); *Boyd v. Coca-Cola Bottling Wks.*, 132 Tenn. 23 (177 S. W. 80, 81); *Parks v. Yost Pie Co.*, 93 Kan. 334 (L. R. A. 1915C, 179). Plaintiff also claims that it is based upon a breach of warranty, citing the following cases: *Craft v. Parker, Webb & Co.*, 96 Mich. 245 (21 L. R. A. 139); *Truschel v. Dean*, 77 Ark. 546

(92 S. W. 781); *Bunch v. Weil*, 72 Ark. 343 (65 L. R. A. 80); *Farrell v. Manhattan M. Co.*, 198 Mass. 271 (15 Ann. Cas. 1076); *Van Bracklin v. Fonda*, 12 Johns. (N. Y.) 468 (7 Am. Dec. 339); *Wiedeman v. Keller*, 171 Ill. 93 (49 N. E. 210); *Jackson C. B. Co. v. Chapman*, 106 Miss. 864 (64 So. 791); *Nelson v. Armour Pkg. Co.*, 76 Ark. 352; *Catani v. Swift & Co.*, 251 Pa. 52 (95 Atl. 931); *Parks v. Yost Pie Co.*, 93 Kan. 334 (144 Pac. 202, L. R. A. 1915C, 179); *Tomlinson v. Armour & Co.*, 75 N. J. L. 748 (70 Atl. 314, 19 L. R. A. [N. S.] 923, 935); *Ward v. Morehead C. S. F. Co.*, 171 N. C. 33 (87 S. E. 958). He also contends that, by his evidence, he made a prima-facie case, and that he was entitled to go to the jury on either or both theories of implied warranty and negligence; that it was for the jury to say whether the evidence introduced by defendant had met the prima-facie case made. On this proposition, they cite *Crigger v. Coca-Cola Bottling Co.*, 132 Tenn. 545 (L. R. A. 1916B, 877); *Jackson C. B. Co. v. Chapman*, 106 Miss. 864 (64 So. 791); *Pantaze v. West*, 7 Ala. App. 599 (61 So. 42); *Doyle v. Fuerst & Kraemer*, 129 La. 838 (40 L. R. A. [N. S.] 480); *Roberts v. Anheuser-Busch*, 211 Mass. 449 (98 N. E. 95, 96); *Rosenbusch v. Ambrosia Milk Corp.*, 181 App. Div. 97 (168 N. Y. Supp. 505); *Catani v. Swift & Co.*, 251 Pa. 52 (L. R. A. 1917B, 1272); *Craft v. Parker, Webb & Co.*, 96 Mich. 245 (21 L. R. A. 139); *Bark v. Dixson*, 115 Minn. 172 (3 N. C. C. A. 106); *Freeman v. Schultz Bread Co.*, 100 Misc. Rep. 528 (163 N. Y. Supp. 396); *Greenfield v. Chicago & N. W. R. Co.*, 83 Iowa 270; *Weber v. Chicago, R. I. & P. R. Co.*, 175 Iowa 358; *Hemmi v. Chicago G. W. R. Co.*, 102 Iowa 25; *Thompson v. Keokuk & W. R. Co.*, 116 Iowa 215; *Larkin v. Chicago & G. W. R. Co.*, 118 Iowa 652, 657; *Iowa Cent. R. Co. v. Hampton E. L. & P. Co.*, 204 Fed. 961.

We shall not attempt to review all of plaintiff's cases. Some of them will be noticed. In *Craft v. Parker, Webb & Co.*, 96 Mich. 245 (21 L. R. A. 139), the plaintiff brought an action for negligence in selling a piece of rolled bacon. The court stated:

"A dealer who sells food for consumption impliedly warrants that it is fit for the purpose for which it is sold. If, in addition to this implied warranty, it is found that he was negligent in selling meat that was dangerous to those who ate it, he will be liable for the consequences of his act, if he knew it to be dangerous, or, by proper care on his part, could have known its condition."

In that case, it was held that the case presented was for the jury.

In *Truschel v. Dean*, 77 Ark. 546 (92 S. W. 781), it is held:

[In sales of goods] "where the purchaser has had no opportunity to inspect them, there is an implied warranty that they are reasonably fit for the purposes for which they are ordinarily used; and when they are, under such circumstances, purchased for a particular purpose known to the seller, there is an implied warranty that they are fit for that purpose."

In *Wiedeman v. Keller*, 171 Ill. 93 (49 N. E. 210), it is said:

"Where, however, articles of food are purchased from a retail dealer for immediate consumption, the consequences resulting from the purchase of an unsound article may be so serious and may prove so disastrous to the health and life of the consumer that public safety demands that there should be an implied warranty on the part of the vendor that the article sold is sound and fit for the use for which it was purchased. It may be said that the rule is a harsh one; but, as a general rule, in the sale of provisions the vendor has so many more facilities for ascertaining the soundness or unsoundness of the article offered for sale than are possessed by the purchaser, that it is much safer to hold the vendor liable than it would be to compel the purchaser to assume the risk."

In that case, however, the vendor was a retail dealer, and, as such, sold the meat to plaintiff. The words "for immediate consumption" have less significance where the sale

is by the manufacturer, rather than by the dealer to the consumer.

In *Jackson C. B. Co. v. Chapman*, 106 Miss. 864 (64 So. 791), another mouse case, where a mouse was found in a bottle of coca cola, the court said:

“ ‘When a manufacturer makes, bottles, and sells to the retail trade, to be again sold to the general public, a beverage represented to be refreshing and harmless, he is under a legal duty to see to it that, in the process of bottling, no foreign substance shall be mixed with the beverage, which, if taken into the human stomach, will be injurious.’ ”

In *Nelson v. Armour Pkg. Co.*, supra, it was held that, in the sale of provisions by one dealer to another, in the course of general business transactions, the maxim *caveat emptor* applies; but, when articles of human food are sold to the customer for immediate use, there is an implied warranty or representation that they are sound and fit for food.

In *Catani v. Swift & Co.*, 251 Pa. 52 (95 Atl. 931, L. R. A. 1917B, 1272), the *Wiedeman* case is quoted with approval, the action being based upon disease arising from the eating of diseased pork. The court further says:

“ ‘In this case, however, the appellee was a regular retail dealer, and as such he sold the meat to the appellant for domestic use, and under the law, as it seems to be settled in this country, as the meat turned out to be unwholesome, he is liable, although he was not aware that it was diseased when he sold it to appellant.’ * * * ‘The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales. The obligation of the manufacturer should not be based alone upon privity of contract. It should rest, as was once said, upon “the demands of social justice.” The producer should be held responsible for the results of negligent acts which he can readily foresee. * * * The meat packer who fails to inspect his products for poisonous parasites or ingredients, knows that poison will poison, and that the persons to be poisoned through his neglect will be those who eat his products, and no one else.

The natural, probable, and almost invariable result of his negligence will be injury to the consumer, and, in my opinion, every consideration of law and public policy requires that the consumer should have a remedy.' * * * Under the foregoing principles, governing the sale of articles of food, a prima-facie case is made out by proof that the meat sold by defendant was diseased, and caused the death of plaintiff's husband. It was not necessary to go farther, and prove defendant knew the food was unwholesome. * * * It was bound to know that the meat was unwholesome and unfit for food, and this duty was not performed by merely showing an inspection and approval by the United States government inspectors."

Other cases go as far as this last one. *Farrell v. Manhattan M. Co.*, 198 Mass. 271 (15 Ann. Cas. 1076); *Van Bracklin v. Fonda*, 12 Johns. (N. Y.) 468 (7 Am. Dec. 339).

In the case of *Parks v. Yost Pie Co.*, 93 Kan. 334 (144 Pac. 202, L. R. A. 1915C, 179, 181), the plaintiff came to his death from ptomaine poisoning, resulting from eating a pie manufactured by the defendant pie company, sold to a retail grocer, who, in turn, sold it to the plaintiff. The court says:

"A manufacturer or dealer who puts human food upon the market for sale or for immediate consumption does so upon an implied representation that it is wholesome for human consumption. Practically, he must know it is fit or take the consequences if it proves destructive."

In *Ward v. Morehead C. S. F. Co.*, 171 N. C. 33 (87 S. E. 958), the court says:

"The authorities are numerous that there is an implied warranty that runs with the sale of food for human consumption, that it is fit for food and not dangerous and deleterious,"—citing *Watson v. Augusta Brewing Co.*, 124 Ga. 121 (52 S. E. 152, 1 L. R. A. [N. S.] 1178).

The following case holds that there can be no action based upon breach of warranty, because there is no privity of contract between the original manufacturer and the consumer who purchases from the retailer. *Freeman v. Schultz*

Bread Co., 100 Misc. Rep. 528 (163 N. Y. Supp. 396.)

In *Bark v. Dixon*, 115 Minn. 172 (3 N. C. C. A. 106), the complaint was drawn both to fit the theory of implied warranty and the theory of negligence. The answer was a general denial. The court said:

"It does not seem important whether the action was based on negligence or on a contract and breach of an implied warranty. The evidence was sufficient to justify the verdict on either theory."

That was a case where defendant furnished plaintiff, their employee, tainted meat, as food.

In *Boyd v. Coca-Cola Bottling Wks.*, 132 Tenn. 23 (177 S. W. 80), the court said:

"When the manufacturer of this beverage undertook to place it on the market in sealed bottles, intending it to be purchased and taken into the human stomach, under such circumstances that neither the dealer nor the consumer had opportunity for knowledge of its contents, he likewise assumed the duty of exercising care to see there was nothing unwholesome or injurious contained in said bottles. For a negligent breach of this duty, the manufacturer became liable to the person damaged thereby.

* * * Some of the cases place the liability on the grounds heretofore stated. Others place it on pure food statutes. Others say there is an implied warranty when goods are dispensed in original packages, which is available to all damaged by their use, and another case says that the liability rests upon the demands of social justice.

* * * Upon whatever ground the liability of such a manufacturer to the ultimate consumer is placed, the result is eminently satisfactory, conducive to the public welfare, and one which we approve."

In *Parks v. Yost Pie Co.*, 93 Kan. 334 (L. R. A. 1915C, 179), on 180, it is said:

"The degree of care required of a manufacturer or dealer in human food for immediate consumption is much greater by reason of the fearful consequences which may result from what would be slight negligence in manufactur-

ing or selling food for animals. In the latter a higher degree of care should be required than in manufacturing or selling ordinary articles of commerce. A manufacturer or dealer who puts human food upon the market for sale or for immediate consumption does so upon the implied representation that it is wholesome for human consumption. Practically, he must know it is fit, or take the consequences if it proves destructive."

From the decisions, and particularly the later decisions, we think there is an implied warranty, as contended by plaintiff, and that the question as to privity is not con-

trolling. The case should have gone to the

4. NEGLIGENCE:
evidence:
sufficiency.

jury on that question. We are of opinion,

too, that, on the whole case, there was

sufficient evidence to take the case to the

jury on the question of negligence, and that it was for the jury to say whether plaintiff's prima-facie case had been negatived or overcome by the testimony introduced on behalf of the defendant. The court erred in requiring plaintiff to elect, as between implied warranty and negligence. While it is true that no particular act of negligence is shown by plaintiff, in the very nature of the case that could not be done. It is also true that, according to the defendant's evidence, its plant and method of manufacture are good,—probably as good as any; still, it does appear that the method was not always adhered to by defendant's employees. We think that, from all the circumstances shown by the evidence, the jury could properly have inferred and found that the can of beans in question, and perhaps a batch, as one of defendant's witnesses calls it, were defective. Take the two coca cola cases before cited, where a decomposed mouse was found in a sealed bottle of the fluid, the defendant's evidence tended to show care on the part of the company in bottling the product. In one of the cases, it was shown that the bottle was inspected under an electric light; that they were finally inspected after being capped or corked; that the bottles were thoroughly cleansed; that the fluid was strained into

the bottle through a fine strainer, and so on. If all these precautions had been taken at the particular time when bottles in question were filled and corked, it would seem improbable, if, indeed, not impossible, that a mouse could get into the bottle. On the other hand, it would, of course, be impossible for a mouse to get into the bottle after it was corked up, and after it left the factory; and yet, the mouse was in the bottle. Could the court say, as a matter of law, that the mouse did not get into the bottle during the process of manufacture? We think not. The jury, under all the circumstances, would have been justified in inferring and finding that some of the things usually done in the bottler's method to prevent foreign substances from getting into the bottle, were not done. In other words, the circumstances were such that it would be for the jury to determine which was the more reasonable probability. That case was submitted to the jury, and the court said, in the *Crigger* case:

"In the present case, the mouse might have gotten into the bottle by some unavoidable accident, but proper inspection should have disclosed the fact, and if in the light of the finding by the jury it were fairly inferable that the mouse was bottled up at the Bottling Company plant, we would consider it our duty to reverse the case, because of the high duty resting on the defendant. * * * In view of the extraordinary care shown to exist at the bottling plant, and the verdict of the jury, it may be that this thing occurred without the fault of the defendant. There are sufficient inferences that may be drawn from the facts to sustain the finding."

In the instant case, there was nothing in the appearance of the can to put plaintiff or his mother upon inquiry. The can seemed to be all right. It had been, in fact, freshly manufactured; no swelling of the ends appeared; the label on the can was not old or soiled,—at least, there is no evidence that it was; and the evidence shows that it appeared to be all right.

4. It is next contended by appellant that, if the liabil-

ity of defendant is based upon tort, plaintiff may rely upon the prima-facie case of negligence arising from the sickness caused by eating the beans, where

5. Food:
negligence in
manufactur-
ing: prima-
facie case.

it is shown, as it was in the instant case, that all of the instrumentalities and materials used by the defendant in the preparation of its pork and beans were wholly within the control and under the management of the defendant—wholly beyond the knowledge of plaintiff; that the injury sustained was unusual, and not such an injury as ordinarily occurs, where proper care has been exercised by the defendant in the selection of materials, and in the preparation and marketing thereof. We are not cited to any Iowa cases holding that this doctrine applies in this kind of case, and we do not find that the exact proposition has ever been determined by this court. There are cases, however, holding that the doctrine does not apply. In the instant case, the facts were all in defendant's possession, as much as they are in a fire case, so that the same reason for the rule exists in this case as in such case. It is true that, in fire cases, the prima-facie case is provided by statute. In the case at bar, we have already seen, and appellee concedes, that a high degree of care is imposed upon defendant in the preparation of food products for human consumption. We hold that, under the record in this case, plaintiff made a prima-facie case, and that it was for the jury to say whether such prima-facie case was met or overcome by the evidence introduced on behalf of the defendant.

In *Freeman v. Schultz Bread Co.*, 100 Misc. Rep. 528 (163 N. Y. Supp. 396), the plaintiff, thirteen years of age, while starting to eat a piece of bread which he had bitten from a slice cut from a whole loaf, bit into a nail which was in the loaf, below the surface, and as a result, lost two teeth. The loaf was made by the defendant and sold to the grocer, from whom it was purchased by the plaintiff's sister. It was established that there were no nails in the plaintiff's home or in the grocer's store, with which the loaf could have come in contact. The defendant offered

no evidence, but rested at the close of the plaintiff's case, claiming that the plaintiff was bound to trace the manufacture of the loaf, and show that the nail was put in or permitted to be put in the loaf, through some neglect of the defendant in the process of manufacture.

The court in this case found that the doctrine of prima-facie case applied, and that there was sufficient evidence to take the case to the jury, and that the verdict for the plaintiff was justified. In the *Crigger* case, supra, the doctrine was not referred to as such, but the facts were similar, and it was held to be a jury question.

In *Rosenbusch v. Ambrosia Milk Corpn.*, 181 App. Div. 97 (168 N. Y. Supp. 505), the court said:

"The plaintiff rested on proof that she was poisoned by the 'mammala' thus prepared and placed on the market by the defendant. She offered no other evidence tending to show negligence on the part of the defendant, excepting the representations made by it on the labels and in circulars. There is, therefore, no express evidence that the 'mammala' was in the same condition when administered to the plaintiff as when it was placed in the can by the defendant. This presents a novel, interesting question of law as to whether the evidence was sufficient to make out a prima-facie case of negligence on the part of the defendant."

In *Catani v. Swift & Co.*, 251 Pa. 52 (L. R. A. 1917B, 1272, 1276), the court held that, in the sale of articles of food, a prima-facie case is made out by proof that the meat sold by defendant was diseased, and caused the death of plaintiff's husband.

In *Jackson C. B. Co. v. Chapman*, supra, plaintiff showed that he was made ill by drinking coca cola from a bottle in which was contained a decomposed mouse. Defendant's evidence was that its system was complete. Held, a jury question. As to the fire cases under the statute, appellant cites *Greenfield v. Chicago & N. W. R. Co.*, 83 Iowa 270.

In *Dail v. Taylor*, 151 N. C. 284 (28 L. R. A. [N. S.] 949), it was held that the mere explosion of one bottle of

coca cola, resulting in personal injury, did not entitle plaintiff to go to the jury on the question of negligence; but it was held that proof of like explosions at about the same time was sufficient to take the case to the jury. The court held that negligence could be proved circumstantially, and that, if the facts proved establish the more reasonable probability of defendant's negligence, the case could not be withdrawn from the jury, though there might be a possibility of accident, arising under the evidence. In the note to that case, it is said that the fact that negligence on the part of a seller or manufacturer is not made out from the mere fact that personal injury resulted from the use of the article sold or manufactured, was, with little or no discussion, declared to be the law in certain cases (citing them).

Appellee cites *Hollingsworth v. Midwest Serum Co.*, 183 Iowa 280. The question in that case was whether defendant, having violated a statute, was necessarily negligent. The statute did not make the producer a warrantor of results. Human life was not at stake, so that, under such circumstances, the question of implied warranty would probably not apply at all. A higher degree of care would be required where food is sold for human consumption. We make a distinction between food products which are canned, bottled, or wrapped in such a way that the contents and the condition thereof may not be known to the purchaser until opened for use by the consumer, and products which are not so put up, and the condition of which is observable. Even in the latter case, cases might arise where the seller would be liable. *Walters v. United Grocery Co.*, supra.

We are of opinion that the duty of a manufacturer to see to it that food products put out by him are wholesome, and the implied warranty that such products are fit for use, run with the sale, and to the public, for the benefit of the consumer, rather than to the wholesaler or retailer, and that the question of privity of contract in sales is not controlling, and does not apply in such a case.

If we call it a duty to use care in the preparation and manufacture, then, in that sense, a breach of that duty would constitute negligence. Or it may be treated as a representation or a warranty that, because of the sacredness of human life, food products so put out are wholesome. In either event, a failure in this respect is a breach of duty and a breach of warranty, and the plaintiff suing may rely on either or both, and, when he makes a prima-facie case, he is entitled to go to the jury on the question as to whether defendant's evidence negatives plaintiff's prima-facie case. As said in the *Boyd* case, supra:

"Upon whatever ground the liability of such a manufacturer to the ultimate consumer is placed, the result is eminently satisfactory, conducive to the public welfare, and one which we approve."

For an interesting discussion of this subject, and the citation of many cases, see Iowa Law Bulletin, Vol. 5, page 86. See, also, *Friend v. Childs D. H. Co.*, 5 A. L. R. 1100; *Ward v. Great Atl. & Pac. T. Co.*, 5 A. L. R. 242, and notes; Yale Law Journal 782.

5. Appellant contends that the court erred in excluding evidence of other defective cans of beans. If the evidence is connected up so as to show that the offered

6. EVIDENCE:
similar facts:
impure food.

evidence had reference to purchases out of the same consignment, or batch, we see no reason why the evidence is not admissible.

It is not necessarily evidence of other acts of negligence. We think it has a bearing on the question of negligence. That is the theory of the *Dail* case, supra. The evidence shows that defendant was producing 35,000,000 cans a year, or several thousand an hour; that, at least on one occasion, an entire batch was found defective. Though it appears that defendant's method or system is good, yet human agencies, which are not always absolutely dependable, were relied upon to carry out the system. See, also, on the question as to evidence of other defective cans, *Ward v. Morhead C. S. F. Co.*, supra; *Craft v. Parker, Webb & Co.*, supra; *Kennedy v. Plank*, 120 Wis. 197 (97 N. W. 895);

State v. Good, 56 W. Va. 215 (49 S. E. 121).

6. The question of *caveat emptor* has been referred to in some of the cases heretofore cited. In the earlier cases, followed, perhaps, by some of the later ones, when a person went to market, with a market basket on his arm, and could examine the food, the doctrine was held to apply, in the absence of a warranty. But the business of canning food products of almost every kind has increased enormously in recent years. The purchaser has no opportunity of examination, until the can is opened for use; and, under the circumstances of this case, we think the doctrine does not apply. It is possible that, when Mrs. Davis purchased this can, had it had the appearance of being old, and the label soiled, or the ends swollen, or something of that kind, the doctrine might apply.

For the reasons given, the judgment is reversed and remanded for a new trial.—*Reversed and remanded.*

WEAVER, C. J., LADD, EVANS, GAYNOR, and STEVENS, JJ., concur.

SALINGER, J. (dissenting). In my view, the only question to be decided is whether defendant has used the highest degree of care. I think it has shown conclusively that it used such care.

MINNIE RANKIN DUNHAM et al., Appellees, v. C. A. DUNHAM, Appellant.

JUDGMENT: Construction of Contractual Decree. In the construction of a contractual decree, the facts and circumstances attending the execution of the contract, which was, in part, carried into the decree, may be given due consideration.

JUDGMENT: Construction of Contractual Decree. A contractual decree requiring defendant "to pay all the expenses of each of said children while they are away from the home of their mother, at school or college, and shall pay (other named ex-

penses of the children) until each of said children is of legal age," is reviewed, and, in the light of the circumstances, is held to charge defendant with the college expenses of the children, *even after they attained their majority.*

DIVORCE: Modification of Contractual Decree. A contractual decree (based upon a contract entered into prior to the decree of divorce) wherein defendant was charged *generally* with the obligation to defray the expense attending the education of his children after attaining their majority, may, on defendant's subsequent default, be so modified as to fix and determine the *specific* amounts which defendant shall pay for said purpose.

PLEADING: Failure to Obtain Leave to Amend. An amendment will not be stricken for want of leave, if leave would have been given, if asked.

INFANTS: Action by Next Friend—Abatement. An action beneficial in its nature, brought by a minor by his next friend, does not automatically abate, upon the minor's attaining his majority.

EQUITY: Once-Acquired Jurisdiction. Principle recognized that equity, having once acquired jurisdiction, will adjudicate all matters pending, even though some such matters are purely law questions.

PARTIES: Beneficiary Under Contractual Divorce Decree. In an action to enforce a contractual divorce decree, in so far as it obligated defendant to furnish his child with a college education, even though the child has attained its majority, the child is a proper party plaintiff.

DIVORCE: Support of Children. A fair and just contract, carried into the decree of divorce, and providing for the support of the children of the parties by one of the parties, may be enforced.

DIVORCE: Contractual Decree in re Support of Children—Enforcement. When one parent is, by the decree of divorce, obligated to provide for the support and education of a child, in accordance with a fair and just contract which is carried into the decree, and refuses to carry out such obligation, the other party to the proceeding may recover of the defaulting party sums necessarily expended in supporting and educating the child.

DIVORCE: Contractual Decree in re "Extraordinary" Expense—Attorney Fees. In an action to enforce a contractual decree, in so far as such decree was for the benefit of minors, *held* that

the court might make a reasonable allowance of attorney fees in favor of the minors.

Appeal from Marshall District Court.—JAMES WILLETT,
Judge.

JULY 6, 1920.

REHEARING DENIED OCTOBER 2, 1920.

ACTION in equity by plaintiff Minnie Rankin Dunham, the divorced wife of defendant, C. A. Dunham, and by the two children of the parties, to construe and modify, to fix specific amounts for the support of the minors during minority, and the college education for them, under the alleged contractual decree of divorce, the provisions of which were not specific in these respects, and which plaintiffs allege defendant had refused to perform; also to recover certain moneys alleged to have been paid by the plaintiff Minnie R. Dunham, which, under the decree, she claims should have been paid by the defendant; and for general equitable relief. The action is entirely in regard to property and property rights. The action is in equity, and appellees contend that, all parties being in court, the entire controversy may be determined in one action, although, incidentally, some of the issues might be legal. The action was brought in equity, and there was no motion to transfer the case, or any of the issues, to the law docket. The defendant sought to raise jurisdictional and some other questions, by demurrers and motions, which will be referred to later. The trial court did not grant the full relief prayed, but plaintiffs have not appealed. From so much of the decree as grants relief to plaintiff, and against defendant, the defendant has appealed. —*Affirmed.*

E. N. Farber, Daniel L. Cruice, and A. S. Langille, for appellant.

C. H. E. Boardman, for appellees.

PRESTON, J.—1. The plaintiff Minnie R. Dunham and defendant, C. A. Dunham, were married June 22, 1898, and lived together as husband and wife until about January 1, 1912. It is claimed, and the record shows, that, about January, 1912, the defendant deserted his wife. The plaintiff also claims that, according to the record, defendant was guilty of cruel treatment towards his wife. Plaintiff also claims that another woman, defendant's present wife, was the cause of the desertion, and, in argument and in the pleadings, seeks, by inferences from some of the circumstances shown, to show that such was the fact. It is true that the original petition for divorce did, in addition to the allegation of desertion, contain a sentence that defendant was guilty of cruelty; but no acts of cruelty are set out. The decree recites that the court finds that the allegations of the petition are true, and that the equities are with plaintiff. This is the ordinary form of decree. We are satisfied, however, that the divorce was granted on the ground of desertion, and probably by agreement between the parties, or rather, that no resistance to the divorce on that ground was contemplated. The defendant argues at some length that plaintiff's strictures on the alleged conduct of defendant with the lady now his wife, are not sustained by the record. In fact, at one place in defendant's argument in this court, he says that the greatest question is whether the good name and reputation of defendant and his present wife shall continue to bear the burden of defamation untruly and unjustly placed upon it by the plaintiff and her daughter, in the pleadings and arguments. This is, perhaps, not very material, under the issues raised in this case, and we shall not go into the details. We are satisfied that, considering all the circumstances, and the time defendant and his present wife met, a finding that defendant's present wife was the cause of the separation would not be justified. It is a most unfortunate situation for the children, with

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construction
of contract-
ual degree.

their parents divorced, and with a stepmother. Naturally enough, there would be some antagonism, under such conditions. Without criticising unduly either defendant or his wife, nor yet entirely excusing either, the record does show that both have said and done some things that doubtless would not have been said or done under other circumstances. Plaintiff Mrs. Dunham may have been somewhat peevish or obstinate in regard to permitting defendant to have some of his personal belongings—his mother's picture, and so on. On the other hand, it is thought that defendant was inclined to be domineering in regard to the schooling, manner of dress, etc., of the daughter, while she was away from her mother at school in the east, during her minority, and matters of that kind. The divorce decree awarded the custody of the children to the mother. We are inclined to think there was some justification in defendant's objection to some of these matters, and it is doubtless true that defendant considered that, if he was to pay the expenses of her schooling, away from home, he should have something to say in regard to such matters, especially when she was away from her mother. The daughter was only a young girl, when she started away to school. For a time after the separation of her father and mother, she seemed to be on the best of terms with her father, but later, became quite antagonistic to him. There seems to have been no friction between the parties as to the son, who was a year or two younger than his sister. There is no reflection upon the character or standing of either the mother or the daughter. The children are not at all responsible for the unfortunate conditions, and they should not suffer, financially or otherwise, therefor. Prior to the decree of divorce, and in May, 1914, plaintiff verified, but did not file, a petition for divorce, and she and the defendant entered into a written contract, in contemplation of the granting of a divorce at the September, 1914, term. By this contract, plaintiff was to have the custody of the children, the homestead and furniture, \$900 in money, and \$15,000 of preferred corporation stock, and \$15,000 of such stock, to be deposited with a trustee, the

income of which was to be paid plaintiff for the care and support of the children, and so on. This agreement was never carried out, and seems to have been abandoned. Subsequently, negotiations for a divorce were renewed, and defendant, as plaintiff claims, made to her, through Mr. Hook, his local business manager, a proposition that plaintiff was to have the home, the furniture, automobile, and \$15,000 in stock; also, the income from \$15,000 additional, for her life, and the custody of the children, except that the daughter should be permitted to finish her four years' course in the school she was then attending. This contract provided, further:

"Mr. Dunham will liquidate the expenses of both son and daughter while away from their mother's home, attending school or college."

Plaintiff claims that she finally accepted this proposition. The defendant testifies that he has no recollection of it; but the circumstances are such that we are satisfied that he did authorize it. He admits that a part of it was carried out, particularly with reference to his sister. At any rate, in January, 1915, the parties entered into a written agreement, in contemplation of divorce, and conditioned upon her obtaining such divorce. This contract is signed by both. It provides, in part:

"C. A. Dunham agrees that his said wife shall have the general care and custody of the children. That the said father is to pay all expenses of the said children while they are away from home at school or college, and shall pay all bills that may be incurred in case of sickness of either of the said children until they are of legal age."

And further, that plaintiff was to have the homestead, furniture, and automobile, \$15,000 preferred stock of the C. A. Dunham Company, and the income for life of \$15,000 additional of the preferred stock of said company. It provides further:

"Said Mrs. Dunham agrees that she will not interfere with, but will consent to, any reasonable plan proposed by the father for the subsequent education of either of the two

children. * * * Mrs. Dunham agrees to properly educate said children both in the grammar and high schools, and such further education as shall be consistent with the circumstances and conditions; and in case she neglects or is unable to do so, then the father shall be permitted to provide for the same. * * * It is agreed that H. C. Lounsberry, acting as counsel for Mrs. Dunham, and Binford & Farber, acting as counsel for C. A. Dunham, shall accept service of any and all necessary papers, and shall have general authority to act for the parties to this agreement. * * * The provisions made for Mrs. Dunham herein, and the property which she is to receive when decree is entered, as herein contemplated, shall be in full settlement and satisfaction for all her right, title, and interest, in and to the property of her husband."

Some of the provisions of these contracts are, in a sense, merged in the decree; but, as shown later herein, the \$30,000 of stock is not referred to in the decree. It is true that the provisions as to the children are carried into the decree, so that, under all the circumstances, a consideration of the contracts has a bearing, and properly so, upon the construction of the decree. One of the contested points in the case is in regard to the construction of the language before quoted in the contract, and carried into the decree in the same language.

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construction
of contract-
ual decree.

"That defendant is to pay all the expenses of each of the said children while they are away from the home of their mother, at school or college, and shall pay all bills that may be incurred for them in case of sickness or other extraordinary necessary expense, until each of the said children is of legal age, or self-supporting."

The defendant's contention is that, properly construed, this means that defendant is only to pay the expenses of the children while they are away from home, at school or college, and so on, until they are of age; while appellees contend that it means that defendant is to pay their expenses at college in any event, and the other expenses therein re-

ferred to until they are of age. We think the language is susceptible of the construction contended for by appellees, and that, under the entire record, it was the intention of the parties, and of appellant, that he should pay for their schooling away from home, and their college education, even after they arrived at majority. Indeed, though appellant contends for a different construction, we are satisfied from his testimony, taken as a whole, and from the entire record, that he does not seriously object to giving his children a college education, and, in fact, that he desired that they should have such education. He says:

"I have not made any arrangements to pay the expenses of my daughter Winifred at college at this time. I am ready to pay the expenses of my daughter Winifred at college, depending entirely upon the attitude of the daughter, and how well we can co-operate in planning that which will be for her benefit. As a personal interest as a parent, I do claim the right to have something to say in regards where she shall go. I have not said I would not take care of her education. That is a matter between my daughter and myself."

We understand appellant to concede, in argument, that, if the language before mentioned should be so construed, then he would be liable for the college education of the chil-

3. DIVORCE:
modification
of contract-
ual decree.

dren, even after their majority. He concedes, too, as we understand it, that if, under the circumstances of this case, where the contract was carried into the divorce decree, the decree is held to be contractual, then it is enforceable, under the coercive arm of the court. As said, appellees contend that it is a contractual decree, and highly so,—a contract of record; and that it may be declared upon, and a recovery had, as upon any other contract. On this proposition, they cite *Simpson v. Cochran & Cherrie*, 23 Iowa 81; *Perry & Townsend v. Saunders*, 36 Iowa 427, 429; *Weiser v. McDowell*, 93 Iowa 772, 774, 775; 15 Ruling Case Law 573. See, also, *Matson v. Matson*, 186 Iowa 607, and cases; *Stone v. Bayley*, 75 Wash. 184 (48 L. R. A. [N. S.] 429, 432). We

think this must be so, under the circumstances of this case. As said, appellees contend that, since the original decree was more specific as to amounts, defendant's refusal to perform, after demand, authorizes the entering of the later decree in this case, fixing the amounts that defendant should pay. It seems to us that there is no other way by which the provisions of the decree in this respect can be enforced. This being so, we think it eliminates some of the questions argued by appellant at considerable length. It appears to us that his position really is that, if he pays for their education while away from home, at school and college, under the contracts and the decree, he should have something to say as to the "plans and arrangements for the education," etc. In view of the record, which will be referred to later, we think this is and ought to be so. There was some friction when the girl was quite young, in regard to her having dresses which were too expensive, and too fashionable to meet the requirements of the school authorities, and in regard to a chaperon, etc., in case she should attend school at a distance.

It will be observed that this contract does not relieve defendant from his primary duty to support the children, at least during their minority. Appellees contend, in substance, that, since a college education is usually had after a student's majority, and since defendant had agreed to pay for a college education for his children, which agreement was carried into the decree, defendant is liable for their college education, even after they attain their majority. Whether this is so, we take it, is really the vital point in this case.

Original notice of the divorce suit was served upon the defendant in Chicago, Illinois, by the sheriff, on February 11, 1915. On March 9, 1915, plaintiff filed an amendment to her petition, reciting that the plaintiff has but little property in her own right, and is delicate in health, and has no trade or occupation, and that defendant is possessed of personal property consisting of stock in the C. A. Dunham Company, and the homestead of the parties (describing it);

and praying that she be allowed the costs and the homestead of the parties, as permanent alimony, and for such other and further relief as is prayed in the original petition. The original petition does not refer to the property of the parties, either personal or homestead; and, while the prayer asked general equitable relief, it specifically asked only that she be divorced, and that she be awarded the custody of her two children. We take it that the purpose of the amendment was to make the petition more specific in regard to the property, and in accordance with the written agreement.

It is suggested by appellant that no leave of court was given to file such an amendment. But we understand the rule to be that an amendment will not be stricken for want of leave, if leave would have been given if asked. At any rate, no motion to strike was made, and the amendment remained a part of the record, and was germane to the allegations of the original petition. The attorneys designated in the written agreement appeared for the defendant. There is no claim that Binford & Farber did not have authority to appear for the defendant. The record shows that they did have such authority, so that the decree was more than a mere judgment *in rem*. The case was tried March 12, 1915, and the decree entered March 22d, and it recites that plaintiff appeared in person, and by C. B. Bradshaw and H. C. Lounsberry, her attorneys, and that the defendant appeared by Binford & Farber, his attorneys. No pleading was filed for the defendant, and his default was entered. Plaintiff was given the general care and custody of the two children, with reasonable opportunity for defendant to see and visit them. The decree further provides:

“That the defendant is to pay all the expenses of each of the said children while they are away from home of their mother at school or college, and shall pay all bills that may be incurred for them in case of sickness or other extraordinary necessary expense, until each of the said children is of legal age, or self-supporting. * * * That the defendant shall have the right to make such reasonable plans and ar-

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failure to
obtain leave
to amend.

rangements for the education of said children as is consistent with the conditions and circumstances, and to have the same followed and carried out, and the plaintiff is to properly educate the said children both in the grammar and high schools, and to give them such further education as is consistent and necessary for them; and, if the plaintiff shall neglect to provide such education, the defendant shall be permitted to carry this provision into effect."

The decree then gives the wife the homestead, furniture, and electric car. The decree does not mention the two items of \$15,000 each of stock, but does provide that the plaintiff shall have no further interest in defendant's property than is provided for her at the time of the rendition of the decree. On March 27, 1915, the plaintiff receipted to Binford & Farber, defendant's attorneys, in a long receipt, covering three pages or more of the abstract, the substance of which is that she received property in conjunction with the settlement in the stipulation of January, 1915. She receipts for a quitclaim deed, as provided in the contract and decree, abstracts, insurance policies, 150 shares of preferred stock, the certificates of which were assigned to plaintiff by C. A. Dunham, in compliance with the terms of the stipulation and decree; also, 150 shares, which certificates were assigned to a bank, trustee, for the use and benefit of said Minnie Rankin Dunham "and the children of said parties," in compliance with the terms of said stipulation and the terms of a trust agreement executed by the parties and the trustee. Other property is receipted for, but such is not now material. The receipt as to the words last quoted is broader than the contract, and it cannot be justly claimed, under the record, that it superseded, in any way, the provisions of the contract upon which the decree was based, as to their property rights. It will be noted that the decree does not fix the amounts that defendant is to pay for the support and education of his children, and it could not well be fixed, perhaps, in the first instance; but, defendant having failed to comply with the terms of the decree in these respects, this action is brought by the plaintiffs, to fix the

amounts, and for judgment. This is what the trial court did.

2. Having now stated the conditions leading up to the divorce, the contracts in reference thereto, and, in a general way, the claims of the parties thereunder, we come to the issues presented by the pleadings filed in the original case. It was stipulated that defendant is financially able to meet any order asked for herein. That this proceeding is not an independent action, but is filed in the original case, is quite clear from the record. The first parties named in the title are those only who were parties to the divorce suit. Appellant speaks of the present proceeding as auxiliary, or ancillary, and contends that this is an effort to modify the original decree; that this may not be done, under Code Section 3180 (Compiled Code, Section 6629); and that there is no provision in the statutes authorizing such proceedings. The petition herein is entitled, to modify the original decree, and make proper provisions for the children. The modification is asked because of changed circumstances. Appellees contend that the rights of the children are auxiliary, and grow out of the rights and liabilities of the parents, and we think they are. The printed record is more than 750 pages. Appellant's argument is about 350 pages. The pleadings are quite voluminous, and more than 100 pages of argument are taken up with reference to the pleadings. It is somewhat difficult to state the circumstances clearly, without taking up space unduly. Stated as concisely as it is possible to do, the record is this:

The abstract sets out the original petition in the divorce case, the contracts, decree, and so on. The first petition was filed herein on September 18, 1917. It was brought by the daughter Winifred and the son Aubra, by Minnie R. Dunham, natural guardian and next friend. At that time, the children were both minors; but Winifred became of age before the trial, and, as hereinafter stated, she filed an amendment, coming in personally, and asked to be substituted as a party plaintiff. In a general way, this petition recites the divorce proceedings; alleges that the conditions have ma-

terially changed since the decree, and wherein; alleges that the decree granted is indefinite, uncertain, and lacking in the following respects:

"Same makes no definite provisions for the support of the minor children, these applicants. Same makes no provision for their support and care when at home. Same makes no definite provision for a college education. Same does not define what constitute extraordinary expenses, and what are ordinary expenses."

It also alleges that defendant has an income of \$20,000 per annum, and is able to provide for his children in a manner suitable to their station in life, and that the original decree should be modified and corrected in the following particulars, among others: Present proper provision for the children's support should be made for each child. Present proper provision should be made for their support while a high school education is being acquired, at Marshalltown, Iowa. Proper provision should be made for a college education for each of said children. Judgment should be entered against C. A. Dunham for expenses accrued, or necessary in the future.

The petition asked for an order or judgment for the support of the children during minority, which defendant should have supplied, and an allowance for a college education; also, asked to recover for expenses of Minnie R. Dunham, in the sum of \$307.82, which she had expended for the children under the original decree, and which defendant should have paid; also, attorney's fees for the attorney of the minors, as wards of the court.

This petition was attacked by the defendant by motion to dismiss, for want of equity. Appellant now contends that the motion was, in effect, a general demurrer, and also a special demurrer. Defendant also made motions to strike certain parts of the petition, and it is said that the motions to strike were also, in effect, general and special demurrers to parts of the petition. We shall state the grounds of these motions in a general way now, and more fully than hereafter, since substantially the same attack was made on

pleadings subsequently filed, with, perhaps, some additional grounds. The grounds of the motions, stated as briefly as possible, are that the minors were without capacity to institute a suit in equity by issuing original notice, or to establish the relationship of attorney and client between themselves and their attorney; that the divorce was between plaintiff Minnie Dunham and the defendant, and the children were not such parties; that no cause of suit was vested in the mother as next friend, because no cause of suit was vested in the wards; that the petition does not identify the plaintiffs, for that the children, by their next friend, purport to be the plaintiffs, and that Minnie Dunham personally, and not as next friend, is the plaintiff, and that the children personally, and not by representative, purport to be plaintiffs; that the petition consists of conclusions and opinions on the part of the pleader; that the facts well pleaded do not exhibit a cause of action; that the divorce proceedings were void *ab initio*, except the order granting divorce; that they were void for lack of proper service of notice upon defendant in Iowa, and lack of facts properly pleaded in the divorce petition; that no cause of suit could be vested in anyone for the modification of a void decree. Appellant seeks, also, to strike allegations in regard to the alleged conduct of defendant and the lady now his wife, as scandalous, and alleges that other allegations are immaterial and surplusage; that, because the provisions of the decree are void, a court of equity has no authority to compel a parent to pay for anything on account of the support of infant children, except usual expenses, and that the payment of expenses asked for are not within the parental duties of defendant; that the allegations concerning medical attention and dentists' and oculists' bills are not specific, but in the nature of conclusions; that the prayer for relief is ambiguous and unintelligible; and so on. The motions were all overruled. Some of the grounds are wholly untenable.

We take it, the gist of the matter is that it is claimed that no action of this character may be maintained. The

defendant answered. We shall set out the contents of this answer somewhat more fully than later answers to subsequent pleadings, because the allegations, for the most part, are quite similar. The answer denied generally, and, among other things, admitted the divorce and its validity, but alleged that other provisions of the divorce decree were invalid; admitted that his income was \$20,000 per annum; denied the alleged slanderous allegations; averred the performance by him of the void orders in the decree of divorce; averred that he had entered into a stipulation providing for the support of his two children, and that he had performed said stipulation according to its terms; alleged that he had provided an income of \$1,200 per year from \$15,000 of stock for the support of said children, and that such sum was ample; and asked that said income of \$1,200 be used, in so far as it is necessary, for the exclusive support of the children, as was mutually intended.

It is conceded by appellant, in argument, that the answer really presented but two issues, other than the jurisdictional questions: First, as to the character of defendant and his present wife, which we have disposed of; and whether defendant made adequate provision for the support and maintenance of his infant children, by the agreement, and whether defendant had performed his duty thereunder, and such other parental duties to his children as were required, under the stipulation or under the law.

During the trial, and on August 1, 1918, plaintiffs filed an amendment to the petition, in which Minnie R. Dunham, personally, and Winifred E. Dunham, personally, and Min-

nie R. Dunham as next friend for the son, made the allegations of the petition more specific in certain respects, and alleged that Mrs. Dunham had been compelled to pay out

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action by
next friend:
abatement.

for the children, while they were away from her home, certain moneys which the decree provided the defendant should pay; and she asked judgment for herself for \$307.82, and stated that the items of the account are for railroad fare for the daughter to school, freight, doctor's bills, two dresses,

dentist's bill, oculist's bill, and so on. The amendment further alleged that, prior to the divorce, there were negotiations and representations to the plaintiff and the court that the children, who were then in school, and neither of whom would graduate from school until of age, should receive a college education, at the expense of defendant. The provisions of the contract and the decree heretofore set out are then referred to, and it is alleged that defendant refused to pay for a college education, because he claimed that all obligations on his part would cease when the children reached their majority, contrary to the contract, decree, and the representations made at the time the divorce was granted. It is prayed that the decree be modified to conform to the situation as it was understood by the parties and the court, at the time the divorce decree was granted, and that any ambiguity therein be corrected, and that the decree in the present case provide for a college education for the children, at defendant's expense. It is also asked that judgment be entered in favor of plaintiffs against defendant for the proper amounts, as shown by the evidence, and for general equitable relief.

Defendant moved to strike the amendment, on the grounds, among others, that Minnie R. Dunham was a new plaintiff, and presented new issues; that the amendment comes too late; that the plaintiffs cannot change the parties and try a new case as to new parties; and that it now affirmatively appears that Winifred had become of age. The grounds of the motion were elaborated at some length, and some additional grounds were set out. Defendant also moved to strike out the name of Minnie R. Dunham as a party, for that defendant was required to try out a new cause, with a new party, and that the amendment in that respect does not meet the proof; moved to strike the allegations in regard to the proceedings leading up to the decree, for the reason, among others, that the decree is final, except as it may be modified by Section 3180; also moved to strike the original petition and the amendment as to Winifred, for

the reason that it affirmatively appears that she had become of age. The motions were overruled.

The argument, as we understand it, in regard to Winifred at this point, is that there was no authority for the mother to bring the suit as next friend for her; and that, Winifred having become of age before the said amendment was filed, the action as to her abated before the filing of the amendment; and that, therefore, there was no basis for the amendment.

Possibly a plea in abatement, after she arrived at majority, and before the filing of the amendment, might have been well taken; but we think the action did not abate automatically. There was no plea in abatement. There was no application for a continuance. Proof had been introduced, tending to establish the claim of Mrs. Dunham. Defendant demurred to the petition, as amended, on the ground that there was a misjoinder of parties and causes of action, because of the joining of Minnie Dunham. This struck at the entire petition and the amendment, and was overruled. Defendant then demurred to the amendment for the same reasons, and this was overruled. Thereupon, and on the same day, defendant filed an amendment to his answer, setting up some of the things he had theretofore set up, and alleged, among other things, that all items of expense which were properly incurred and presented to him had been paid; that prior negotiations were merged in the decree; and that Minnie R. Dunham is not a proper party to the action to modify the decree; and that she was not a party hereto, until the filing of such amendment. He also pleaded misjoinder of parties and causes of action; that Winifred had become of age, and that the petition and amendment as to her should be dismissed; that, by the terms of the contract executed January 18, 1915, and by the decree, the obligation of defendant to provide for the children terminated, as to each one, when he or she reached majority; that there has been no such change since the divorce decree as to warrant the court in rendering a finding or decree in the present action in favor of Minnie R. Dunham.

This hearing was had before the same judge who granted the decree of divorce. By its decree, entered December 30, 1918, the court found that plaintiffs were entitled to the relief demanded in their application for a modification, interpretation, and construction of the decree of divorce, and that the plaintiffs' claim in reference thereto had been established by the proof, and found against defendant in the affirmative prayer of his pleading that the income of \$1,200 from the stock be devoted to the exclusive support of the children, the court finding that such was not the contract between defendant and his wife; that the decree and stipulation did not relieve defendant of his primary duty to support his children; that Minnie R. Dunham has contracted expense and paid out funds for the benefit of the children which it was the legal duty of the defendant to pay; that, though a portion of this expense was incurred after Winifred had reached her majority, this was on account of defendant's wrongful refusal to perform his legal duty during her minority, and that defendant's wrongful refusal during her minority may not defeat the rights of plaintiff Minnie now; and that a court of equity will compel defendant to do now what he should have done during her minority. The court therefore allowed Mrs. Dunham personally \$307.82, with interest; and found that, under the stipulation and decree, defendant was not relieved from his primary duty to support his children until their majority, and that he had not performed that duty, but that this duty had been performed by Mrs. Dunham, and she was allowed her claim in part, to wit, support for Winifred, three months, at \$50, or \$150, and for Aubra, 17 months, at the same rate, or \$850. The court refused to allow support for the time prior to the filing of the application, and terminated the allowance for Winifred's support at her majority; the allowance for the support of Aubra was ordered continued until his majority; a college education was ordered for Winifred and Aubra, at \$675 per year for each; attorney's fees for attorney for the minors were fixed at \$500. In short, the court required defendant to support his

children during minority, and to give them a college education, even though this could not be done during their minority.

Appellees claim that the court did not allow them as much as they are entitled to; but they have not appealed. We shall not go into the evidence. It is sufficient to say that, so far as the amounts are concerned, the court was well within the evidence, and, as to some of the items at least, within estimates given by the defendant himself.

3. We shall spend but little time on the claim made by appellant below that, because Mrs. Dunham, near the close of the trial, came into the case personally, first, that the entire case should be dismissed as to all parties, and then, that the amendment should be dismissed or stricken. There is little argument on the proposition, and appellant seems not to rely seriously upon this point. Appellant's next proposition is that Mrs. Dunham, having appeared only as next friend and guardian in the petition herein, is estopped from claiming that she was present in court under said petition in any other capacity. That might be true, if the case stood on the original petition herein alone. But there was an amendment. They say, also, that the existence and performance of said contract barred her from introducing any of the subject-matter of the contract into the divorce proceedings, and that this is a bar in the nature of an equitable estoppel. This assumes, in part, that there had been a performance by the defendant, which, the evidence shows, is not the fact. Whether she was barred from introducing the subject-matter of the contract into the divorce proceedings, will be covered by consideration of other questions later in the opinion.

Appellee contends, in regard to this matter, that, this being a suit in equity, and all parties being in court, equity will not send one of the suitors, under the circumstances of this case, who shows that she is entitled to relief, to another forum; that no motion to transfer was made, and that it was the duty of the trial court to grant full relief, and

6. EQUITY :
once-acquired
jurisdiction.

enter the proper judgment or judgments, under the principle that equity, having obtained jurisdiction of a controversy, will retain it, and do full justice, and end the litigation, if possible, even though, in so doing, it may pass on matters ordinarily cognizable at law. They cite *Illinois State Bank v. Boysen*, (Iowa) 168 N. W. 786 (not officially reported).

We think the following cases also sustain the proposition: *Howard v. National F. D. H. Assn.*, 169 Iowa 719; *Fallers v. Hummel*, 169 Iowa 745; *Bronson v. Lynch*, 181 Iowa 654, 659. As having a bearing, see, also, *Hume v. Independent School Dist.*, 180 Iowa 1233, 1247; 16 Cyc. 114; and *Fisher v. Trumbauer & Smith*, 160 Iowa 255, 264, where a claim at law was filed in an action properly brought in equity, and it was held that plaintiff was entitled to a hearing of the entire matter in equity. In the instant case, the petition was properly brought in equity, in the original equity divorce case. The equitable issues, or at least some of them, were sustained by the proof. Mrs. Dunham, in the first ancillary petition, had asked to recover for the same items of money expended by her, but had asked it as next friend. By the amendment, she asked that that part of the recovery be awarded to her personally. The entire matter, and the claims of all the parties plaintiff, grew out of one transaction: the marriage of the defendant and his wife, the divorce, and the rights of all the parties, growing out of the marriage and the divorce. It may be possible that Mrs. Dunham could have recovered all these amounts, both for herself and the children, because she was the sole plaintiff in the divorce case, and that the children were not necessary parties to this proceeding. The children were, however, vitally interested in the result of the suit; and, even though they were not necessary parties, it is clear to us that they were proper parties.

This suit was instituted primarily by the children: that is, by their guardian and next friend, for their benefit. The amount of the recovery and the purposes therefor would

7. PARTIES :
beneficiary
under con-
tractual di-
vorce decree.

have been precisely the same, so far as the defendant is concerned, had the mother recovered in her own name for them; so that the defendant is, so far as we can see, in no manner prejudiced. Furthermore, by the amendment the daughter asked to recover her part personally, because she had arrived at her majority. If she was a proper party from the beginning, by her guardian and next friend, it was appropriate for her to personally ask for such relief; otherwise, the action as to her would have abated, under defendant's theory, and she would have been precluded entirely from a recovery for her college education; and this, as we have said, is really the most important point in the case.

4. Whether plaintiffs can, under Section 3180, maintain this action to modify the divorce decree, is argued by appellant at some length. We shall not go into the discussion of this question as fully as we otherwise would, but for the matter to be now stated. As we have said, we are satisfied that defendant is willing to give both his children a college education, provided that, when they are away from home, he, furnishing the money, has something to say about the matter, or, as the contract and decree provide:

"That the defendant shall have the right to make such reasonable plans and arrangements for the education of the said children as is consistent with the conditions and circumstances, and to have the same followed and carried out."

We think this applies to a prior provision:

"That the defendant is to pay all the expenses of each of the said children while they are away from the home of their mother, at school or college," etc.

We think this gives the defendant some right, though not the exclusive right, to say where they shall be educated, what their education shall be, and so on. The mother and the defendant, for the best interests of the children in this regard, ought to be in agreement, if this be possible, consulting, too, the reasonable wishes of the children, their inclination and adaptability for any particular business or

profession, and an education to that end. The record shows that there has been some difference of opinion in regard to these matters; and, if the parties cannot agree, there ought to be some modification of the decree in this respect, in order that the rights of all parties may be preserved, and the children properly educated, as contemplated; or, if not a modification, that, at least, the decree hold the matter open for determination by the court, if that be necessary. The trial court may have overlooked this feature of the situation. Code Section 3180 provides:

“When a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be right. Subsequent changes may be made by it in these respects, when circumstances render them expedient.”

Mrs. Dunham is not asking any increase or change in the alimony awarded to her, nor do the children. As to the children, it is asked that the decree be changed so that it may be enforced. We think there were subsequent changes in the conditions, subsequent to the entry of the decree, or, in the language of the statute, the circumstances rendered subsequent changes in the decree expedient: indeed, not only expedient, but necessary, because defendant refused to carry out the provisions of the divorce decree, particularly in regard to the college education. It may be true, as contended by counsel for defendant, that, in defendant's testimony, he did not flatly refuse to pay for the college education of the daughter, but was willing to pay upon certain contingencies. But though, at different times, he has expressed a willingness to pay for the girl's education, he has not paid it; and further, in the district court and here, he is denying all liability therefor, not only as to the daughter, but as to both children. That is really the principal matter being contested. We think appellant is not in a position to say that he has not refused to comply with the decree, and especially so in regard to the college education. *Bobzin v. Gould Bal. Valve Co.*, 140 Iowa 744; *Goshen Mfg. Co. v. Myers Mfg. Co.*,

242 U. S. 202 (61 L. Ed. 248, 251). When the divorce decree was entered, it was to be presumed that defendant would perform his part of the decree, even though the amounts were not definitely fixed, without coercion, either by contempt proceedings or execution. The provisions as to future payments, schooling, and college education, were not made specific as to the amounts, and they could not have well been so. Upon defendant's subsequent refusal, the decree in these respects became ineffectual. In order that the decree might be enforced, it was expedient, under the circumstances, that changes therein should be made in the respects authorized by the statute, which are in regard to the children, property, parties, and the maintenance of the parties. True, these children were not parties to the divorce suit,—not directly,—but their rights grow out of and are dependent upon the rights and duties of the parents, who were parties; and the statute authorizes the court, in such a suit, to make such orders as may be right, in relation to the children. The children may not be deprived of their rights because of the dissension of their parents, nor may the duties and liabilities of the parents be evaded because thereof. 9 Ruling Case Law 480. After defendant's refusal, in order that the decree might be enforced, it became expedient to fix, by evidence, as well as that could be done, the amounts he should pay, and to enter judgment therefor. Any subsequent order, without fixing the amount and the entry of judgment, would add nothing to the original decree. The case was in equity, and plaintiff also asked that the original decree be interpreted and construed, and for general equitable relief. The issues were broad enough, and the power of the court in equity broad enough to adjust and settle the rights and liabilities of all the parties, growing out of the divorce proceedings.

It is contended by appellant, and cases are cited as holding, that the parties were bound by their divorce contract. We do not understand appellee to dispute this. It is further said by appellant that the court has never held that the statute in question authorizes any person other than the

divorced husband or wife to act as plaintiff in a suit for a modification of the decree. We think it was so held in *Gould v. Gunn*, 161 Iowa 155, 162, where the action was both upon the contract and the decree. The adverse parties did not contend otherwise, however, in that case. Appellant cites many cases which have been decided under Section 3180, under different circumstances, to the general effect that the decree is conclusive, and should not be changed unless substantial reasons are shown, or that justice and equity demand change; that the decree is conclusive as to the circumstances of the parties at the time it was rendered; that the decree in regard to the custody of the children will not be modified, unless there are changed conditions; that the statute does not contemplate a new trial, or to retry the same case. Among other cases relied upon by appellant is *Kinney v. Kinney*, 150 Iowa 225, 228, which cites a number of our cases, which are separately relied upon and argued by appellant. The *Kinney* case was where the divorced wife was in court, demanding an allowance to herself out of her former husband's property, to be used in the support and maintenance of the children. No material change in the circumstances of the parties was shown. It was said that, if such relief was reasonably required, the decree of divorce should have granted it, and because plaintiff had accepted the measure of relief given by the divorce, the mere fact that she ought to have had more, without showing any material change of conditions, was not a ground of modification, or for increase of the allowance; and further, that, under the circumstances of that case, it would be presumed that the alimony awarded was fixed with reference to the obligation which plaintiff assumed, to support the children, and that the amount so paid and accepted was agreed to as defendant's equitable contribution to the support of his children, as well as the wife's share of the estate. In the instant case, the decree of divorce did grant the things now claimed for, except that the amount of the education of the children was not fixed. In the instant case, we are not required to presume that the amount fixed in the

decree as going to Mrs. Dunham was defendant's full contribution for the children, for the reason that the record and the decree itself clearly show that such was not the fact. The *Kinney* case further held that the decree did not absolve the defendant from his duty to his children, and that performance of that duty may doubtless be enforced by the ordinary and usual remedies employed in such cases, whenever their necessities are such as to reasonably require it.

It is contended by appellant, and conceded by appellees, that the parents of infant children are without power to enter into a contract between themselves which will relieve

8. DIVORCE:
support of
children. either or both of them of those parental duties due the children, and which the state requires them to perform (*Slattery v. Slattery*, 139 Iowa 419, 422, and the *Kinney* case, *supra*); and that the court is not bound by the stipulation of the parties. *Delbridge v. Sears*, 179 Iowa 526. The court may do so, however, if the contract appears fair and reasonable. 19 Corpus Juris 251. Counsel also agree to the proposition that courts should carefully consider the welfare of the children, and that, upon such applications, the trial court is vested with a reasonable discretion, due to the fact that a human life is likely to be involved. *Linguist v. Linguist*, 148 Iowa 259, 263. Appellees contend that the primary obligation of the father is to provide for the children—educate, support, and maintain them; and that the giving of the children to the custody of the mother does not absolve the defendant from this obligation. We do not understand appellant to dispute this proposition, at least as to the period of the minority of the children. They also contend that it still remains his duty after divorce, unless, perhaps, as in some of the cases, the amount awarded covered such matters. *Schooley v. Schooley*, 184 Iowa 835; 9 Ruling Case Law 479, 480, 482, 484. In 14 Cyc. 811, 812, the doctrine is laid down that a court of equity has the power to make an order directing a father to provide for a minor child, long after the decree is rendered, where the decree contains no provision on the subject. We think that, by the

contract, which was carried into the decree, defendant obligated himself, as a continuing obligation, to give the children a college education after their majority. In *Stone v. Bayley*, supra, a father, in a divorce case, contracted for the support of a minor child after his death. The court said:

"That such a provision for the support of a minor child, when contained in the decree of divorce, survives, as against the husband's estate, subject only to the future orders of the court, can hardly admit of serious question. While it is true that, at common law, a father was under no legal obligation to provide support for his minor children after his death, we can conceive of no sound reasons of public policy to prevent his so doing. He can by contract create a continuing debt in favor of strangers which would constitute a claim against his estate; then why not as in favor of his children?"

It follows, we think, that, defendant having agreed, by the contract and the decree, to give his daughter a college education, this duty and contract continue until performed, whether he dies, or whether the daughter reaches majority. This applies to both the children in this case. As a general rule, students do not obtain a complete college education during minority. This is a circumstance, we think, tending to show that it was within the contemplation of the parties that defendant should pay for their college education after majority.

5. The money allowed Mrs. Dunham for support of the children during minority, and for dental and other bills for the children, were expenses which the agreement and decree required defendant to pay. He did not pay them, and they were paid by Mrs. Dunham. This being so, there is an obligation on the part of defendant to pay her, which ought to be enforced by judgment. The court properly allowed these amounts. 14 Cyc. 812, Note; *Gilley v. Gilley*, 79 Me. 292 (9 Atl. 623, 1 Am. St. 307); *Pretzinger v. Pretzinger*, 45 Ohio St. 452 (15 N. E. 471, 4 Am. St. 542); 19 Corpus Juris 354, Section 814, Note 2; *Young v. Young*,

9. DIVORCE:
contractual
decree in re
support of
children:
enforcement.

179 Iowa 1259. This last-named case also deals with the question of a college education of the children, under a stipulation. As said, defendant and his son seemed to be on friendly terms, and it is perhaps not likely that there will be any friction in regard to sending the son to college at defendant's expense. But, since defendant is contesting that matter, it is advisable that the decree determine that matter, and possibly prevent further litigation as to him.

6. As to attorney's fees, the court found that, for the personal recovery made by Mrs. Dunham and by the daughter, after majority, that they should each pay their at-

10. DIVORCE :
contractual
decree *in re*
"extraordi-
nary" ex-
pense: attor-
ney fees.

torney's fees; and as to the remainder of the application, the court fixed the allowance at \$500. These fees were allowed for services for the minors, as we understand it, for extraordinary necessary expense, and as wards, and because they were wards of the

court. The contract and divorce decree provide that defendant is to pay all bills that may be incurred for them in case of sickness, or other extraordinary necessary expense, and so on. There is no dispute as to the reasonableness of the amount allowed. There is little argument on the point. We think the allowance was proper. For a like reason, the application of plaintiff's attorney for an additional allowance for services in this court is sustained, and he is allowed \$200, in addition to the \$500 allowed below.

7. The judgments are affirmed. But, as said, we think defendant should be permitted to have some say in regard to the education of the children. We do not mean by this that he shall be permitted to dominate in the matter: his reasonable plans therefor should be carried out. It is to be hoped that the differences between the parents may not further operate to the disadvantage of the children, in regard to their education. The time for college will soon pass. Without going into the details, it appears that, when the daughter first attended school, at eastern schools, she was quite young, probably 15 or 16 years old. Counsel seem to differ somewhat as to her age, or when she attained her ma-

jority. As we understand the record, she was born September 23, 1900, and it is argued that she became of age September 23, 1917. It appears that at first she wrote her father affectionate letters, but later became incensed against him, due in part, perhaps, to the father's interference with her dresses, which had been prepared for her use at school. The rules of the school favored simple dresses, and discouraged extravagance. We are inclined to think that perhaps some of her dresses were unsuitable. The daughter left the school, soon after the commencement of the school year, and after the tuition and expense for the year had been paid. Defendant sent her a wrist watch, with what seems to us a kindly and affectionate letter. She returned the watch, and exhibited bitterness. The father thought a chaperon was necessary for her, and that her mother should be with her at Leland Stanford University. As said, we do not propose to go into details of this, nor state exactly the situation, except in a general way, to show the necessity of guarding this point. The case will be remanded, with directions to the district court to appoint some suitable, disinterested person to determine these matters, in case of disagreement, or to keep the case open, in order that applications may be made, if necessary, and that the court may determine any dispute.—*Affirmed*.

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

MARTIN EVENSON, Appellee, v. CHRIS OLSON, Appellant.

PARTNERSHIP: Accounting. In a partnership accounting, involving a partnership in the disposal of a stock of goods, the court, in determining profits, should proceed, in the absence of evidence of any greater value, on the basis of what one of the partners originally paid for the goods—not on the basis of what the goods invoiced when they were so purchased.

PARTNERSHIP: Judgment on Accounting. A partner whose profit and interest is in a stock of goods, and who acquiesces

in a trade of such stock for land taken in the name of the other partner, is not entitled, on settlement, to a personal judgment against the other partner for his interest, but only to a lien on the land for the amount due him.

Appeal from Monona District Court.—J. W. ANDERSON,
Judge.

OCTOBER 2, 1920.

THE trial court adjudged that, on settlement of the affairs of a partnership at one time existing between these parties, a stated sum was due the plaintiff, appellee, and gave him decree and judgment for that amount. Defendant appeals.—*Modified and affirmed.*

Prichard & Prichard, for appellant.

Crary & Crary, for appellee.

SALINGER, J.—I. The defendant bought a stock of merchandise, and he entered into an arrangement with plaintiff which amounted to a partnership between them, at least so far as conducting a business to dispose of said stock is concerned. This relation was ended on January 1, 1918. As said, the plaintiff prays an accounting, to the end that it may be adjudged how much is due him on account of net profits made by this partnership. Though, when this stock was purchased, the sellers had invoiced it at \$11,430.96, they sold it to defendant for \$5,500. One agreement between the defendant and the plaintiff was that, from any share of profits due defendant, he should suffer a deduction for interest at the rate of 8 per cent, on one half of said \$5,500. The first conflict is this: Defendant insists that, in counting profits, the deduction for stock bought by him should be the invoice price of \$11,430.96; while plaintiff contends that the deduction should not be this invoice price, but the \$5,500 actually

i. PARTNER-
SHIP:
accounting.

paid for the stock. The court agreed with the plaintiff. We hold that in this it did not err. Even if we assume the evidence shows that the plaintiff was not to share in any profit resulting because the stock purchased was worth more than the \$5,500 paid for it, that would not bind the plaintiff to treat the stock as being worth the invoice price of \$11,430.96. Neither he nor the defendant made this invoice, and the amount named therein would not establish against either that the stock was worth the invoice price. To make that price the start of the accounting, there must, on any theory, be evidence either that the stock bought was worth more than \$5,500, and how much more, or of an agreement that the value should be the said invoice amount. There is no evidence for either proposition. It must follow that the trial court rightly ordered that, in computing profits due the plaintiff, the \$5,500 paid for the stock, and not the invoice price, should be one deduction from gross profits.

II. An invoice taken when the partnership was terminated, placed the value of the stock on hand at \$14,018.64. The court scaled this by 10 per cent, and gave a money judgment

which treated the 90 per cent of the in-

2. PARTNER-
SHIP: judg-
ment on
accounting.

voice price precisely as it should be dealt with if the partnership had received the 90 per cent in cash. On that theory, it gave judgment for plaintiff in \$2,077.34, with interest on that sum at 6 per cent from January 1, 1918. This action could not be complained of, had the sale been for cash; but it was not. The defendant traded this stock for Iowa land, and in the same trade put in the building which defendant owned as an individual, but in which the business of the partnership had been conducted. He took the title to this land in his individual name. There is no evidence that he ever tendered a conveyance to plaintiff, and no evidence that plaintiff has demanded one, or demanded any interest in the land. The theory upon which the money judgment rests, is a finding that trading this building and this stock constituted a conversion of such interest as plaintiff had in the profits of the partnership, and his money judgment is an allowance of

damages caused by such conversion. Appellee puts it thus:

“Certainly, this clandestine and arbitrary appropriation of the plaintiff’s profits and the stock of goods and business amounted to a conversion, for which the defendant is justly chargeable.”

Appellant responds—and we think the record warrants it—that there was nothing clandestine or secret about the transaction, and that nothing was done that worked a conversion, because the trade was made with the full knowledge and acquiescence of the plaintiff. The record discloses that plaintiff was in possession of the store when this trade was made; that, while it may be true the contract to sell or trade was made in his absence, and without his knowledge, yet plaintiff did know the trade was made, helped invoice the stock, and, in speaking of the trade, he testified:

“I left the stock, and let the man to whom it was traded take possession. I made no objection. The stock has been sold and removed.”

Here is no conversion. Under this record, the case stands as though plaintiff had expressly consented that his profits should be put into this land, instead of being paid to him in cash. If that be so, and since, under the presumption of continuity, we must assume that the defendant still owns this land, the only power the court of equity has is to fasten a lien upon these lands for the \$2,077.34 which it was found was the share of the plaintiff in the profits.

We are unable to agree with appellant that *Faulkner v. Des Moines Drug Co.*, 117 Iowa 120, or *Furst v. Tweed*, 93 Iowa 300, compel us to hold that the contract relied upon by plaintiff is void for uncertainty. Aside from the modification hereinafter ordered, we approve of the decree.

The cause is remanded, to ascertain whether the title remains in the defendant. If it does, the said sum will be impressed upon it as a lien. If defendant has parted with the title, then, unless it be made to appear that the proceeds of the land have been invested in something else, with the consent of the plaintiff, the judgment and decree below will stand affirmed. If the title remains with the defendant, the

modification of substituting a lien on the land for said money judgment will be made.—*Modified and affirmed.*

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

P. H. FISHER, Appellee, v. SKIDMORE LAND COMPANY,
Appellant.

TRIAL: **Objections to Conclusion Statements.** Objections to statements in an affidavit for continuance (admitted in order to avoid a continuance), on the ground that the same were mere conclusions, reviewed, and *held* that the court had, by its ruling, eliminated all prejudicial matters.

BROKERS: **Reasons for Rejection of Bid.** In an action for commission, evidence by the proposed purchaser, tending to show that the owner of the property rejected his bid (which the owner had once authorized), solely on the ground that the owner had discovered that he could secure a higher price, is competent, relevant, and material.

TRIAL: **Sufficiency of Objection.** The dragnet objection that testimony is "irrelevant, incompetent, and immaterial" is too indefinite to present a reviewable question on appeal, unless, from the nature and condition of the subject-matter in hand, the attention of the court is fairly called to some specific objection of an obvious or discernible nature. So held as to such objection to testimony tending to show (1) the reason why an owner of land had rejected an authorized bid for his land, and (2) that the proposed purchaser was able to meet and had met the requirements of the contract.

TRIAL: **Nonresponsive Answer.** The nonexaminer of a witness may not interpose the objection that the answers are not responsive to the questions.

EVIDENCE: **Allowable Conclusion.** The testimony of a witness that he is "ready, willing, and *able*" to pay a named sum for a thing in accordance with his contract, is an allowable conclusion, in so far as it does partake of the nature of a conclusion.

TRIAL: **Conflicting Instructions.** An instruction is not conflicting which, in one part, declares that a broker suing for commis-

sion may not recover if he produced a purchaser who was unable to make a required deposit, and in another part, declares that he may recover if the owner declared that the proposed purchaser was acceptable, irrespective of his inability to make the deposit, but was not acceptable because he would not raise the bid on which the broker had been authorized to sell.

APPEAL AND ERROR: Insufficient Assignment. The point "*that the verdict is not supported by the evidence*" is not raised by an assignment "that the court erred in overruling motion for new trial" based on multifarious grounds, even though one of the grounds presents the insufficiency of the evidence.

BROKERS: Waiver of Terms of Sale. A broker who contracts to produce a purchaser who will (1) make a named deposit and (2) pay a named price, is entitled to recover his commission when he produces a purchaser who is ready, able, and willing to pay the price, but is unable to make the deposit, and the owner, in effect, *agrees to omit the deposit*, but refuses to sell, solely on the ground that he must have a higher price.

PLEADING: Evidence Beyond Paper Issue—Waiver. A litigant may not sit by without objection, and permit his adversary to prove a waiver, and thereafter contend that the evidence went beyond the paper issue.

Appeal from Jefferson District Court.—C. W. VERMILION, Judge.

OCTOBER 2, 1920.

THE plaintiff has verdict and judgment for a land broker's commission, and this appeal presents various objections thereto.—*Affirmed.*

Ralph Munro, for appellant.

Thoma & Thoma, for appellee.

SALINGER, J.—I. Applying settled rules of practice in this court, we consider this appeal on the points relied on for reversal, as amplified by the brief points. We have so

1. TRIAL: ob-
jections to
conclusion
statements.

often held that review must thus be limited that we pretermitt citations.

II. One claim by plaintiff was that the vice-president of the defendant had consented to a contract of sale made with one Kerr, although this contract involved some departure from the terms fixed by defendant in employing the plaintiff to sell or find a buyer for the land.

There was much controversy, and there were many objections to that part of an affidavit for continuance which recited what an absent witness would testify to, if present. But we think that, in admitting what this witness would testify to, if present, counsel set forth what defendant considered to be the principal and substantial objections to the recitals in the affidavit. The recitals "particularly objected to" were the following:

a. "That all the plaintiff had done in securing Kerr's signature to the contract, and depositing by him of checks of \$1,000 down payment, was done at the request of Riehle, as vice-president of the Skidmore Land Company."

b. That this "contract had been secured by plaintiff from George W. Kerr at the request of defendant."

c. A recital that Riehle said "all the plaintiff had done in securing Kerr's signature to the contract and depositing by him of \$1,000 down payment was done at the request of himself as vice-president of the defendant company."

The objection to these recitals was, in substance, that each and all were conclusions, rather than statements of fact, and, at any rate, if any part was a statement of fact, and if it purported to give what was said by Riehle, rather than a deduction of the witness as to what he said, such statements of fact were so mingled with conclusions as to make it impossible to distinguish what was conclusion and what was statement of fact.

But, by sustaining some of the objections made, the court eliminated so much of the recitals in the affidavit as stated that the contract had been secured by plaintiff from

George W. Kerr, at the request of defendant. We are of opinion that this ruling in effect excluded all that was objected to. While it is true the recitals speak of consent to, say, the obtaining the signature of Kerr to the contract, and of consent to deposits made, or request that they be made, the vitals of it all was the statement that the contract entered into was one requested by defendant. This last eliminated, nothing seriously objectionable remains. It took out of the testimony all claim that defendant was in no position to object to the contract because it had been obtained at its request. We therefore dismiss this assignment on the ground that the thing complained of therein was not done.

III. It was the theory of the plaintiff that the defendant refused to complete the transaction because it discovered it could obtain a higher price than the one at which it

2. BROKER'S:
reasons for
rejection of
bid.

had authorized the sale on which the commission is claimed. The buyer Kerr, testified that, when he was asked to raise his bid, he said:

"Nothing doing with me; I thought I had bought it; I thought I had bought the farm, but I didn't get it."

He was then asked whether Riehle made any objection to the contract with Kerr, or to any of the terms of the contract, except as to the price. At this point, defendant made objection that this was immaterial, incompetent, and irrelevant. The objection was overruled, under exception, and the witness answered that Riehle—

"Made no objection to nothing, only he wanted more money. I don't believe—the way I remember—I don't think we discussed this contract when he was in the office,—I don't remember. About the only thing Mr. Riehle said to me about this farm was, 'If you buy this farm, you will have to pay more money,' and he said he could get more money for the farm,—he had found that out; and if I got it, I would have to raise the bid. That is the amount of it."

We hold that, in its general aspect, this testimony, or anything legitimately called for by the question, was neither

immaterial, incompetent, or irrelevant, and that, as to this matter, this objection is too broad, and lacks too much in definiteness for appellate review. See *International Harv. Co. v. Chicago, M. & St. P. R. Co.*, 186 Iowa 86.

We hold likewise as to the following examination of Kerr, to which it was objected that the same was irrelevant and incompetent:

3. TRIAL: sufficiency of objection. "Q. State whether or not you had deposited in the First National Bank a sufficient sum of money to honor that check of \$500 drawn on the First National Bank. Exhibit No. D-1, when that check should have been presented to that bank, properly indorsed. A. Yes, sir. Q. State whether or not you had a sufficient sum of money deposited in the Birmingham Savings Bank so that Exhibit D-2 would have been honored when presented to them, properly indorsed. A. Yes, sir."

And so as to the following examination, to which the objection was that the same was immaterial and incompetent:

"Q. Mr. Kerr, say whether, at the time of the signing of the contract Exhibit P-7, and up until after you had this talk with Mr. Riehle, here in Fairfield, you were able and willing to get the money and make a deposit, if any objections were made to your checks. A. I had the money in the banks, not only to pay these checks, but to pay the full \$5,000."

One answer was: "I was willing and able to do that." As to this answer, there was a motion which urged the additional ground that the answer was not responsive. As to this, we have to say that this objection does not lie in the mouth of the one who is not examining the witness.

4. TRIAL: non-responsive answer.

IV. The witness Kerr was asked whether or not he had informed Riehle, at the stated time, that he, the witness, was ready, able, and willing to buy the farm in question for \$42,000 cash. This was objected to because it calls for a conclusion and is immaterial, incompetent, and irrelevant. The

5. EVIDENCE: allowable conclusion.

objection was overruled, under due exception. We shall recur to what is involved in this objection. As to the objection, it suffices to say that, if there was any error in overruling it, the error was cured, because the witness limited his answer to saying: "I told Mr. Riehle that is what I came up here for, to close up the deal for that farm at \$42,000." Assuming it to be objectionable to ask a witness whether, at a stated time, he was, in fact, ready, able, and willing to buy a farm for \$42,000 cash, it is not objectionable to show that he came to see the seller for the purpose of closing up a deal for a farm at \$42,000. If that be a conclusion, it is one permitted of necessity, and sanctioned by elementary law. Disregarding, for the moment, the rule laid down in *International Harv. Co. v. Chicago, M. & St. P. R. Co.*, 186 Iowa 86, and assuming that these objections of immateriality, incompetency, and irrelevancy are not too broad to obtain appellate review, it would seem clear that so much as the witness said is neither immaterial, incompetent, nor irrelevant.

But, in response to apt inquiry, this witness did testify that he had at all times relevant here been ready, able, and willing to buy this farm at \$42,000 cash. It should be noted that, in course of the examination on this point, there were times when the witness gave no conclusion, but stated the fact that he had arranged his affairs so that he could pay the money required. But passing that, and with it the argument that, if the inquiry was erroneous, answer made cured the error, we reach the question squarely whether it is either immaterial, irrelevant, or incompetent, in a case such as this, to receive such testimony, and whether such testimony, if a conclusion, is an objectionable conclusion. Clearly, in a suit for a commission instituted by a land broker, it is neither immaterial, irrelevant, or incompetent for the buyer to testify that he was ready, able, and willing to buy on the terms fixed by the seller. It is both material, relevant, and competent, because such readiness, ability, and willingness is a necessary

element in the plaintiff's proof. The sole question, then, is whether the form of eliciting this testimony was objectionable. It is said that it states a conclusion, rather than a fact. In a sense, that is so. But, so far as being ready and willing is concerned, the testimony discloses a state of mind and the intentions of the buyer. It needs no citation to sustain the proposition that, whenever proposed testimony goes to state of mind or intention, such state of mind and intention may be stated directly, and that any conclusion involved in such statement is a permissible conclusion, and permissible of necessity. *Thomas v. Wyckoff*, 187 Iowa 148. A closer question arises on whether the witness may say, in answer to a direct question, whether he was able to perform. If the interrogation may not proceed in this manner, then, of necessity, the witness must state, in the first instance, what property or means of credit he had at a given time; and, in a sense, such a statement as that generally involves much of opinion and conclusion. On the whole, we conclude that a categorical statement that the buyer was able to perform, should not be dealt with by an attempt to exclude the statement, but by cross-examination. We therefore hold no reversible error was committed in permitting the witness to say, not only that he was ready and willing, but was able to perform.

V. Instruction 5 is excepted to because the two paragraphs thereof are in conflict with each other. We find the first part of the instruction to charge that, if all there is, is the bringing of a buyer who was unwilling or unable to make the very deposit exacted by the contract, then plaintiff had not found a purchaser, in such sense as to entitle the plaintiff to a recovery.

The second part charges that, while this is so, yet, if the jury found from the evidence that, when the seller finally acted, he declared that the buyer was acceptable, without reference to deposit made, and refused to go on purely because a greater price would not be acceded to by the buyer, then the agent had found a satisfactory buyer,

6. TRIAL :
conflicting
instructions.

and could recover, notwithstanding the fact that the deposit required by the contract had not been made. Whatever objection this instruction may be vulnerable to, it is not that parts of it conflict with each other. They are, in a sense, alternative propositions. They amount to a ruling that, if an agent is, in the first instance, entitled to no recovery unless he finds a buyer who is willing and able to make a certain deposit, he cannot be defeated of a recovery for commission if, when a purchaser is produced, he is declared acceptable, though he has not made the required deposit, and the owner refuses to deal merely because the buyer will not raise the price beyond the one stipulated in the agent's authority. In the last analysis, it is a charge that, while the agent must produce a buyer who is ready, willing, and able to deal on the terms proposed by the owner, the agent may recover a commission, if the buyer is acceptable without compliance with the deposit requirement, and the refusal to deal is not based on that failure, but on the fact that the buyer has refused to accede to new terms and benefits demanded by the owner which are not found in the contract of agency.

VI. A motion to direct verdict was made at the close of the testimony for the plaintiff. It was, however, not renewed at the close of all the evidence. Under oft-repeated decisions of this court, that disposes of the complaint lodged against the overruling of this motion. But, under those same decisions, there is left the right to urge that, while refusal to direct verdict may not be complained of, yet the verdict returned is not sufficiently supported by the evidence.

7. APPEAL AND
ERROR: In-
sufficient
assignment.

One way that this question is raised, is by an allegation that "the court erred in overruling defendant's motion for a new trial, as set forth on pages 90 to 94 of the abstract," and that "the court erred in entering judgment on the verdict of the jury, as set forth on page 94 of the abstract." Both complaints are clearly too broad, un-

certain, and indefinite to serve as a basis for appellate review. The motion for new trial, to which reference is made, does allege that the verdict is not sustained by sufficient evidence, and is contrary to law and to the instructions. These complaints of the verdict constitute the first, second, and third grounds of the motion. The same motion complains that an affidavit was permitted to be read in evidence; it complains of the giving of certain instructions; it asserts that the pleadings do not state facts sufficient to constitute a cause of action, "under the undisputed facts proven in the case;" and it sets forth an exception to the giving of the second paragraph of Instruction 5. The assignment complains of the overruling of the motion for new trial in its entirety. It is not a good assignment, unless every ground of the motion was well taken. It is not seriously contended that this is true. It follows that the claim the court erred *in toto* in overruling the motion for new trial will not enable us to review the sufficiency of the evidence, nor to pass upon whether the verdict is contrary thereto, and contrary to the charge. We think this conclusion is squarely supported by *Wells v. Chamberlain*, 185 Iowa 264, and by *Shilling v. Sioux City G. & E. Co.*, 184 Iowa 1153, wherein we said:

"One brief point is that the court erred in overruling appellant's motion for new trial, because of the various assignments 'heretofore made herein, which were urged as grounds for a new trial.' The motion for new trial has 40 grounds. The assignment is too general for appellate review."

Surely, this is as definite as the assignment at bar. And other complaints as definite have been held too indefinite to obtain appellate review. Such were that the court erred in overruling motion for new trial, and that a new trial should have been granted, "under the record in the evidence in this case." *State v. Strum*, 184 Iowa 1165. Another was that it was error to overrule motion to direct, and a motion in arrest of judgment, and to overrule the exceptions, for each and all of the reasons stated in such

exceptions. *State v. Wilcox*, 185 Iowa 90. Still another was an assertion that the motion for new trial should have been sustained because the verdict was against the weight of the evidence and contrary to the instructions of the court, and "for other reasons shown by said motion, as shown by copy of the same on pages 106 to 113 of the abstract." *McDermott v. Ida County*, 186 Iowa 736.

VII. But the question remains whether the state of the evidence was not complained of in some manner that is sufficient to invoke appellate review. It will be remembered that the plaintiff made contract with the purchaser on terms that differed from the ones fixed by the seller. These terms demanded that the purchaser should make a cash deposit of \$5,000, and no deposit in that amount was made. There was testimony from which the jury might believe that, after the defendant knew there had been failure to make such deposit, it still expressed itself satisfied with the contract made. The court instructed, in the first part of Instruction 5, that, if it was found that no deposit had been made, in conformity with the authority given the agent, he could not claim anything on account of procuring a purchaser; and further charged, in the second paragraph, that, if the jury found that, when contract was tendered the defendant, it was satisfactory to it, though no cash deposit had been made, and that the refusal to enter into contract and to sell was due, not to a failure to make the deposit, but to the fact that a greater price than the one at which the agent was authorized to sell was being demanded by the buyer, then the jury was warranted in finding that the plaintiff had produced a purchaser ready, willing, and able to buy, on terms satisfactory to the defendant, and, therefore, that plaintiff was entitled to recover.

The sufficiency of the evidence to sustain the verdict is challenged by an exception to this instruction. The exception asserts that the instruction "authorized the jury to find a verdict in favor of the plaintiff, on the theory that defendant might have waived the required deposit of

\$5,000 cash, and the requirement of a cash deposit in any sum." It is said that this was erroneous because "no waiver was in any wise pleaded, and no evidence was competent to prove any waiver under the pleadings, and there was no competent or sufficient evidence from which the jury could have found that the defendant was willing to accept the terms provided by the writing presented to defendant by plaintiff, identified as Exhibit No. 7, unless a higher price should be provided for or paid by the proposed purchaser for the land in question."

The ultimate question was whether the plaintiff had produced a purchaser satisfactory to the buyer. If such a purchaser was found, it became utterly immaterial what terms had been fixed in the original agency contract. To be sure, the seller could refuse to accept a buyer who did not meet the terms of that authority. The contract of agency defined, in the first instance, what would constitute a buyer satisfactory to the seller. But, though the agent was directed to find a buyer who would make a preliminary cash deposit of \$5,000, and though, as matter of law, a purchaser who made such deposit would be held to be satisfactory to the landowner, it does not follow that one who was unwilling or unable to make such a deposit might not be a satisfactory purchaser. If the seller was willing to accept as a buyer one who failed or refused to make such a deposit, he cannot be heard to say to the agent that no satisfactory buyer had been found because such buyer would not do what the seller had demanded at an earlier time. The moment the owner declared that the produced buyer need not make the stipulated cash deposit which had been demanded of any buyer produced by the agent, he could no longer say that no satisfactory purchaser had been found; could no longer say that, though he, the owner, was now willing to forego the cash deposit, the agent should have no commission because, at an earlier time, the owner was unwilling to do without such a deposit. No waiver nor an estoppel are involved. All there is, is

8. BROKERS:
waiver of
terms of
sale.

the question of fact whether the terms finally offered by the produced buyer were then satisfactory to the seller. If they were, the agent cannot be defeated because, at an earlier time, the seller thought a buyer unsatisfactory whom, on reflection, he concluded to be acceptable.

7-a

As to the complaint that there was no competent or sufficient evidence to authorize a finding by the jury that defendant was willing to accept only if a higher price were paid, we have to say that, in the absence of objection, there was an abundance of competent testimony upon which the jury could find that everything was satisfactory to the seller except a refusal to change the original price fixed.

VIII. The claim that waiver is involved includes a claim that no waiver was competently established. On this point, it is the theory of appellant that, where waiver is

9. PLEADING:
evidence be-
yond paper
issue:
waiver.

involved, the fact that it is not pleaded makes it impossible to competently establish a waiver. It is quite possible to establish a waiver though it should have been pleaded and was not. In other words, the requirement that waiver be affirmatively pleaded may be waived. Assuming, for the sake of argument, that waiver is involved, and with the foregoing propositions in mind, we inquire whether it can be maintained that there was "no evidence competent to prove any waiver; and no competent or sufficient evidence from which the jury could have found that defendant was willing to accept the terms obtained as to deposits, provided only that a higher price be paid by the proposed purchaser." We find that the testimony bearing on waiver, if waiver be involved, was received without objection. We hold a party may not sit by while evidence which, on his construction, tends to establish waiver is being put in, make no objection, and thereafter successfully urge, in motion for new trial, that the verdict should not stand, because, though the testimony was received without objection, it went beyond the paper issue. See *Benson & Marxer v. Brown*, 190 Iowa——.

We find no reversible error; wherefore, the judgment is—*Affirmed*.

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

J. F. GORMAN, Appellant, v. KATHERINE JOENS et al.,
Appellees.

TRIAL: Transfer to Law on Failure to Prove Equity. One who pleads himself into equity, but demonstrates, on the trial in equity, that the action is *solely* at law, may not complain of the action of the court in declining to retain further jurisdiction, and in transferring the cause to the law calendar, and especially so when defendant was asking for such transfer.

Appeal from Scott District Court.—A. J. HOUSE, Judge.

OCTOBER 2, 1920.

THIS action was brought in equity, plaintiff alleging that defendants, by false representations and conspiracy, induced him to purchase certain mining stock, and obtained from him \$2,500. The petition asked to have the contract rescinded, and the stock returned to defendants, or to Mrs. Joens. The petition also alleged that plaintiff had informed defendant that he would rescind the contract, and that he had offered to return the stock, and demanded the return of the money; alleges insolvency of defendant, and plaintiff's right to foreclose his lien on the 500 shares of stock sent him by defendant; and asks for the return of the \$2,500, and that he recover judgment for said amount, and for general equitable relief. In addition to a general denial, the defendant, who was served, and who answered, denies that there was any fiduciary relation; denies that she was the agent of plaintiff; denies that she was guilty of any fraud, or that she received any money from the

plaintiff; denies her insolvency. At the proper time, and before trial, defendant moved to transfer the cause to the law calendar, which motion was resisted by plaintiff, and the motion was overruled, because, as the case then stood, the petition, on its face, showed ground for equitable jurisdiction. After the evidence was heard, the court concluded that there were, at that time, no grounds of equitable jurisdiction involved, and held that plaintiff was not entitled to relief in equity; but refused to dismiss, because defendant was entitled to a trial by jury. Thereafter, plaintiff filed a motion for new trial, asking the court to further consider said order, and enter judgment in favor of plaintiff and against defendants, as prayed in the petition. This motion was overruled, and from such rulings, the plaintiff has appealed. He, having appealed first, is the appellant. Defendants contend that the court should have dismissed the petition, and from the refusal to do so, they have appealed.—*Affirmed on both appeals.*

J. A. Hanley, W. M. Chamberlin, and Sharon, Harrison & McSwiggin, for appellant.

Cook & Balluff, for appellees.

PRESTON, J.—1. Personal notice was had on defendant Katherine Joens in this state. She is the only one who has answered, and is the only witness for the defendants. Notice was had upon the other defendants by publication, or service outside of the state.

It is true, as claimed by defendants, that, in the petition, plaintiff claimed misrepresentation and fraud by defendant Katherine, whereby he was induced to purchase from her certain shares of mining stock, for a sum of money in excess of the value of such shares; but the petition also alleges that said defendant conspired with A. B. Stevenson and the others named, with the design and purpose of defrauding plaintiff, and that said Stevenson and his wife, and the other defendants, aided and abetted said Katherine

in her fraudulent designs, and benefited by said transactions. Plaintiff and his family, and the defendant Katherine, had lived in Davenport for some years, and were on friendly terms. Plaintiff sold his interest in the hotel business for \$22,500, and claims that he was incapacitated from entering into any other business, and was anxious to invest his money safely. Plaintiff claims that defendant frequently mentioned a gold mine in which her sister and brother-in-law Stevenson were interested, and stated that her sister had 14,000 shares, and her sister's husband 40,000 shares of stock, and that it was a big-paying mine, and that, on account of the income from the mining stock, he was about to give up his position with a railway company; that she said the probable monthly dividends would be \$75, and representations of that character were frequently made; that, thereafter, plaintiff and his family went to Honolulu, and, on their return, that Mrs. Joens called on them at Los Angeles, and repeated the representations, and constantly talked about the mine in a commendatory way, and said that, if plaintiff could get some of the stock, it would make him rich. Soon thereafter, plaintiff and his family returned to Davenport, and, on the 2d of June, 1916, received the following telegram from defendant Katherine Joens:

"Pocatello, Idaho, June 2, 1916

"James Gorman,

"410 E. 12th St.,

"Davenport, Iowa.

"I have option for two days on one thousand shares of Pac. stock, the mines Mr. Stevenson is director of and owns forty thousand shares. I can handle five hundred shares myself, would advise you to take the other five hundred shares. We can get it through Mr. Stevenson at five dollars per share. This stock has never been on the market. We are in luck to get this as they pay first dividend in July. Other party waiting. Answer by wire.

"Mrs. Joens."

In response to this, plaintiff wired as follows:

"Davenport, Iowa, June 2, 1916.

"Mrs. Katherine Joens, Pocatello, Idaho.

"You can draw on me for \$2,500.

"J. F. Gorman."

He then wrote her as follows:

"Dear Mrs. Joens:

"Your wire arrived last night 10:30. I replied to it at once stating I would take the 500 shares at \$5.00 per share and would send draft today. I do not know who it should be made to. Am advised to have you draw on me through the above bank for the amount \$2,500 and I will attend promptly to same. Hope it will make Mr. Stevenson rich and you and I some money, enough to keep us in the non-worry club. We look for you, Hazel and William along about the 20th. * * *

"J. F. Gorman."

A draft was made on plaintiff, signed by A. B. Stevenson, which plaintiff paid. About a month after this, Mrs. Joens returned to Davenport, with her daughter and son, and stayed at plaintiff's home for several weeks. She either gave or sent a certificate of stock to plaintiff, at the same time advising him to pay no attention to "Shares—10c—each." The certificate is set out in the record, and at the bottom thereof, this appears: "Shares—10 cts.—each." Thereafter, plaintiff had an investigation made, which indicated that the stock was of much less value than the price plaintiff paid. One report says:

"If your cousin paid \$5.00 per share, he was buncoed out of at least \$4.00 per share."

Some of plaintiff's witnesses testify that Mrs. Joens still claimed that the stock was all right, and promised to take the stock back, and return to Mr. Gorman his money, if she could get some insurance that was coming to her; but she failed to do so, and this suit was brought. Plain-

tiff testifies that Stevenson had been a member of the board of directors of the corporation, and interested in the company for several years. Defendant Uhland is Stevenson's stepson, and defendant Hazel Joens is the daughter of Katherine. There is a conflict in the evidence at some points. We have not stated all the evidence, nor gone into the details, and we think it is unnecessary to do so, in the view we take of the case. We do not go into the merits, since there is no adjudication thereof.

The right of rescission, as between plaintiff and defendant, yet remains, and we do not understand that it is necessary to go into equity to rescind. The mining company is not a party to this suit. It is not our custom to go into details, where the case is yet to be tried. It is enough to say, at this time, that the evidence is sufficient, though in conflict, to take the case to a jury, or raise an issue of fact on the merits of the controversy; and further, that, when the evidence was in, there were no grounds of equitable jurisdiction, and that the remedy of plaintiff was at law. As said, upon the statements made in the petition, there were; but under the evidence, there were none, and the court rightly so held. In other words, plaintiff pleaded himself into equity. Appellant contends that, the suit having been brought in equity, and the court having assumed jurisdiction in that forum, the jurisdiction will be retained, to settle all the rights of the parties, although such adjudication requires the establishment of purely legal rights and the granting of legal remedies which, but for such assumed jurisdiction, would be beyond its authority. It may be that this would be the rule if there were, in fact, some grounds for equitable jurisdiction, although others were of a legal nature. Appellee cites at this point *Richmond v. Dubuque & S. C. R. R. Co.*, 33 Iowa 422, 488, and 2 Story on Equity, Sections 796, 797, as holding that, after equity has properly acquired jurisdiction for any purpose, it may retain the case and grant proper relief by way of damages, but that it cannot do so when jurisdiction is wanting for any purpose recognized as a ground of equitable jurisdiction.

See, also, *Amodeo Co. v. Town of Woodward*, 187 Iowa 569; *Fisher v. Trumbauer & Smith*, 160 Iowa 255, 261. Or if defendants had proceeded with the trial of the action brought in equity, without objection, the plaintiff might be entitled to all the relief to which he had shown himself entitled. But, as we have seen, defendants did object, and, at the proper time, moved to transfer the cause to the law side; and this was overruled, for the reasons before stated. Under the circumstances of the case, we think the trial court rightly held, at the close of the evidence, that plaintiff was not entitled to relief in equity, and that the court rightly refused to dismiss the case entirely. It was not necessary that defendants should renew their motion after the evidence was in, though doubtless it would have been proper enough to have done so. But the court had authority on its own motion to do so, or the court had a right to reconsider his ruling; and especially so when it appeared from the evidence that there were no grounds for exercising equitable jurisdiction. Suppose, when the motion to transfer was made, the court had said he would hold the motion and hear the evidence, and then rule. If that had been done, the motion could have been sustained. That, in effect, was done. The defendant had not waived the error, if there was any, in the form of the action, because she did move to transfer. If plaintiff was not entitled to relief in equity, it would be a useless proceeding to dismiss the case, in order to get upon the right side of the calendar. The statute provides that the error shall not work an abatement or dismissal of the action, but merely transfer to the proper docket. *Reiger v. Turley*, 151 Iowa 491, 497.

The real controversy between the parties in this case was the attempt to recover the \$2,500.

2. It seems to be conceded by defendant, inferentially at least, that there might be a theory upon which plaintiff would be entitled to recover damages, if he could satisfy a jury, by evidence, that he was entitled to recover. As to defendant, it is claimed, on her appeal, that the court should have dismissed the petition, because, as her counsel say,

plaintiff chose his forum, and defendant made all the protest she could, by moving to transfer; that plaintiff kept his case in equity by misstating the facts in his petition; that plaintiff failed to sustain the issues as chosen and made by him. But as we have seen, she was not entitled to a dismissal. She was asking that the cause be transferred to the law docket. This was finally granted to her, and we fail to see that she has any ground for complaint. The cause is affirmed on both appeals, and remanded to the district court for trial.—*Affirmed.*

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

HALL & MARTIN, Appellants, v. M. W. CHANDLER,
Appellee.

PROCESS: Burden of Proof in re Service on Agent. A plaintiff who proceeds on the claim that defendant has created an agency in a county other than that in which defendant resides, and makes service on defendant by serving the agent, must, on special appearance by defendant to question the jurisdiction of the court, show that the defendant is a nonresident of the county in which the agency is located. (Sec. 3532, Code, 1897.)

Appeal from Kcokuk District Court.—D. W. HAMILTON,
Judge.

OCTOBER 2, 1920.

THIS appeal involves the single question of whether the trial court erred in holding, on objection made at special appearance, that notice served on an alleged agent was insufficient to confer jurisdiction.—*Affirmed.*

Daniel W. Davis, for appellants.

Hamilton, Updegraff & Willcockson, for appellee.

SALINGER, J.—I. The claim of the appellant is that defendant, Chandler, authorized one Utterback to find a purchaser for certain lands owned by defendant, and that plaintiff produced a purchaser ready, willing, and able to buy, on the terms fixed in the authority given to Utterback. The ultimate claim of the plaintiff is that defendant wrongfully failed to convey to the purchaser produced, and that plaintiff is, therefore, entitled to a commission. The only notice in a suit making this claim was served on Utterback, and the effectiveness of that notice is the question before us. Such notice as this is purely statutory, and the statute provides that it may be made where an individual has, for the transaction of any business, an office or agency in any county "other than that in which the principal resides." The record shows that Utterback resides in Keokuk County, and was there served. Confessedly, the record is silent on where defendant, Chandler, resides, and the dispute between the parties really resolves itself into a question who has the burden of proof, where special appearance is made, to object to jurisdiction. And the essential argument for the appellant is that "a presumption of law arises from the pleadings, and is sufficient to cast a burden on the other party to show the fact is otherwise than the presumption indicates." We are constrained to disagree. We hold that whosoever seeks to avail himself of the purely statutory right to obtain jurisdiction by serving an alleged agent, has the burden of showing the conditions under which alone such service is authorized by the statute. If Chandler and Utterback resided in the same county, then, under the statute, this service was invalid. Appellant does attempt to show that Chandler had created an agency in Keokuk County. This met the statute requirements in part. The other parts were just as essential. And even as it was necessary to show that an agency had been created in the county, was it necessary to show that the principal and the agent did not reside in the same county. Because the appellant and plaintiff produced no evidence that the agency was created in a county "other than that in which

the principal resides," the trial court was right in holding that it had no jurisdiction to proceed.

We are unable to find any case entitled *Plank v. Marks*, which the brief of the appellant places on page 53 of 152 N. W. We find nothing in *Barnabee v. Holmes*, 115 Iowa 581, *Moffitt v. Chicago Chronicle Co.*, 107 Iowa 407, *Murphy v. Albany Pecan Dev. Co.*, 169 Iowa 542, *Morey v. Standard Separator Co.*, 174 Iowa 530, *Bellows v. Litchfield*, 83 Iowa 36, or in Section 29 of Abbott's Trial Brief, sustaining the proposition that one who does not show that the alleged principal and agent reside in different counties may obtain jurisdiction against the alleged principal by serving such alleged agent.—*Affirmed*.

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

C. W. HUFFORD et al., Appellants, v. J. I. HERROLD et al.,
Appellees.

SCHOOLS AND SCHOOL DISTRICTS: Quo Warranto. Quo warranto is the exclusive remedy for testing the validity of the incorporation of a consolidated school district.

SCHOOLS AND SCHOOL DISTRICTS: Consolidation—Acquisition of Land by Federal Government. The acquisition by the Federal government of lands within a consolidated school district in no wise disturbs the legal incorporation of the district, even though the lands taxable for school purposes are reduced below 16 sections.

SCHOOLS AND SCHOOL DISTRICTS: Attempt to Cede Lands—Delay in Selling Bonds. The legal incorporation of a consolidated school district is in no wise impaired (1) by the illegal attempt of the directors to cede part of the district territory to another district, nor (2) by delay on the part of the directors in disposing of bonds duly authorized for schoolhouse purposes.

SCHOOLS AND SCHOOL DISTRICTS: Remedy in re Improper School Site. The discretionary action of school directors in selecting schoolhouse sites may be reviewed only on appeal to the county superintendent. (Sec. 2818, Code, 1897.)

SCHOOLS AND SCHOOL DISTRICTS: Acquisition of Lands by
5 Federal Government—Effect. The power of a consolidated school district (1) to sell its authorized bonds, and (2) to levy authorized taxes, is in no wise impaired by the fact that, subsequent to the authorization, the Federal government acquired large tracts of land within the district, and thereby removed such lands from taxation.

SCHOOLS AND SCHOOL DISTRICTS: Restraining Authorized Tax
6 Levies. Authorized tax levies may not be restrained on the ground that fraud existed in the original organization of the district.

Appeal from Polk District Court.—HUBERT UTTERBACK,
Judge.

OCTOBER 2, 1920.

ACTION in equity to enjoin the removal of a school building, formerly used by the subdistrict, to another site within an independent consolidated district, and to enjoin the collection of certain taxes levied for school purposes, and also to enjoin the issuance and sale of bonds voted at a special election for the erection of a school building within said district. A demurrer to plaintiff's petition was sustained, and they appeal.—*Affirmed.*

Brockett, Strauss & Blake, for appellants.

Parsons & Mills, for appellees.

STEVENS, J.—Plaintiffs are residents and taxpayers within the consolidated independent district of Jefferson, Jefferson Township, Polk County, Iowa, and defendants comprise its board of directors, and the auditor and treasurer of said county. The petition assails the validity of the organization of said district upon the grounds of indefiniteness, irregularity, inaccuracy, and conflict in the description of the proposed boundary and territory thereof, as set forth in the petition and notices of election therefor;

that the requirement of the statute, that separate ballot boxes be provided for the residents within towns and villages within said proposed district and the territory outside thereof, was not complied with; that the promoters of the proposition to organize said district acted in bad faith, and procured sufficient nonresidents to cast illegal votes at the election to obtain a majority in favor thereof, without which the proposition would have been defeated.

The petition also charges that, if the incorporation of the district was valid, it had, at the times complained of, ceased to have a legal existence, for the reasons that, since its organization, the United States government has acquired, for military purposes, more than two sections of the territory situated therein, same constituting a part of the cantonment known as Camp Dodge; that 120 acres originally included therein have been ceded by the board of directors to the neighboring district of Grimes; that no effort to carry out the purpose of said incorporation has been made since its organization, in 1917; and that said district has been abandoned, and ceased to function as such; and that, by reason of the action of the United States government and the board of directors, as above set forth, the territory within said district has been reduced to less than 16 sections.

It is also alleged in said petition that the defendant board of directors has determined that no school shall be conducted in said district, except in a building located within the limits of the territory acquired by the United States government for military purposes, and is threatening and proposing to remove a schoolhouse, situated in said consolidated district, to a site located outside of the territorial limits of the said district, which site is unsanitary and unsuitable for school purposes, for the reasons that same is located near an interurban railway and station, and in the vicinity of picnic grounds, and of a place frequented by, and forming a common meeting ground for, immoral characters of both sexes, and used for immoral purposes; that soldiers in charge of trucks and automobiles

in great numbers pass and drill near said site, and that the attention of the pupils will be distracted from their studies; that no suitable playground can be provided for the use and benefit of pupils attending said school; that same is remote from the center of the school population, and is opposed by the patrons of said school.

It is further alleged in said petition that, on or about June 30, 1917, at an election held for that purpose, the electors within said district voted to issue bonds in the sum of \$20,000, for the purpose of creating a fund to be used in the erection of a schoolhouse; and that, subsequent thereto, the defendant board of directors made and certified a tax levy for school purposes to the county auditor of Polk County upon a part only of the real estate originally comprised in said district; that the taxes so levied, if payment thereof be enforced and the bonds issued and sold, would impose an unlawful and oppressive burden upon the property and taxpayers within said district, and a burden not contemplated by the parties at the time of the organization of said district. Plaintiffs pray that the defendants be enjoined from removing said school building, and from issuing and selling bonds, and that the taxes levied and certified to the county auditor be canceled, and their collection enjoined. Possibly, the foregoing summary of the allegations of plaintiff's petition does not include all of the essential matters therein set forth, but the omission, if any, will be supplied in the discussion to follow.

I. In so far as the petition charges irregularities and defects in the organization of the consolidated district, it does not state ground for injunctive relief. We have

1. SCHOOLS AND
SCHOOL
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repeatedly held that the validity and legality of the incorporation of a consolidated school district can be tested only by quo warranto. *Haines v. Board of Directors*, 184 Iowa 401; *State v. Rowe*, 187 Iowa 1116; *Harvey v. Kirton*, 182 Iowa 973; *Nelson v. Consolidated Ind. Sch. Dist.*, 181 Iowa 424.

This is practically conceded by counsel for appellant;

but they seek to make a distinction between a direct assault upon the validity of the incorporation of the district, and a situation wherein such questions arise as a mere incident to the main grounds upon which equitable relief is demanded. The allegations of the petition, however, specifically challenge the legality of the organization of the district, and relief is asked upon this ground.

II. Appellants also maintain that, even if it were conceded that the original incorporation of the district was, in all respects, valid, yet, because of the matters set forth

2. SCHOOLS AND
SCHOOL
DISTRICTS:
consolidation;
acquisition of
land by
Federal
government.

in the petition and admitted by the demurrer, it has ceased to have a valid existence.

The acquisition by the United States government of a portion of the territory included within said district for military purposes, it is true, deprived the district of the right

to levy and collect taxes therefrom, but our attention is called to no statutory provision or other authority to the effect that such action changed the boundaries of said district, or took the land thus acquired by the government out of the territorial limits of the district, within the meaning of the statute providing that consolidated school districts shall not be organized with an area of less than 16 sections. If the United States government shall, in the future, restore the land taken to private ownership, it would doubtless be subject to the payment of taxes, the same as though the government had not acquired it for military purposes.

So far as the board of directors have attempted to cede to a neighboring district any portion of land within said district, such action was clearly unauthorized and

3. SCHOOLS AND
SCHOOL
DISTRICTS:
attempt to
cede lands:
delay in sell-
ing bonds.

illegal. No such authority is conferred upon it. Surely, the statute which requires that no district containing less than 16 sections may be organized, did not confer implied authority upon the board of direc-

tors to cede enough of the territory therein to another district to thereby reduce the area thereof to less than

16 sections. The legality of the corporation was not affected by the attempted cession of territory to the district of Grimes, nor do we perceive any theory upon which a court of equity could sustain the contention of appellant, that its validity was affected by the neglect or failure of the board of directors, for the period indicated, to sell the bonds voted at the special election for the purpose of erecting a schoolhouse, and to function in other respects as a consolidated district, or that this could extinguish the right of the board of directors to thereafter carry out the purposes for which it was organized. The reduction of the area of the district to less than 16 sections, by the acquisition of territory therein by the government for military purposes, thereby depriving the district of the right to levy and collect taxes thereon for the support of the schools of said district, could not have the legal effect of destroying the validity of the district. The land remained within, and continued to be a part of, the district. It might, however, suggest a valid reason for the dissolution thereof. The burden cast upon the land included within the boundaries thereof, and subject to the payment of taxes for the maintenance of the school, might, by such action, be so great as to justify the dissolution of the district; but this did not operate to destroy its validity.

III. But it is also alleged in said petition that the defendant board threatens the removal of a schoolhouse situated within the limits of said district, to a site wholly

4. SCHOOLS
AND
SCHOOL
DISTRICTS:
remedy in re
improper
school site.

outside the limits thereof; that said proposed new site is unsanitary and unsuitable for school purposes, for the reasons stated above, and others of similar import. As we understand the petition, the allegation that the defendant board threatens removal of the schoolhouse to a site outside of the territorial limits of the district, is based upon their claim that the appropriation of a portion of said land by the United States government for military purposes, within the limits

of which the proposed new site is situated, removed the same from said district. We have already held that this was not the effect thereof; and, therefore, the ultimate facts pleaded leave no doubt that the new site is within the territorial limits of the consolidated district. It is not alleged in the petition that the proposed new site is not owned by the district, or that it does not have legal possession and control thereof for school purposes, if it is within the boundaries of the district. On the other hand, the petition charges, by implication at least, that the proposed new site consists of one acre of ground, on which there is another school building, to which it is proposed to join the schoolhouse in question.

The selection of a site for the school building is peculiarly within the authority and discretion of the board of directors, and can be reviewed only upon appeal to the county superintendent, or to the superintendent of public instruction upon appeal from his decision. *Munn v. Independent Sch. Dist.*, 188 Iowa 757; *Clay v. Independent Sch. Dist.*, 187 Iowa 89. It is well settled in this state that the courts may not review the action of school officers which is based upon the exercise of discretion, and which is within their powers. *Templer v. School Township*, 160 Iowa 398; *Knowlton v. Baumhover*, 182 Iowa 691; *Clay v. Independent Sch. Dist.*, 187 Iowa 89; *Munn v. Independent Sch. Dist.*, supra. If, however, the threatened action of the board, which it seeks to have enjoined, is in excess of its legal authority, injunction will lie to restrain such action. *Knowlton v. Baumhover*, supra; *Hume v. Independent Sch. Dist.*, 180 Iowa 1233; *Kinzer v. Directors*, 129 Iowa 441; *Hinkle v. Saddler*, 97 Iowa 526; *Burkhead v. Independent Sch. Dist.*, 107 Iowa 29; *Peterson v. Pratt*, 183 Iowa 462.

What is here said applies also to the remaining grounds upon which it is sought to enjoin the removal of said school building. They all relate to the suitable character of the proposed new site for the location of a school building. In the selection of a site for the location of a school-

house, the board exercises discretionary powers, which can be reviewed only by the county superintendent, or by the superintendent of public instruction, upon appeal from the decision of the county superintendent. If the proposed new location is unsanitary, and unfit for the location of a school building, it may be safely assumed that the action of the board would, upon appeal to the county superintendent, have been promptly reversed.

IV. Doubtless, the electors residing within the proposed consolidated district voted in favor of the incorporation thereof with the belief and understanding that

5. SCHOOLS AND
SCHOOL
DISTRICTS :
acquisition of
lands by
Federal
government :
effect.

all of the territory therein would be subject to taxation for the support thereof. It is also true that the appropriation by the government of a large area within the limits thereof for military purposes has resulted in greatly increasing the burdens to be

borne by the taxable property situated therein; but these facts afford no ground for the interference by a court of equity with the sale of the bonds. It might be that, if an injunction were sought, to restrain the sale thereof, pending proceedings under the statute for the dissolution of the district, such sale would be temporarily enjoined.

The grounds upon which are based the allegations of the petition charging that the taxes levied for school purposes and certified to the county auditor were unlawfully

6. SCHOOLS AND
SCHOOL
DISTRICTS :
restraining
authorized
tax levies.

levied and certified, are that the area of said district was, by the action of the United States government and of the defendant board of directors, reduced to less than 16 sections, thereby restricting

the number of acres of land subject to taxation to much less than the electors contemplated at the time of the incorporation of the district. This unexpected change in the situation, while unfortunate, did not in any way lessen the power of the board to levy the necessary taxes for the support of the incorporated district. As we understand counsel, it is their contention in part that, if the

attempted cession of the 120-acre tract to the independent district of Grimes was unauthorized and illegal, it is subject to the levy, if valid; and if the cession was, in fact, authorized, then the levy is unlawful, because it casts a much greater burden of taxation upon the plaintiffs and other taxpayers and residents of said district than was contemplated by the electors at the time of the organization of the district.

The petition charges that the promoters of the proposed consolidated district, in advance of the election, fraudulently arranged with the owners of the 120-acre tract to cede the same to the independent school district of Grimes, before it would be subjected to taxation in the new consolidated district, in exchange for the support or acquiescence of such owners in the organization of the proposed district, and that said land was ceded, in pursuance of said fraudulent arrangement. Whatever might be the probative value of such arrangement, if shown, upon the trial of an action to test the validity of the corporation, it can be given no weight in determining the legality of the levy in question.

The prayer of the petition is that the taxes levied be canceled, and the treasurer enjoined from enforcing payment thereof. It is not alleged in the petition, or claimed by counsel, that the levy was not made upon all of the taxable property within the district, except the 120-acre tract, or that the board sought, in making such levy, by specific provision to exempt the same from bearing its appropriate portion thereof. The action of the board in ceding the 120-acre tract to a neighboring district, if unauthorized and illegal, may, of course, be set aside in an appropriate proceeding for that purpose, and the tract be subjected to the payment of taxes for the support of the consolidated district.

Counsel for appellants contend with much earnestness that the allegations of the petition admitted by the demurrer entitle plaintiff to the relief prayed. We are of the opinion, however, that, for the reasons stated, the petition does not state a cause of action; and many of the questions presented are fully settled by the prior decisions of this court. It fol-

lows that the judgment of the court below, dismissing plaintiff's petition, must be and is—*Affirmed*.

WEAVER, C. J., LADD and ARTHUR, JJ., concur.

IN RE ESTATE OF L. S. COFFIN.

FORT DODGE PORTLAND CEMENT CORPORATION, Appellee, v.
CARRIE RUTLEDGE, Administratrix, Appellant.

NEW TRIAL: Withdrawal of Attorney as Unavoidable Casualty.

The dismissal of an action because of the withdrawal by counsel of his appearance, without giving his client due, timely, and reasonable notice of his intention to withdraw, may constitute such "unavoidable casualty and misfortune" as to justify the court in setting aside the dismissal. So held where the only warning ever given by the attorney to his client was to the effect that, if arrangements were not made as to his fees and expenses in case of trial, he would "feel" justified in withdrawing.

Appeal from Webster District Court.—EDWARD M. MCCALL,
Judge.

OCTOBER 2, 1920.

UPON the withdrawal of counsel for the claimant, the claim of the Portland Cement Corporation was dismissed by the court. On application by that corporation, the dismissal was vacated, and the claim reinstated. Therefore, the administratrix appeals.—*Affirmed*.

Kenyon, Kelleher & Hanson, for appellant.

B. J. Cavanaugh, for appellee.

SALINGER, J.—I. The Fort Dodge Portland Cement Cor-

poration, hereinafter spoken of as the corporation, held the note of L. S. Coffin, now deceased. It was given for stock bought in that corporation by Coffin. On his decease, a claim based on this note was duly filed, and the administratrix refused to approve the same. The corporation placed the note for collection with the Commercial Liquidation Company, and on a contingent fee of 10 per cent. In July, 1915, the Liquidation Company sent the note to one Bryant, a practicing attorney at Fort Dodge. He was to receive a contingent fee of 6 2/3 per cent. He testifies (apparently without dispute) that this fee was to be for *collection only*. He adds:

"I do not know that I ever believed the Cement Corporation would pay any more money for collection than under the contract with the Commercial Liquidation Company."

Bryant made no complaint as to fees, until about January, 1917. Thus matters remained on the contingent basis for almost two years. When the matter was reached for hearing, the counsel for the claimant withdrew, and, as said, thereupon the court dismissed the claim. The question is whether it erred in vacating the dismissal and reinstating the claim. It is asserted for the action of the trial court that, under the provisions of Code Section 4091, it was not justified in granting said relief, because the evidence shows that claimant had not met with "unavoidable casualty or misfortune preventing the party from prosecuting or defending."

The exact position of the appellant is that there is no evidence that any such casualty or misfortune existed, and that neither plea nor evidence claims or shows that any fraud or irregularity practiced on the applicant prevented it from prosecuting its claim. The appellee contends the evidence shows casualty and misfortune, such as is intended by this statute provision.

II. We think it unnecessary to give extended consideration to much that is stressed in the arguments. Suppose it be the fact that claimant was not indifferent, but was earnestly desiring to prosecute its claim to a successful end.

That will not entitle it to have the dismissal set aside and the claim reinstated, if its attorneys were justified in withdrawing, and exercised such right in a proper manner. If the withdrawal was wholly due to the fault and negligence of the client, he may not be relieved from the consequences of his own fault. That is elementary.

Was there such fault? It is undisputed that the contingent fee was *for collection only*. It was not intended to cover preparation for trial. Much less was it intended to cover a long trial, with chances strong against success. If it had been intended that the contingent fee should cover all that might be necessary to bring about "collection," the agent of plaintiff with whom Bryant made the contingent fee arrangement would not have felt bound to send money to cover expense of interviewing and subpoenaing witnesses. We hold it was mutually understood at all times that the 6 2/3 per cent was the compensation for collection without suit. That being so, the attorney did no wrong in asking—nay, demanding—some per diem fee arrangement for preparing for and conducting a trial. No attention was paid to repeated demands. The Liquidation Company evaded responding. The corporation declined to make the arrangement asked; declined to go beyond said contingent fee. This justified withdrawing.

2-a

The remaining question is whether the right to withdraw was properly exercised. Claimant asserts it was not. In effect, it contends, first, that no notice was given that there *would* be a withdrawal; that the notification was confined to statements that, if proper fee arrangements were not made, the attorneys would feel justified in withdrawing.

The right to withdraw was not properly exercised, unless there was due and reasonable warning. On no conceivable provocation may an attorney withdraw his appearance, without advising that that is his intention at such time as gives reasonable opportunity for the client to make a substitution. If timely notice was not given, if, indeed, no notice that counsel *would* withdraw was ever given, we are relieved from

considering whether the client could have saved himself harmless from the withdrawal. If not advised that there would be a withdrawal, except by a statement that it had already been made, a dismissal resulting from such withdrawal would warrant the court in setting aside such dismissal. Such a situation would amount to a preventing of the litigant from prosecuting his cause, and would so be within the statute. The first question, then, is not whether timely warning was given, but whether warning was given at all.

Was there notice that counsel would withdraw? In one sense, there was. But that was notice that counsel would withdraw unless money to get witnesses was furnished by a stated time. But it was furnished in time, and so this particular notice is out of the case.

What other notice was there? Mr. Bryant testifies that he saw the president of the corporation "very shortly prior to the time we withdrew. I think it was about April 10th. I was on my way to take a train, stopped, and had a few words with him on that matter, told him the situation, and suggested that he go and see Mr. Joyce, and make some arrangements with him, because I had only a few seconds to talk." Again: "I simply told Nicholson that we felt we couldn't go into the trial of a case of that kind on a contingent fee basis." This, of course, did not advise that there would be a withdrawal. What other notice there is, is by letter. It is highly questionable whether any letter other than the one in which it was advised that there had already been a withdrawal, dealt with a withdrawal in case a per diem arrangement was not made. The only letter earlier than the one announcing that withdrawal had already taken place is the one of date April 17th. In that, Bryant wrote the Commercial Liquidation Company:

"We must know what to depend upon in the way of trial fees other than the contingent fee offered, and the money necessary for expense of witnesses and incidentals of trial. If some satisfactory result is not reached by the time the case is called for trial, * * * I feel that we cannot as-

sume the risk of trying the case, furnishing expense money and depending upon securing a verdict * * * for our remuneration. So if nothing satisfactory in the way of payment is assured before going to trial, we shall feel justified in withdrawing our appearance in the case."

It may well be claimed that this deals with a withdrawal, if expense money is not furnished. But assume that it is not so limited, yet it states no more than that counsel will, if a per diem arrangement be not made, "feel justified in withdrawing our appearance in the case." In the letter advising that the withdrawal had taken place, and had resulted in dismissal, the statement was not stronger than that the treatment of counsel was such that "we felt justified in withdrawing our appearance." There is nothing more, excepting that, in the letter advising that the case had been dismissed, there is a claim that "Mr. Joyce and myself informed Mr. Nicholson that we would not continue in the case." It will hardly be claimed that this self-serving statement in this letter, made after the dismissal had taken place, proves that advance notice was given that there would be a withdrawal of appearance. It is quite evident the client did not understand there was such advance notice. The president of the corporation claims that, within two days before the dismissal, he had endeavored to get in touch with Mr. Bryant, and that the president thought, if the case were tried, it would be in the latter part of the week. The letter of April 16th, written by the Liquidation Company to the corporation, indicates plainly that it is not understood by the writer there would be a withdrawal; for the corporation is told that, if it did not desire to make an effort to obtain witnesses, to notify Bryant, so that there might be a dismissal "when the case comes up." Put it at its strongest for the appellant, and the first time there was a flat statement as to withdrawing, it was made in the letter announcing the withdrawal had already taken place, by the statement that what had been done made counsel feel that they were justified in withdrawing, and "our withdrawal is final." At no time did the warning go beyond an argumentative dec-

laration that withdrawal was justified, and that counsel felt it was. Men do not always do what they are justified in doing, even if they feel that they are justified. The statement that one feels thus about it is not a statement that the feeling will be followed to action.

The appellant relies upon *Andres & Co. v. Schlucter*, 140 Iowa 389. The case is not available to her, because it has the very thing that is lacking on this record. In the *Andres* case, the attorney advised the agent of the client that the attorney would not further appear for the client, and, on subsequently receiving a telegram and letter from the client with reference to this, the attorney wrote the client, on September 14th, that the case was set down for peremptory call on September 19, 1907. And he wrote:

"Your wire and letter received. In reply will say that I cannot further appear for you in cases pending here as I have not been paid for services rendered and there is more than \$500 due me and I see no prospect of being paid. I therefore cannot give time or pay out expenses without some hope of being paid. * * * The case of Andres & Company against you is assigned for trial next Thursday. I have written [your agent in Chicago] that I will not appear in it. * * * You will, therefore, understand that if you desire an attorney here you will have to get some other attorney than myself."

The difficulty with the case at bar is that, while arguments were submitted, claimed to prove (and grant, if you please, proving) that withdrawal was thought justified, there never was a statement even to the effect that counsel would withdraw, and that others must be employed.

We cannot hold that, in these circumstances, it was error to hold that the claimant had made a case within the statute.—*Affirmed*.

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

IN RE ESTATE OF ANTON ULLRICH.

CHRISTINA ULLRICH, Executrix, Appellant, v. CLEMENS
ULLRICH et al., Appellees.

WILLS: Rejection of Apparent Limitation. A seeming limitation
1 on an otherwise clearly granted power to a life tenant to sell,
will not be given such effect if the court can, in reason, de-
termine that such was not testator's intention. So held where
a wife was given, for life and in lieu of dower, the income of
a small estate, with an added provision that "*she*" might sell
designated property, "if for any reason my wife as executrix
thinks best to sell," etc.; it being held that testator very clearly
did not intend the words "*as executrix*" to be a *limitation*.

WILLS: Authority to Sell Property—Judicial Review. Even
2 though there be large warrant for the position that a will gives
authority to a life tenant to sell without any court permission,
the probate court may well assume jurisdiction of such an ap-
plication, (1) when the application is made after the closing of
the estate; (2) when the life tenant's interest depends on her
continued celibacy; (3) when the interest of a minor is at
stake; (4) when the proceeds of the proposed sale are, in a
sense, to be invested "beyond the jurisdiction of the court;" (5)
when, without such permission, it might be impossible to in-
duce buyers to purchase; and (6) when some fair doubt exists
as to whether the judgment of the life tenant as to the advis-
ability to sell is final, and beyond judicial review.

Appeal from Monona District Court.—GEORGE JEPSON,
Judge.

OCTOBER 2, 1920.

ON December 7, 1915, Anton Ullrich made his last will.
He died on January 16, 1916. The will was admitted to
probate. It named appellant, Christina Ullrich, executrix,
and she qualified and acted. The trial court found that,
in May, 1917, the estate was fully settled, the executrix dis-

charged, and "her bondsmen released." So far as the order appealed from rests on finding the release of the bondsmen, it is erroneous; because, by reason of the provisions in the will, there were no bondsmen.

On the 24th day of June, 1919, Christina Ullrich filed a paper in probate, which was styled an "application to sell land." Therein it is recited that Christina is the widow of Anton Ullrich; that, "as such executrix," she has paid all the indebtedness of the estate, and has turned over to herself, the widow, "the real property." It is further alleged the will provides:

"If for any reason my wife as executrix thought best to sell the town property she shall have the right to do so, and to use the proceeds from the sale for any necessary purpose, or to invest in other property."

It is next alleged that applicant is endeavoring to educate her minor son, Bernard, now a student at the State University of Iowa; and that, in order that she may have the necessary means to complete his education, she needs to dispose of the "town property in Mapleton, as provided in said will." Further, it is alleged that she proposed to purchase a home in Iowa City, wherein she can board and room students, and so pay for the keeping of said minor; and that she will be unable to do this, unless permitted to sell said Mapleton property "belonging to estate of said decedent, and described in said last will." The prayer is that she "may be authorized to dispose of said premises and invest the proceeds in a home in Iowa City." This application was contested by the son older than Bernard. The court dismissed the application, and denied the right to dispose of said premises, as prayed. Christina A. Ullrich appeals.—*Reversed and remanded.*

Prichard & Prichard, for appellant.

Miles W. Newby, for appellees.

SALINGER, J.—I. This somewhat extended statement is

necessary, because appellee makes the point that no interpretation of the will is prayed, and that the application is

nothing more than an application in probate

1. WILLS: re-
jection of ap-
parent
limitation.

for permission to sell land and to invest the proceeds.

Assuming, for the purpose of present discussion, that it makes a material difference whether or not the application is what appellee claims it to be, we have the question whether the claim made is tenable. We are of opinion that, while the relief sought is permission to sell and invest proceeds, such relief is asserted to be due because of the interpretation of the will on part of the applicant, and that, to save all question on whether applicant can give good title, and may reinvest, the court is asked to say whether the interpretation of the will on part of applicant is a correct one. Indeed, the court was compelled to construe the will, and, as will presently appear, did so.

II. The will gives to the wife (and not to the executrix) the net income of decedent's farm, after deducting for improvements made and taxes paid. It gives to her the use and income from his town property, and she is to have both incomes during her natural life, or so long as she remains single (and she has so remained). This income is in lieu of dower, and at her death, all the realty shall be divided equally between the two sons.

Were this all, it may be granted the court did not err in refusing permission to sell. With the title to vest in the two sons absolutely, as soon as the mother died, it could well be held that authority to sell any of the real property should be denied for any of many reasons, especially where application was made by one who had ceased to be executrix at the time she applied. But that is not all of the will. The testator put therein the following proviso:

"(7) If for any reason my wife as executrix thought best to sell the town property, she shall have the right to do so and to use the proceeds from the sale for any necessary purpose or to invest in any other property."

Manifestly, testator contemplated, when he inserted this, that circumstances might arise which would require authority somewhere to sell the town property before title vested, on death of the mother. And, as said, in denying the application, the court of necessity construed this proviso. The interpretation of the court was that, if "she" thought best, "she" had the right to sell the town property, and to use the proceeds for any necessary purpose, and to invest them in any other property; but that she had this right, only provided she thought this best "as executrix"—meaning that, unless she did this thinking while still executrix, there was no power in the court to sanction or to give effect to her thinking.

The parties agree, of course, that the intention of the testator, as it may be gathered from the circumstances surrounding the testator, when he made the will, and the words of the testament, fairly construed together, control. Applying these canons of construction, what was the intention of the testator? Can it be said he intended that the property might be sold only if his wife thought, "as executrix" (while still executrix), that it was best to sell it? Appellee tells us that it was the intention thus to limit the power to sell, because testator may well have thought, when he made the will, that, if it became necessary to raise money wherewith to meet debts and expenses, such necessity would develop while the wife was still executrix; and that, if it never became necessary to sell while she was still executrix, there would be no occasion to sell after that status ended. But what warrant is there for this claim made for the mental processes of the testator? Why should he, possessed of but a small estate, and giving power to sell, or to sell and re-invest for any necessary purpose, if she thought best, have intended by this provision that there should be no sale after she had ceased to be executor? What proves he believed that there could be no necessity, after she was discharged as executrix, which would make it best to sell the specified part of the realty? He made it plain he did not want the farm sold, and that, if there was a necessity to

hesitated, unless such permission were obtained. And it is not strained to say that possibly the judgment of the widow as to the necessity and propriety of the proposed sale and reinvestment was not beyond judicial review. See *In Re Trusteeship of Clark*, 174 Iowa 449. The fact that she was no longer executrix when she applied will not support the refusal to give the authorization asked, any more than not being executrix at the time would bar the grantee of appellant from quieting title, had the court granted this application. We are of opinion that not being executrix at the time application was made and granted would most clearly not warrant a refusal to quiet the title.

On the theory of this opinion, a remand becomes necessary. The cause is remanded to the district court, with direction that it hear such evidence as may be adduced for and against the application, and then determine the same on the merits, and upon such evidence.—*Reversed and remanded.*

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

INDEPENDENT VAN & STORAGE COMPANY et al., Appellees, v.
IOWA MERCANTILE COMPANY, Appellee; JOHN C. ARM-
STRONG, Intervener, Appellant.

RECEIVERS: *Technical Procedure—Waiver.* When a creditor, under permission of the court, intervenes in receivership proceedings, and presses to a close, without objection, his claim for a preference, subsequently raised objections (1) that the presentation of the claim was not timely, (2) that no order was entered permitting the receiver to be sued, (3) that the receiver was not named as a defendant, and (4) that the other creditors were not notified, will be treated as waived.

PLEADING: *Admission Because of Failure to Deny—Waiver.* A material allegation is not deemed true because of the failure to deny it, when the party pleading neither moves for default nor for judgment, but proceeds to trial as though such allegation had been formally denied.

RECEIVERS: Judgment. Adjudicating Preference. A judgment
3 against an insolvent, for money paid under a fraud-induced and
rescinded contract, does not *ipso facto* adjudicate that the judg-
ment plaintiff is entitled, in receivership proceedings, to the
standing of a preferred creditor, especially when neither the
receiver nor the remaining creditors were parties to the judg-
ment proceedings.

TRUSTS: Claimant Against Insolvent. One who has been de-
4 frauded of his property, and seeks to establish a trust against
the insolvent and his general creditors, must (1) actually point
out his property which is the subject of the trust, or (2) actu-
ally show that his property has passed into other specific prop-
erty, and that the same is now in the possession of the de-
fendant.

RECEIVERS: General Creditors. A defrauded creditor of an in-
5 solvent, who fails in his claim for a preference over all other
creditors, should not be denied the rights of a general creditor.

APPEAL AND ERROR: Motion to Strike Amendment. Appellee's
6 unnecessary or unauthorized amendment to abstract will not be
stricken, when the only matter at stake is the costs, and when,
under the decision, appellee must pay all the costs.

Appeal from Linn District Court.—MILO P. SMITH, Judge.

OCTOBER 2, 1920.

INTERVENER, Armstrong, prayed that a judgment he had
obtained against the Mercantile Company should be made
a preferred claim on assets in the hands of a receiver of
that company. His petition of intervention having been
dismissed, he appeals.—*Modified and affirmed.*

C. W. Meek, for appellant.

Crissman, Linville & Churchill, for appellees.

SALINGER, J.—I. On April 18, 1916, Armstrong gave his
notes, aggregating \$1,500, to the Mercantile Company, in
payment for shares of stock in said company. The company

went into the hands of a receiver, on September 7, 1916. Learning of this fact on September 18, 1916, Armstrong served notice on the company and on the receiver that he had elected to rescind his said stock subscription, on account of fraud and misrepresentations in obtaining the subscription. On November 15, 1916, he obtained a decree in the superior court of Cedar Rapids, rescinding the subscription on the ground of fraud and want of consideration, and he obtained judgment against the company in the sum of \$1,551.99, because his notes had been transferred to an innocent purchaser.

On permission of the court, Armstrong, on November 29, 1916, intervened in the receivership suit. As said, he asked that his judgment be established as a preferred claim against the estate of the company, and that it be allowed, and ordered paid in full by the receiver.

Each party urges technical objection to positions taken by the other. Appellee insists that, since the decree appealed from is general, that for all that appears, such decree was based on the conceded fact that,

1. RECEIVERS:
technical
procedure:
waiver.

when intervener first appeared in the receivership suit, the time limit fixed in that suit for filing claims therein had been passed. It is said, too, that no order was made, permitting suit against the receiver; that he was not named as a party defendant to the intervention; and that the creditors were not served with notice of intervention. We may admit it to be the general rule that the claimant must file within the time fixed, or excuse failure so to do. 34 Cyc. 342; 23 Am. & Eng. Encyc. of Law (2d Ed.) 1118. We may grant it is the proper practice to obtain a formal permission to proceed, as against the receiver, to name him as a defendant, and to notify creditors who have filed claims. But we think all this was waived, because the court did permit and did give consideration to the intervention, and did this without objection's being made on any of these heads. And this view is supported by the further fact that final distribution had not been made, at the time when appellant intervened.

1-a

Appellant urges, in effect, that his claim was, under provisions of Section 3623 of the Code and the rule in 20 Standard Encyc. of Practice 880, 884, confessed, because there was no denial of his amendment to petition of intervention. We find that such denial would have added nothing to the general denial already on file. See *Markey v. Chicago, M. & St. P. R. Co.*, 171 Iowa 255. Be that as it may, no such confession may be claimed; because no default was asked, no motion for judgment was made on account of want of further answer, and because the trial was proceeded with as and though said amendment had been formally denied. See *Gregory v. Bowlsby*, 126 Iowa 588; *Long v. Valleau*, 87 Iowa 675, 691; *Medland v. Walker*, 96 Iowa 175.

II. Intervener asserts that the decree of the superior court is an adjudication for intervener that a trust to the amount of the judgment is impressed upon the assets of the Mercantile Company now in the hands of the receiver, and said decree settles that the judgment is a preferred claim, senior to the merchandise creditors of the company. True, the superior court judgment finds that Armstrong's subscription was fraudulently obtained, that he received no benefit for his notes, and that he has been guilty of no laches. It rescinds and cancels the subscription. So far, nothing is decreed that creates a special trust relation between Armstrong and the company; and, in effect, the decree does not go beyond finding that, by reason of the fraud practiced in obtaining the notes from Armstrong, the company was indebted to Armstrong. This fact, alone does not entitle intervener to the preference he claims. Be that as it may, the superior court judgment is no adjudication on the vital matter involved in this controversy, because, so far as the record shows, neither the receiver nor the creditors who filed in time were made parties, or appeared in the superior court. Moreover, the decree of that court has this proviso:

2. PLEADING:
admission be-
cause of fail-
ure to deny:
waiver.

3. RECEIVERS:
judgment
adjudicating
preference

“And this decree is not an adjudication of the rights, if any, of plaintiff against K. T. Lamb, receiver of the Iowa Mercantile Company, nor against the creditors of said company, or of the rights of said receiver or said creditors against the plaintiff.”

III. The record does not establish the trial court held “that the mere appointment of a receiver of the Iowa Mercantile Company because of mismanagement, fraud, and insolvency, prior to intervener’s notice of rescission, and action in court to force a rescission, barred intervener’s right of cancellation, rescission, and recovery, on the grounds of the admitted fraud, misrepresentations, and despite his diligence in discovering the same.”

But assume that the naked fact that a receiver was appointed before Armstrong rescinded, does not bar the claim for preference. Still, the preference may not be had merely

because some things will not defeat it. It was still the duty of intervener to show that he was entitled to the preference claimed by him. On the right to have this preference, the argument for the appellant divides into three general propositions:

4. TRUSTS :
claimant
against
insolvent.

a. The money paid by Armstrong bought merchandise for the company, and the receiver now holds the money received for this merchandise, and this has increased the funds in his hands as receiver, to the extent of the intervener’s judgment.

b. There is no evidence that the assets are insufficient to pay all claims, including that of intervener; therefore, there is no evidence that anyone will be injured if the preference is allowed.

c. Neither the receiver or the creditors have pleaded an estoppel, or pleaded that any debts had been contracted after Armstrong made his subscription; and neither receiver or creditors have opposed the allowance in full.

The appellees respond that they are not bound to show that full allowance will do no harm; and that it is for appellant to show that allowance of his claim will not preju-

dice the other creditors; and that he has the burden of proving that the funds in the hands of the receiver were accreted to the extent of intervener's judgment. They point out that, even if appellees had the burden, the record shows that the money obtained from Armstrong was expended long before the receiver was appointed; that over \$100,000 was absorbed by losses and mismanagement of the Mercantile Company; that creditors who have filed their claims with the receiver extended credit to the company after the date when Armstrong bought his stock, and before the appointment of the receiver, in the sum of \$14,436.39; that the claims filed with the receiver, including said \$14,436.39, aggregate the sum of \$85,640.35; that the court may not assume the money of Armstrong was not dissipated by the losses and mismanagement of the Mercantile Company, nor assume the receiver still has the particular money lost by Armstrong, in the form of assets remaining.

The general position of appellee is summed up thus: Where a creditor seeks to repudiate or rescind his contract for the stock of an insolvent company which is in the hands of a receiver, he has the burden of both alleging and proving that no rights of creditors intervened between the date he became a stockholder and the date of the appointment of the receiver. We need not decide whether there be such evidence, nor some of the other questions suggested; for all authority agrees that claimant who seeks a preference based on a trust has the burden of proving that what is in possession of the receiver has been accreted by the money or property of claimant. One who has been fraudulently deprived of his property, and seeks to establish a trust against the defendant and defendant's general creditors, must actually point out his property which is the subject of the trust, or actually show that his property has passed into other identified property, and is preserved in that form in the hands of defendant. *Farnsworth v. Muscatine P. & P. I. Co.*, 177 Iowa 21. To like effect are *State v. Bank of Commerce*, 61 Neb. 181 (85 N. W. 43); *City of Lincoln v.*

Morrison, 64 Neb. 822 (90 N. W. 905); and 39 Cyc. 544, 545, 547. And see *Seeley v. Seeley-Howe-Le Van Co.*, 128 Iowa 294.

We are of opinion that the provisions in the articles of incorporation which regulate what and how much may be bought on credit, and provisions restricting the going in debt in excess of the amount of cash on hand, are immaterial to any issue to be decided on this appeal. And it may be said in passing that, if these restrictions were exceeded, it was done by the directors of the Mercantile Company, who were the agents of Armstrong.

IV. But the troublesome question arises over whether it was proper to deny the intervener all relief. Appellee himself says: "The most he could claim was that he was a general creditor." To be sure, it is added

5. RECEIVERS:
general
creditors.

that "he is not entitled to participate as such." Why not? He did make claim. He was, then, a general creditor. He was permitted to proceed with his claim, and without objection on the score that he had not filed in time. If, then, he may be excluded from participation as a general creditor, it must be on the ground urged by appellee: That Armstrong was, after all, but a stockholder, and that the general creditors are entitled to full payment from the insolvent estate before a stockholder could participate; that the receiver is a trustee, first for creditors, and only secondarily for stockholders. The difficulty with that position is that, at the time when Armstrong made claim against the receiver, the action of the superior court had canceled his subscription, and terminated his relation of stockholder; and to the suit in which the judgment having this effect was entered, the receiver was made a party, on due notice.

We think Armstrong was at least a general creditor. With no objection made to the time and manner in which he asserted his claim, he is to be treated as a general creditor, who had claimed in proper time and form. It follows the district court should not have dismissed his interven-

tion *in toto*, but should have treated him as a general creditor.

V. Appellant moves to strike appellee's amendment to abstract, on the grounds that all the matters contained therein were proper subjects of pleading, and were not pleaded in answer to the petition of inter-

6. APPEAL AND ERROR: motion to strike amendment. vention; that all the matters are evidentiary, and there is no record that they were introduced in evidence, nor called to the attention of the trial court; that none of said matters are part of the agreed statement of facts, and, therefore, unnecessary to a full understanding of the questions presented by this appeal, and are in contravention of Rule 30; and that appellee has waived any rights he might have had by reason of the matters set out in the amended abstract, because he went to trial without having interposed any objections based on matters set out in the amended abstract.

The appellee resists this by saying that all these matters are a part of the court records and files in this action, in which appellant has intervened; that the trial court took judicial notice of all of them, and considered them without formal introduction; and that they are all proper and material for present consideration.

In view of the conclusions we reach, this motion involves really nothing but the cost of printing of appellee's amendment. And because of our said conclusion appellee has all the costs to pay, no useful purpose would be served by striking the amendment, assuming that there is any ground for striking it.

The appellee moves to strike from appellant's abstract page 1 to and including line 13 on page 22, with the exception of Article 9 on page 13, which is lines 14 to 29 on page 13; and the motion is grounded on the claim that these matters are wholly unnecessary to a full understanding of the questions presented by appellant, and are in contravention of Rule 30. This motion, too, is denied.

On remand, judgment will be entered below in harmony with this opinion.—*Modified and affirmed.*

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

W. C. BRYANT et al., Appellees, v. O. S. MUNDORF et al.,
Appellants.

ATTORNEY AND CLIENT: Compensation—Trial of Cross-Bill as

1 “**Defense.**” An attorney who contracts to “defend” a defendant in divorce proceeding, and to receive a named sum in case of “trial,” and a lesser sum in case of settlement “out of court,” and who later files a cross-bill for divorce on defendant’s behalf, is, in view of the evident intent of the parties, as reflected in the contract and circumstances, held entitled to recover the larger sum, when plaintiff in the divorce proceedings voluntarily dismissed her action, and the cause proceeded to trial on the cross-bill, with divorce decree for defendant.

PLEADING: “Cross-Bill” as “Defense.” The filing in divorce
2 proceedings of a cross-bill on behalf of a client, and the trial of the same, may constitute a “*defense*” of the client, within the meaning of a contract relative to fees for “defending” the client.

ATTORNEY AND CLIENT: Contract Compensation if Action Set-
3 **tled “Out of Court.”** An agreement by an attorney with a defendant in divorce proceedings to accept for his services a named sum, in case of settlement “out of court,” has no application to a case where defendant filed a cross-bill for divorce, whereupon plaintiff dismissed, and the cross-bill went to successful trial for defendant.

Appeal from Pottawattamic District Court.—O. D.
WHEELER, Judge.

OCTOBER 2, 1920.

To the claim of the plaintiffs that a stated balance was due them for having given services as attorneys under

written contract, various defenses were interposed. The plaintiffs had judgment, as prayed, and defendants appeal. —*Affirmed.*

Tinley, Mitchell, Pryor & Ross, for appellants.

W. C. & T. J. Bryant, C. B. Clovis, and F. A. Turner, for appellees.

SALINGER, J.—I. Under the terms of the contract as written, as much as the trial court allowed (\$600) was to be paid, “when trial [of a suit for divorce instituted by the then wife of O. S. Mundorf] is completed.” The attorneys are to negotiate a settlement of that suit on his behalf if O. S. Mundorf suggests or orders it, and approves of it, and in case of settlement of that suit “out of court,” \$300 is all that is to be paid.

1. ATTORNEY
AND CLIENT:
compensa-
tion: trial
of cross-bill
as “defense.”

G. L. Mundorf guaranteed in writing “the payment of the \$600 fee provided to be paid in the above contract * * * also the \$300 fee.” One defense on part of guarantor is that, “because of accident and mistake, the guaranty is unintelligible; and that, through accident and mistake, there was omitted therefrom the statement that the fee was to be \$300 if the case was not tried, but disposed of otherwise than by a trial.” This defense needs no consideration, beyond pointing out the fact that there is no evidence of accident or mistake.

II. The contract provides that the plaintiffs “are to act as attorneys” in a named and pending divorce suit, brought by the then wife of defendant, O. S. Mundorf. They are to “defend” Mundorf “in said action.” They are “to try said cause for defendant” in the named suit and in court where it was pending, and to do this “to the best of their ability, regardless of the length of said trial.” They agree to defend “said case” for said defendant diligently; to consult witnesses; investigate testimony; to “de-

fend against the allowance of temporary alimony or other alimony; take depositions, if necessary; and to prepare all papers, pleadings, and filings necessary and proper to be drawn, prepared, or filed in said above-entitled cause or in connection therewith." They agree further "to negotiate for the settlement of said case," if ordered to do so, "and to conduct said settlement on behalf of said first party, and to prepare all necessary papers thereunto pertaining." But no settlement "shall be made or suggested, unless defendant orders and approves it."

The suit of the wife was dismissed by her without prejudice. The plaintiffs filed cross-bill, and obtained divorce for Mundorf on default. The defendants have paid \$300, and contend that is all that the contract obligated them to pay. Their theory is this: (a) The \$600 is due only if there is a "trial;" (b) the suit brought by the wife was, of course, not tried, because she dismissed it; (c) the contract is limited to mere resistance of the suit, and does not contemplate the filing of cross-petition; and (d), waiving that, there was no trial on the cross-petition, because the wife made default.

After all, here is a mere question of intention. Was it intended that nothing should be done that was not strictly "defensive," and that the large fee should be paid only in event that the defense involved a contested "trial?" In solving this question, we consider the circumstances attendant upon the making of the contract.

Before the wife of G. L. Mundorf instituted her divorce suit against him, she left him, and took one of the minor children with her. In her suit, she charged Mundorf with cruel and inhuman treatment, adultery, and drunkenness. She asked alimony in \$10,000, and attachment and the custody of one of the minor children. Despite all this, at the time the contract was entered into, the husband desired reconciliation. But surely, we may assume that, though that was his desire, he certainly was not willing to be found guilty on the charges made in the divorce petition, nor to yield voluntarily what was prayed therein. It surely was

intended that, if a reconciliation was not obtainable, the suit should be resisted. For Mundorf obtained contract that plaintiffs were "to defend first party in said action, and to try said case for defendant, and to defend against allowance of alimony, temporary or other, and to prepare all pleadings necessary or proper to be drawn, prepared, or filed in said cause or in connection therewith." It is conceded reconciliation became out of the question, and, if plaintiffs had resisted the suit by engaging in a trial, it would be conceded that the contract gave them what the trial court did. But they could not engage in trial of a defense in that particular suit, because the wife dismissed that suit. Now, was it intended that, if no contest was or could be had in the suit of the wife, the contract obligation to pay \$600 on the one hand and the agreement "to defend" on the other was dead? Is it not more reasonable to say that the husband was more concerned with having his family troubles adjusted finally, and as well as it might be done, than he was over whether there was a naked defense to the suit of the wife, or some other proceeding that would as well or better accomplish the major object? Is it not the reasonable construction that he wanted done what would be best under conditions foreseen or any unforeseen that might develop? The answer was filed in March, 1915. Later, and in the trial of another cause, evidence was discovered which seemed to justify divorcing the wife for adultery. Based on this, the plaintiffs filed a cross-petition, on April 30, 1915. The discovery was communicated to counsel for the wife, and it became reasonably probable that she would dismiss. With no cross-petition, the dismissal would leave the trouble as it was; the wife would keep the minor child she had taken; she would retain her status of wife, and could at any time rebring her suit. Now, what would success on the cross-petition accomplish? The obligation of husband would end. The adultery of the wife would give the husband the custody of the children, and, if alimony were granted the wife at all, it would be nominal. What was intended, if such conditions should arise? Suppose, when

the contract was made, it had been suggested that, by possibility, such a situation might come to exist. Would defendant have said that, in that event, the attorney should do nothing affirmative, and, if there was a dismissal, should take his compensation out of scaling the fee to \$300? We think he would have said, instead, that, in the suggested possible case, the attorneys should do what would be calculated to obtain as much as purely resistive defense would. It seems clear to us there would have been bitter complaint if a dismissal had put the adjustment of the husband's marital trouble out of court. On the whole, we are persuaded that, on the reasoning of *Clancy v. Kelly*, 182 Iowa 1207, it was intended that any action should be taken that would deny the wife a divorce, or settle that she should have neither alimony nor custody of the children. To be sure, it was not known, when the contract was made, that she was an adulteress, but none the less, all possibilities and needs for action could not be foreseen, and we think it may fairly be said the intention was to take such action as facts subsequently discovered would justify. The plaintiffs were to "consult witnesses and investigate testimony;" to take necessary depositions; to prepare and file proper and necessary pleadings, not only in the suit of the wife, "but in connection therewith;" and to defend against the allowance of alimony in any form,—and they were to defend "diligently." Surely, it was intended that these described activities should effect what would do the most for the client.

III. If defense had been made by answer only, and strictly as a defensive proceeding, the amount allowed the plaintiffs was, of course, proper. Was not the cross-bill the equivalent of "defending?" Is it not included in an agreement "to defend?" If it is, then the larger sum to be paid for "defending" was due. "Defense" has been defined to be, "The denial of the truth or validity of the plaintiff's complaint, which is extended and maintained by the defendant in his plea." And it has been said that:

2. PLEADING:
"cross-bill"
as "defense."

"Although the term 'defense,' in its strictly technical

sense, does not include a justification, but applies only to the denial of the complaint, in common parlance the word is used as applicable to any facts which defeat the action wholly or partially." 9 Amer. & Eng. Encyc. (2d Ed.) 175, 176.

We held in *Lindsay, Salinger & Co. v. Carpenter*, 90 Iowa 529, that, while a counterclaim is not, in strictness, a defense, an agreement to defend for a sum certain, includes service on a counterclaim presented in the case. It is said:

"The agreement to defend the case was certainly not understood to be limited to presenting defensive facts alone, but whatever might be properly presented on behalf of the client."

Under Paragraph 5 of Code Section 3566, the answer may contain a statement of any new matter constituting a counterclaim. As to the statute requirement that, if the pleading of one be verified, subsequent pleading by the other must be, we have held that an answer, though it contains a counterclaim, is such subsequent pleading. *Yarger v. Chicago, M. & St. P. R. Co.*, 78 Iowa 650. And a counterclaim is an answer. *Town v. Bringolf*, 47 Iowa 133. Both the suit by the wife and the cross-action deal with a settlement of the same contractual relation, and for that reason, too, the last is "a defense," in the eyes of the law. On that reasoning, we held, in *Wilson v. Wilson*, 40 Iowa 230, that, in an action for divorce, defendant may set up any matter connected with the subject of the action and occurring after its commencement and constituting a cause of action against plaintiff upon which affirmative relief may be asked, and that such matters constitute a counterclaim. By analogy, this is supported by *Foster & Co. v. Ellsworth*, 71 Iowa 262. There, the original suit was to cancel a tax deed executed to the grantor of the defendant. Plaintiffs, having failed to show that they or their grantors had title at the time of the tax sale, dismissed their petition. It is held that, notwithstanding the dismissal, defendant had the

right to proceed with the trial of the cause made by a cross-bill asking that title be quieted in defendant; and he was allowed to prevail, because the court could not consider any evidence of the invalidity of the tax deed where the attacker had dismissed his case, and therefore had not shown that he was the holder of the patent title.

We conclude the cross-bill was within the contract "to defend."

IV. But, if the suit of the wife was "settled out of court," the allowance below was more than the contract justified. Was there such settlement? Surely, the suit by

3. ATTORNEY
AND CLIENT:
contract
compensation
if action set-
tled "out of
court."

the wife was not "settled." In effect, she elected to dismiss, because her counsel were unwilling to risk a trial, after being advised of what evidence of her adultery it was claimed had been found. Nor was the mari-

ital trouble "settled;" for the cross-bill was proved up, and a divorce got by the husband. Nothing was compromised or abandoned by mutual consent. As well remarked in the opinion filed by the trial judge:

"A settlement cannot be made by one party. There must be assent of the other. It imports a meeting of the minds of two contenders. The term 'settlement,' when applied to a lawsuit, means payment, or accord and satisfaction, or something equivalent to accord and satisfaction. 'I have settled the matter' means it has been brought to a conclusion. 7 Words & Phrases, page 6449."

The contract relieved from payment if there was a settlement either suggested or ordered by the husband or approved by him. There was no such or any other settlement. What occurred was action that forced the wife to dismiss, and a pressing the divorce question to an end on cross-bill.

V. It may be granted the larger fee was not due unless there was a "trial." True, there was none in the dismissed suit.

Was there a "trial," within the contemplation of the contract? As to the cross-bill, there was. The fact that the defendant in the cross-bill defaulted, does not change

this. An issue was made in pleadings, submitted to the court, with evidence in its support, and decree obtained. See *Clancy v. Kelly*, 182 Iowa 1207.

"In a general sense, the term 'trial' means an investigation and decision of the matters in issue between opposing parties before a competent tribunal." 28 Am. & Eng. Encyc. (2d Ed.) 636, and cases cited.

VI. There is no merit in the claim that there was a settlement between the parties to this suit by the payment of the \$300 received prior to proving up the cross-petition. It was not a settlement in full. There is no satisfactory evidence that plaintiffs said it was such settlement. The evidence fairly indicates the plaintiffs intended no such settlement.—*Affirmed*.

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

TOM KASCOULTAS et al., Appellants, v. FEDERAL LIFE INSURANCE COMPANY, Appellee.

INSURANCE: Strict Construction of "Death" and "Disability"

- 1 **Clauses.** A policy which clearly distinguishes between loss by "*death*" and loss by specified "*disabilities*," and promises to pay the former to a named beneficiary, and the latter to the insured himself, with a proviso that the policy "does not cover *disability* resulting from intentional injury of the insured, inflicted by himself or any other person, whether fatal or non-fatal," does not exempt the insurer from making payment to the estate of the insured, in case the insured is *murdered* by the beneficiary.

INSURANCE: Murder of Insured by Beneficiary. The statute

- 2 (Sec. 3386, Code Supp., 1913,) which provides that policies of insurance issued by *benevolent* associations shall be payable to the estate of the insured in those cases where the named beneficiary feloniously takes the life of the insured, simply converts the common-law rule into statute rule, but does not abrogate the common-law rule that, under a like state of facts arising under a *nonbenevolent* policy, the same result must be worked out.

APPEAL AND ERROR: *Affirmance Without Prejudice.* When it affirmatively appears that plaintiff, as appellant, has a good ground for reversal, but pins his faith, in his "brief points," to an untenable ground, the appellate court will *affirm*, but may do so without prejudice—with permission to amend in the trial court, or to bring a new action. So held where appellant, seeking to recover as administrator on a *non-benevolent* policy of insurance, on the ground that the beneficiary had murdered the insured, contended for reversal on the untenable ground that Sec. 3386, Code Supp., 1913, was applicable, and demanded a reversal, when he should have assigned the common-law rule as the basis for his contention.

Appeal from Woodbury District Court.—GEORGE JEPSON, Judge.

OCTOBER 2, 1920.

THE decedent obtained a policy of insurance in the defendant company. Gus Kascoutas was the beneficiary, if he survived the insured. He intentionally caused the death of assured. The appellant administrators contend that this gives the estate of decedent the proceeds of said policy. The trial court took the contrary view, and directed verdict for defendant. Plaintiffs appeal.—*Modified and affirmed.*

McCormick & McCormick, for appellants.

F. H. Free and *C. A. Atkinson*, for appellee.

SALINGER, J.—I. Grant that public policy forbids that a beneficiary in a life insurance policy shall receive a benefit from that policy where he murders the insured. But no public policy condemns an undertaking to pay insurance to the estate of one insured who has died from injuries inflicted by the named beneficiary. We do not understand appellee to question this proposition, and do understand its position to be that it is liable to no one because it has a valid contract that there shall be no liability

1. INSURANCE:
strict construction of
"death" and
"disability"
clauses.

if the death of the insured is caused or results "from intentional injury of the insured inflicted by * * * any other person, whether fatal or nonfatal."

If the policy has such a proviso, it may well be claimed that no question exists here as to what shall be done about the payment of a policy where public policy prohibits the beneficiary from taking, and whether, in such case, payment must be made to the estate of the murdered insured. We may concede that, if there be such agreement as appellee claims, no such questions can arise, because, by contract, payment is due to no one. Decisions too numerous to cite so declare.

The first inquiry, then, is what contract exemptions has the appellee? It has but one, and it is this:

"This policy does not cover disability resulting from intentional injury of the insured, inflicted by himself or any other person (assaults for the purpose of robbery or burglary excepted), whether fatal or nonfatal."

If this proviso does not work total release from liability, then the trial court erred in holding that the estate of the murdered man had no rights, and that the fact that he was intentionally murdered not only destroyed the rights of the named beneficiary, who was the murderer, but as well released from liability to pay to anyone.

Had no beneficiary been named in the policy, then, in the absence of contract exemption, the policy was payable to the estate of the deceased, even though he came to his death through assassination. See *Grand Lodge I. O. M. A. v. Wieting*, 168 Ill. 408. As said, then, a most important question is whether there be a contract which discharges from liability solely because intentional murder caused the death.

1-a

Beyond the need of interpretation, there is a proviso that nothing shall be paid on account of *disability* caused by intentional injury by a third person, whether the injury does or fails to result in death. True, the policy does purport to deal with both loss of life and with disability. But

it does not follow that, therefore, the exempting clause deals with anything more than *disability*. And if the only contract exemption is confined to *disability* caused by intentional injuries, then no contract relieves as to *death* from such injuries. And, as said, no law stands in the way of collecting insurance on the death of a murdered insured, except that, if the murderer be the beneficiary, *he* cannot be the recipient of the payment. We must, then, settle whether the exempting proviso is not limited to *disability* caused by the murder—to what is suffered from the crime during the time in which the victim survives the attack. And here comes into action the elementary rule that, in construing such exceptions, the court will deal strictly with the insurer, who drafted the proviso, and will resolve all doubt in favor of payment.

In various parts of the policy, death and specified disabilities are, in terms, differentiated. There is specific provision as to whom indemnity for loss of life shall be payable in certain contingencies, and in this connection it is said that "all other indemnities are payable to the insured." With this distinction recognized by the insurer, it still, and in terms, limited the proviso to "disability." It may, therefore, well be said that no exemption from payment of death loss was intended. This is strict construction, but is demanded by the law. See *American Acc. Co. v. Carson*, (Ky.) 30 S. W. 879, and *Rosenberry v. Fidelity & Cas. Co.*, 14 Ind. App. 625 (43 N. E. 317). The contract, construed in entirety, can work such a distinction and justify such a construction. *Allen v. Travelers Prot. Assn.*, 163 Iowa 217. This is recognized in *Brown v. United States Cas. Co.*, (Tenn.) 88 Fed. 38, at 42. But in that case, the proviso exempts "from the result of intentional injuries," and the decision is that such wording cannot be construed to mean that the exemption is limited to harm from the injuries short of death. In *Burnett v. Railway O. & E. Acc. Assn.*, 107 Tenn. 185 (64 S. W. 18), an indemnity policy indemnified against physical injury resulting in disabilities described (up to a certain number of weeks), and provided

further that death should immediately terminate liability. There was no express provision as to death and payment therefor, and it is held the policy did not insure against death. The text in 1 Corpus Juris 466 declares that:

"A provision for the payment of a weekly indemnity during the period of total disability refers to the condition of a living person, and no recovery can be had thereunder for the death of the insured."

And see *Brown v. United States Cas. Co.*, (Calif.) 95 Fed. 935. And our statute (Section 3386, Code Supplement, 1913,) makes a distinction in terms between death and disability, by specifically speaking of both. It first deals with cases where life is taken, and declares that no beneficiary in a policy payable on death or disability, or who procures life to be taken or procures a disability, shall take the proceeds of the policy; next, that all benefits accruing to such beneficiary, either on death or disability, shall either become subject to distribution among the other heirs; or, if it be a case of causing disability merely, the benefits shall be paid to the disabled person.

II. The statute, Section 3386, Code Supplement, 1913, provides for a reverter to the estate of decedent, if he be murdered by the designated beneficiary. Such reversion is

upheld in *Schmidt v. Northern Life Assn.*,

2. INSURANCE:
murder of
insured by
beneficiary.

112 Iowa 41. In that case, it is declared:

"The wife (murderess and designated beneficiary) cannot recover, because it is contrary to public policy to allow her to enforce the claim. But this rule of public policy ought not to be extended so as to defeat all claims on the policy."

It is further said that, though public policy prevents recovery by the wife, the interest in the benefits to which the assured was entitled from the association was not destroyed. It expressly approved *Cleaver v. Mutual R. F. L. Assn.*, 1 Q. B. Div. (1892) 147. There it was held that, notwithstanding the wife murdered her husband, and was named as a beneficiary in his certificate, and though she could not recover, still the insurance money formed a part

of the husband's estate, and could be recovered by his administrator.

2-a

We do not understand that appellee challenges the rule formulated by what has just been said. What it does do, is to urge an avoidance.

It is the fact that the *Schmidt* case is but an application of said statute provision. And the statute deals with none but policies of insurance and certificates of membership issued by "benevolent associations or organizations." It is not shown that appellee is such association or organization, and, on the contrary, it is indicated that appellee is a commercial enterprise. But, for the purposes of the point now to be considered, it suffices that there is failure of proof as to the nature of defendant's structure.

Upon these premises, appellee makes the counter point that the statute does not apply because the policy sued upon was not the certificate of a benevolent association or organization, as contemplated in Section 3386, Code Supplement, 1913.

The statute reference to benevolent associations is not a casual one. It intends to recognize that equitable considerations enter into requiring a reverter, in the case of a certificate issued by a benevolent organization. It is pointed out in *Schmidt v. Northern Life Assn.*, 112 Iowa 41, that designating the beneficiary in such a certificate is an act revocable at the pleasure of the insured member; that, therefore, no beneficiary can have a vested interest until the insured dies; that sentence of life imprisonment is not generally recognized in this country to create civil death; that, therefore, all the named beneficiary has, while insured lives, is a mere expectancy; that if, for any reason, such beneficiary cannot take at the death, equity creates the condition of unenforcible trust, or lapse of legacy,—equal to a case of no beneficiary's having been named,—and the trust fund goes to those who would take, had no beneficiary been designated (citing *Rindge v. New England M. A. Soc.*, 146 Mass. 286 [15 N. E. 628], and *Newman v.*

Covenant Mut. Ins. Assn., 76 Iowa 61). Again, the *Schmidt* case grounds itself on the doctrine that, in the case of felonious killing by the named beneficiary in the certificate of a benevolent association, there exists a fund created by the payments made by the insured for the benefit of himself and others in his class, and that, if such trust fails, a resulting trust arises in favor of him who made such payments, or of his estate. In this, it is squarely supported by 1 Bacon on Benefit Societies (2d Ed.), Sec. 243 a, and *Bancroft v. Russell*, 157 Mass. 47 (31 N. E. 710).

2-b

Clearly, then, Section 3386, Code Supplement, 1913, controls nothing but policies issued by an association named in the statute. Defendant is not shown to be such association. Therefore, the *statute* gives plaintiffs no right to recover. And, if the statute is exclusive,—if it amounts to a declaration that there shall be no reverter to the estate unless the certificate is that of a benevolent association,—then plaintiffs may not recover in any form of action. We are of opinion the statute is not exclusive; that it does no more than single out and emphasize as to certificates of benevolent associations, and make rules as to reverter on such.

III. But does it follow there must be a reversal? An appellant may have good grounds for reversal, and fail because he presents none but untenable ones. In other words,

3. **APPEAL AND
ERROR:**
affirmance
without
prejudice.

the presentation may lose an appeal. We shall not cite cases for the proposition that appellant must stand or fall by his "brief points." He has but one on the vital point. It is this:

"Administrators can recover on a policy where the beneficiary has become disqualified from receiving under policy. Section 3386, Code Supplement, 1913. *Schmidt v. Northern Life Assn.*, 112 Iowa 41." In the argument *in extenso*, this "point" is interpreted by quoting said statute, to establish the basis for recovery. We have said that the statute gives no right to recover. That position is one of the grounds

of the sustained motion to direct verdict for defendant. As the court rightly sustained this one ground, it is immaterial now whether it erred in sustaining any or all of the others. It follows there must be an affirmance. But it is without prejudice to amending on remand by asserting a right to recover not based on said statute, or bringing new suit not based on said statute. We hold that the judgment appealed from should be deemed not in bar but in abatement; wherefore, we modify and affirm at cost of appellant.—*Modified and affirmed.*

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

I. F. KLEMM, Appellant, v. J. L. ADAIR, Appellee.

FALSE IMPRISONMENT: Proximate Cause. Evidence reviewed, and held wholly insufficient to present a jury question on the issue whether defendant's conduct was the proximate and efficient cause of the arrest of plaintiff.

Appeal from Des Moines Municipal Court.—THOS. L. SELLERS, Judge.

OCTOBER 2, 1920.

THE plaintiff charged that defendant instigated the arrest of the plaintiff; that he was arrested and jailed, though innocent. Actual and exemplary damages are prayed. A verdict was directed for defendant. Plaintiff appeals.—*Affirmed.*

C. C. Putnam and Judson E. Piper, for appellant.

F. T. Van Liew, for appellee.

SALINGER, J.—I. On the evening of the day of the alleged imprisonment, appellant was at his home, and a Ford car, belonging to his brother, and which appellant had been driving, was standing in front of his house. Defendant had a notion that this was a car that had been stolen from him, and finally got an officer to come to the place, and the officer looked the car over with a flashlight. The car was finally taken to the police station. That came about as follows: The officer reported its presence to police headquarters, informing the captain that it was there in the street without tail light or number, on the wrong side of the street, and with a key in. The captain responded he would send a car up to pull this car in, if he, the officer, would then drive it. The captain sent the police wagon up. Defendant and the officer were still present on the scene when the police wagon arrived. The officer then hitched onto it, and, on his invitation, defendant rode to the station with him, and, on reaching the station, the two men went into the captain's office. The plaintiff discovered that the car had been removed. He called the station, and advised the officers that his car had been taken. He was told to come to the station and see about it. He says he thought it over, and concluded he could be safe by doing this in the morning, and then returned to bed. After he was there a few minutes, a policeman came, and told him that he was wanted to go to the station. He put on his clothes, and, when he reached the street, he found the defendant outside. They all waited until the police wagon came, and then the three went in it to the station. When the car was first brought in, the captain attempted to find the plaintiff's residence by the telephone book. At this point, an officer told the captain he was going in that direction, and thereupon was told:

"You go up there and see if you can find this man, Klemm. It seems funny he wouldn't come down. There is something wrong about this matter,"—or something like that.

It was on this direction that Klemm was gotten out of

WILLIAM PICKENS, Appellee, v. MILWAUKEE MECHANICS
INSURANCE COMPANY, Appellant.

INSURANCE: Action on Policy—Incendiarism—Evidence. On the
1 issue whether the insured and his renter had feloniously burned
the insured premises and contents, witnesses should be per-
mitted to testify: (1) That one of the alleged conspirators had
been seen to leave the premises shortly before the fire; (2)
that, when one of the parties moved, shortly before the fire, to
the premises in question, he possessed and took with him but
a trifling amount of furniture; and (3) (there being relevant
counter testimony) that gasoline was not suitable for mixing
with paint, and that, if it had been so used, the smell there-
from would have disappeared in a short time.

TRIAL: Nonassumption of Agency. Instructions reviewed, and
2 held not to assume that a named party was an agent.

INSURANCE: What Constitutes "Soliciting" Agent. Testimony
3 that a party solicited and secured an application for insurance,
collected the premium, delivered both to the recording agent
of the company, and that the recording agent issued a policy
thereon and delivered it to the soliciting party, who, in turn,
delivered it to the insured, justifies a jury in finding that said
soliciting party was, under Sec. 1749, Code, 1897, the soliciting
agent of the company, even though such party was not, in fact,
in the employ of the company, and received no compensation
from the company.

APPEAL AND ERROR: Misconduct—Reversal on Other Grounds.
4 Alleged misconduct on the part of counsel for the prevailing
party will not be passed on, when a reversal is ordered on
other grounds.

Appeal from Wapello District Court.—C. W. VERMILION,
Judge.

OCTOBER 2, 1920.

APPELLEE, plaintiff, has verdict and judgment on a fire
policy issued by defendant. It appeals.—*Reversed.*

Jaques, Tisdale & Jaques, for appellant.

W. W. Epps and *A. W. Enoch*, for appellee.

SALINGER, J.—I. It was one theory of the defendant that plaintiff and his renter, Hammersley, had jointly burned the property insured by plaintiff. The property was bought on contract, and for \$500 (and insured for \$1,200). It burned within two weeks after the insurance was effected. At this time, only \$20 of the purchase price had been paid. But plaintiff claims he had added improvements in \$309.30. As to one incriminating circumstance, appellant is in error. While Curran did say that plaintiff advised him of the fire on the night of July 4th, and before there was a fire, Curran corrected this, on cross-examination, by stating that, after refreshing his recollection, he desired to say that this talk was on the day after the fire had occurred. In addition to what has been so far set forth, there was testimony that plaintiff went to insurance agent Curran, and procured insurance on the Hammersley household goods, first stating he wanted \$500, and finally getting Curran to make it \$800, and paying the premium on this insurance. There is a claim that this was gross over-insurance; that the property insured for Hammersley consisted only of a bed and stove. On the other hand, Curran testifies that he wanted to see the goods, and "looked in there," and saw there was an average amount of household goods, and, after satisfying himself, he then told them he would issue the policy; that:

"I satisfied myself, when I looked in there, that there was an average amount of household goods for the amount of the policy."

A near neighbor testified that the fire which burned the house insured by plaintiff did not start until 2 o'clock in the morning of July 5th. The house smelled of gasoline at 10 o'clock of that night. Plaintiff testified he poured gaso-

1. INSURANCE:
action on
policy: in-
cendiarism:
evidence.

line in some paint he put on the house, several days before the fire.

On the issue of this alleged joint incendiarism, defendant made profferts, to which objection was sustained. Some of these rulings were so clearly right that we will not lengthen this opinion by setting them out.

As to other profferts: A witness said that he saw someone driving away from or from the direction of the house, at about 10 o'clock of the night of the fire. It would seem that proffert to show that it was Hammersley, was rejected. Defendant offered to prove by the witness J. A. Underwood that he knows Hammersley, knew when he moved away to Rutledge, and that he didn't take very much with him; took a bed and a stove and a few other small articles. Offered to prove, further, that Hammersley did not have anywhere near \$800 worth of furniture; that all he had was some cheap furniture, such as is used by fishermen and clammers. Defendant also offered to prove that gasoline was not a proper ingredient to use to thin paint; and that, if it had been used, the smell would have disappeared in three hours; and that it could not be smelled in 20 to 25 feet away.

We hold that all these rejected offers dealt with relevant and proper circumstantial evidence, and that the objections to each of these profferts should have been overruled.

II. The defendant pleaded in avoidance several provisions of the policy, and averred that their violation by plaintiff defeated his right to recover. The court charged, and on this appeal it is the law of the case, that plaintiff could not recover unless he had shown by a preponderance "that said provisions of the policy were waived by the defendant company." The only alleged waiver submitted was conduct and knowledge of one Lundgren, claimed by plaintiff to have been the agent of the defendant. This involved having the jury pass on whether Lundgren was such agent. On that point, there was the following instruction:

"If, at the time said policy was issued by the defendant company or its agents, said company, or its agents solicit-

2. TRIAL: non-
assumption
of agency.

ing said insurance or taking the application therefor, if any, was informed by plaintiff of the true character and extent of plaintiff's interest in said insured property, and the true circumstances of his title and ownership thereof, and of the character of the lien thereon, then the defendant would be held to have waived the above-mentioned provisions of the policy."

If this were all, it might well be claimed, as appellant does claim, that the jury was, in effect, instructed that Lundgren *was* an agent of defendant, and that his knowledge, at the time he is alleged to have taken

3. INSURANCE:
what constitutes
"soliciting"
agent.

the application, was chargeable to the defendant. But what has been adverted to is not all. Immediately following, in the same instruction, is a definition of what is by statute made a soliciting insurance agent. This is, in turn, followed by a charge that the jury was to say whether Lundgren was shown by a preponderance to have been such an agent.

We hold that the charge is not vulnerable to the attack that it assumes the existence of a matter in dispute.

III. Another complaint of this instruction is that there was no evidence upon which to give it; that there is no testimony that Lundgren had any authority to represent defendant. The same point was raised by the overruled motion to direct verdict for defendant.

The appellee says there was sufficient evidence to take the issue of agency to the jury, and claims this is so because there was the following evidence: Cresswell & Grube were the recording agents of defendant in Ottumwa. Lundgren solicited this policy, collected the premium, turned it to Cresswell & Grube; they acted on his knowledge, issued the policy, delivered it to Lundgren, and he delivered it to Pickens, and Lundgren was paid for his services. Appellee says Lundgren is shown to be the subagent, solicitor, or clerk of defendant agency Cresswell & Grube, by his own testimony, which shows that he left a memorandum on the table at the office of Cresswell & Grube, received the premium for the policy from Pickens, paid it to Cresswell & Grube, received

the policy from Cresswell & Grube, and delivered it to Pickens. The undisputed testimony is that, at the time Lundgren claims to have taken the application involved in this case, he was taking orders for groceries, and he testified, also:

"I was working for Cresswell & Grube, and not for any insurance company they represented, and particularly the Milwaukee Mechanics Insurance Company."

Statute and case law combine against our sustaining the contention of the appellant, and prohibit us from holding that, as matter of law, there is no evidence that Lundgren was such agent as that his knowledge of the state of the title, etc., bound the appellant. Section 1749 of the Code provides as follows:

"Any person who shall hereafter solicit insurance or procure application therefor shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application or on a renewal thereof, anything in the application, policy or contract to the contrary notwithstanding."

A statute in substance like this one was construed in *Bennett v. Council Bluffs Ins. Co.*, 70 Iowa 600. There it was held that, by reason of this statute, if an accredited agent of an insurance company sent his clerk to solicit insurance, so much was not a prohibited delegation of power, whatever may be said of delegating to such a clerk the power to pass upon the application. In the *Bennett* case, as here, the delegation of power and the action of the clerk were not known to the insurance company. And this court said:

"But suppose the application, so filled up and signed, is presented to the company, and it issues a policy thereon, and receives the premium. Is it not bound thereby, even if it does not know who procured the application? We think a policy so issued would be a valid contract of insurance. If material, the company was bound to know who the agent was, and without doubt could be compelled to pay the loss, if one occurred. The statute should be construed, we

think, as embracing any case where a policy has been issued upon an application; and whoever procures such application must be regarded as the soliciting agent of the company issuing the policy."

It is further said that, at any rate, the accredited agent who issued the policy binds the insurer with his knowledge, and that, in the *Bennett* case, the accredited agent necessarily knew, since he had sent his clerk to procure an application, that the application returned had been solicited by the clerk. And finally, it is said that the defendant company was bound to know who procured the application, because its accredited agent (as here) had that knowledge when he issued the policy, and the defendant company was charged with knowledge obtained by this clerk, while soliciting and obtaining the application. The *Bennett* case has approval in *Dodge v. Grain Shippers Mut. F. Ins. Co.*, 176 Iowa 316, 330. Cases to like effect also have approval there, to wit: *London & L. Ins. Co. v. Gerteisen*, 106 Ky. 815 (51 S. W. 617), and *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177 (24 N. E. 100).

The court did not err in submitting as a question of fact whether Lundgren was such agent as that knowledge acquired by him bound the defendant.

IV. There is complaint that counsel for the prevailing parties was guilty of prejudicial misconduct. Since there must be a reversal without reference to whether this charge

is or is not well founded, we treat the complaint as a moot one, under the rule in *Davis v. Hansen*, 187 Iowa 583.

4. APPEAL AND
ERROR:
misconduct:
reversal on
other
grounds.

For the reasons stated in Division I, the judgment appealed from must be—*Reversed*.

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

QUAKER OATS COMPANY, Appellant, v. GEORGE KIDMAN et al.,
Appellees.

FRAUDS, STATUTE OF: Oral Testimony of Vendor to Prove Con-
1 tract. The oral testimony of vendor that he had neither sold
certain personal property to plaintiff nor authorized another
person to sell it for him is conclusive—may not be contradicted.

PLEADING: Refusal of Unnecessary Amendment. Complaint may
2 not be made of the refusal of an unnecessary amendment.

Appeal from Buena Vista District Court.—JAMES DELAND,
Judge.

OCTOBER 2, 1920.

ACTION for damages resulting from the alleged breach of an oral contract for the sale of corn. By direction of the court, the jury returned a verdict in favor of defendant, and plaintiff appeals from a judgment thereon for costs.—*Affirmed.*

Healy & Faville, for appellant.

E. M. Duroe and Bailie & Edson, for appellees.

PER CURIAM.—I. The defendant Hartung leased certain premises from his codefendant for the year 1916 by written lease, agreeing to pay as rental two fifths of the crop grown. In the fall, he gathered about 1,500 bushels of corn from said premises, and placed the same in a crib thereon, without division. Plaintiff alleged in its petition that, on or about January 18, 1917, defendant Hartung orally sold the corn, in pursuance of an agreement and arrangement between said defendants, au-

1. **FRAUDS,
STATUTE OF:**
oral testi-
mony of ven-
dor to prove
contract.

thorizing such sale. Only 810 bushels of the corn, for which Hartung was paid the agreed price of 88 cents per bushel, were delivered.

It is further alleged in plaintiff's petition that it expects to prove the terms of the alleged oral contract by the testimony of the defendants and each of them. Hartung made no appearance, but Kidman filed an answer, denying the allegations of plaintiff's petition, and admitted that Hartung sold certain corn to the plaintiff in January, 1917, for immediate delivery, but alleged that the contract pleaded was void, under the statute of frauds.

The defendant Kidman, called as witness on the part of the plaintiff, admitted that he was the owner of two fifths of the corn raised upon the leased premises and placed in the crib from which the 810 bushels were taken, and that it was agreed between himself and Hartung that they would sell the corn together; but denied that he either sold the corn to plaintiff or authorized his codefendant to do so. Whereupon, counsel for plaintiff called the defendant Hartung as a witness, and sought to prove by him that Kidman authorized him to sell his share of the corn to plaintiff, and that he acquiesced in such sale. This testimony was, however, excluded, upon objection of counsel for defendant. The written lease required the tenant to deliver the landlord's share of the grain to market.

Counsel for plaintiff also sought to show by one Lee that the defendant Kidman orally admitted that Hartung had sold the corn for him. This testimony was also excluded. Counsel for appellant contends that the offered testimony should have been received.

Section 4625 of the Code provides:

"Except when otherwise specially provided, no evidence of the following enumerated contracts is competent, unless it be in writing and signed by the party charged or by his authorized agent: (1) Those in relation to the sale of personal property, when no part of the property is delivered and no part of the price is paid; * * *"

Code Section 4626 provides certain exceptions to the

above statute, and Code Section 4627, that the same shall not prevent enforcement of contracts not denied in the pleadings, except in cases wherein it is sought to enforce a contract, or to recover damages for the breach thereof, against some person other than the maker. Section 4628 of the Code further provides that:

"The oral evidence of the maker against whom the unwritten contract is sought to be enforced shall be competent to establish the same."

Plaintiff relies upon the latter provisions of the statute. We have repeatedly held that, if the plaintiff relies upon the testimony of the defendant to establish the alleged oral contract, he must prove the same thereby, and cannot contradict or supplement the same by the testimony of other witnesses. In such case, the testimony of the adverse party must be sufficient in itself. *Auter v. Miller*, 18 Iowa 405; *Thorn & Stein v. Moore*, 21 Iowa 285; *Mighell v. Dougherty*, 86 Iowa 480; *Burnside & Co. v. Rawson & Co.*, 37 Iowa 639; *Johnson v. Holland*, 124 Iowa 157; *Marks v. McGookin*, 127 Iowa 716; *Olsen v. Peregoy & Moore Co.*, 182 Iowa 889.

It is true that counsel for plaintiff offered to prove by Hartung that Kidman authorized him to sell the corn; but this testimony, if received, would have flatly contradicted the testimony of the latter. This was not permissible.

II. It is, however, further argued by counsel for appellant that the objections offered to the excluded testimony were not sufficiently specific. It is true that some of the objections were general, but considered as a whole, they fully disclose the specific grounds upon which the same were based. Neither counsel for plaintiff, nor the court was misled by the failure of counsel to state specifically the grounds thereof.

III. Plaintiff offered in evidence a letter, identified as having been written by defendant's attorney, which, it is claimed, admitted the oral contract relied upon. The

2. PLEADING:
refusal of
unnecessary
amendment.

letter was excluded, upon the objection of counsel for defendant; whereupon plaintiff tendered, and requested permission to file, an amendment to its petition, alleging that

the defendant admitted the alleged contract in writing, basing the same upon the letter referred to. The court refused permission to file the amendment. The ruling of the court excluding the letter and refusing to permit the filing of the offered amendment is complained of by counsel for appellant. It appears from the record that plaintiff's attorney wrote a letter to defendant Kidman, in reference to the sale of the corn, and that he gave the letter to his attorney, requesting that it be given attention. The letter in question was written by defendant's attorney, in response thereto. The offered letter was not called to the attention of defendant, nor was he asked to testify that he authorized his attorney to make admissions for him, or that he knew the contents thereof. The letters are not set out in the record. Whether, if defendant's attention had been called to the letter, and he had admitted that the alleged admission was authorized by him, it would have been admissible as part of his testimony, relied upon to establish the oral contract, is not involved; but see *Olsen v. Peregoy & Moore Co.*, supra. If it were thus admissible, the offered amendment was unnecessary. It does not purport to set up a new cause of action. The record, therefore, does not present error in the ruling of the court excluding the letter, or denying permission to file the amendment.

IV. As stated above, the corn, when gathered, was placed in a crib without division. Plaintiff was the owner of three fifths, and the defendant of two fifths thereof. It was agreed between them that they would sell the corn together. Plaintiff sought, by the testimony of Hartung, to prove an agreement to own and dispose of the corn in partnership, but this testimony was excluded by the court.

Kidman admitted that the parties were to sell the corn together, but denied specifically that Hartung had authority to sell his share. This testimony, under the holding of the cases cited supra, could not be contradicted by the testimony of other witnesses. It is not claimed that the evidence elicited is sufficient to entitle it to recover. We find

no reversible error in the record, and the judgment of the court below is—*Affirmed*.

STATE OF IOWA, Appellant, v. JOE T. LAW, Appellee

CONSPIRACY: Adultery. An agreement to commit an offense which can only be committed by the concerted action of two persons, i. e., adultery, does not constitute an indictable conspiracy.

Appeal from Polk District Court.—JOSEPH E. MEYER, Judge.

OCTOBER 2, 1920.

A DEMURRER to an indictment charging the defendant with the crime of conspiracy to commit adultery with one Clara Watts was sustained, and the State appeals.—*Affirmed*.

H. M. Havner, Attorney General, *F. C. Davidson*, Assistant Attorney General, for appellant.

C. C. Putnam, for appellee.

STEVENS, J.—The ground of the demurrer is that the indictment which charged the defendant, a married man, with conspiring, confederating, and agreeing with one Clara Watts to meet together in a room of a hotel in Des Moines, Iowa, for the purpose of committing adultery, does not allege a criminal offense. The consummation of the act is also alleged. No third party is involved. The prosecution is based upon Section 5059 of the Code of 1897.

The precise question presented has not been passed upon

by this court, but has been before the courts of other jurisdictions. So far as we are advised, they have uniformly held that an agreement to commit an offense which can only be committed by the concerted action of two persons does not amount to a conspiracy. *Shannon v. Commonwealth*, 14 Pa. 226; *Miles v. State*, 58 Ala. 390; *State v. Huegin*, 110 Wis. 189 (85 N. W. 1046); *Thomas v. United States*, 156 Fed. 897; *United States v. Dietrich*, 126 Fed. 664; *United States v. New York Cent. & H. R. R. Co.*, 146 Fed. 298; *United States v. Burke*, 221 Fed. 1014. To the same effect, see 2 Wharton on Criminal Law (11th Ed.), Section 1602.

The crimes most frequently referred to as coming within the class designated are adultery, bigamy, incest, and dueling. An implied recognition of this rule is contained in *State v. Clemenson*, 123 Iowa 524. Agreements between a victim and another person to produce an abortion, and for the transportation of a female from one state to another for the purpose of prostitution, are cited by the attorney general as analogous in principle to the case at bar; but the court, in *United States v. Holte*, 236 U. S. 140, in which the accused was charged with having conspired with another person for her transportation from Illinois to Wisconsin for the purpose of prostitution, specifically recognized the principle above stated. The act of producing an abortion may be committed by a pregnant woman upon herself, without the concurrence or concerted action of another person, but the crime of adultery is possible only by the concerted action of two persons. In such case, the agreement between the parties is a part of the offense itself. If, however, the agreement charged is between several persons, and is to cause the offense to be committed by others, or between a member of the combination and a person outside of it, it may amount to a conspiracy. *State v. Clemenson*, supra. The agreement charged in the indictment is limited to the defendant and the woman with whom the unlawful act was committed. There was no participation therein by a third person. In harmony with the uniform course of judicial decisions, we hold that the indictment does not charge

crime. The demurrer was, therefore, properly sustained.—*Affirmed.*

WEAVER, C. J., LADD and ARTHUR, JJ., concur.

DORA VEEDER, Appellant, v. FRED C. VEEDER, Appellee.

DIVORCE: Impossibility of Obtaining Corroboration. Corroboration of the truth of the assigned ground for divorce must be produced, even though, from the very nature of the wrongful act, it may be practically impossible to obtain such corroboration. So held as to a charge of excessive sexual indulgence.

DIVORCE: Untrue but Justifiable Accusations. Accusations of misconduct which are untrue in fact, but made in good faith and in the reasonable belief of their truth, are not grounds for divorce, even though accompanied by a measure of abuse and threats prompted by such justifiable belief.

DIVORCE: Bad Faith in Consummating Marriage—Effect. Entering into the marriage relation in bad faith, and with ulterior motives, may present a very persuasive reason why such person should be denied a decree of divorce.

DIVORCE: Bad Faith of Wife as Grounds. One party to a marriage may not have a divorce on the sole ground that the other party entered into the relation in bad faith, and with ulterior purpose of obtaining the property of the applicant for divorce.

DIVORCE: Nonproof of Loss of Health. Proving grounds for divorce without proving that health or life has been endangered thereby, presents a total failure of proof.

Appeal from Wright District Court.—R. M. WRIGHT, Judge.

OCTOBER 2, 1920.

PLAINTIFF sought and was denied a divorce. Defendant filed cross-petition, and thereupon obtained divorce. Plaintiff appeals both from the denial of a divorce to her and the

granting of one to defendant.—*Affirmed on plaintiff's appeal; reversed on defendant's appeal.*

Berry & Hill, for appellant.

Healy & Thomas and *Ladd & Rogers*, for appellee.

SALINGER, J.—I. One charge is that the excessive sexual demands of the husband constituted cruel and inhuman treatment. We may assume that such demands may be such treatment. We may assume that the testimony of the plaintiff shows such treatment. But a most careful reading of the record fails to disclose any corroboration.

1. DIVORCE:
impossibility
of obtaining
corroboration.

We recognize that, in the very nature of things, corroborative evidence supporting such an accusation is difficult to obtain. But that, of course, will not change the statute. Upon that charge or any others there may not be a decree of divorce without corroboration. That the corroborative evidence may be difficult to obtain is the misfortune of plaintiff, which, however, cannot repeal the statute. Indeed, it may not be amiss to add that there was at least one occasion when corroborative testimony in some degree could have been obtained, and would naturally have been obtained, and yet was not gotten. Plaintiff testifies that, on one occasion, she was driven from her bed by the conduct of the defendant, and sought refuge with a nurse, sleeping in another room. It would have been most natural to make some declaration as to the alleged cause for coming into this room and retiring there with the nurse, and not wholly unnatural to at least intimate the reason now asserted for it. But not a suggestion of the sort, which might possibly have been admissible as *res gestae*, was made. On the contrary, the explanation given was that she was disturbed by the snoring of one of the children, sleeping in the room of herself and husband, because of pressure of company. This charge fails for lack of corroboration.

II. Appellee contends that the sole basis of plaintiff's

application for a decree of divorce is cruel and inhuman treatment, worked by alleged excessive demands on part of defendant. We do not so read the petition.

2. DIVORCE:
untrue but
justifiable
accusations.

Such treatment is further claimed to have been suffered because, at the time when plaintiff was away from the home of defendant, and pregnant, and she became ill with chills and fever, and was confined to her bed at the home of her parents, that, on the forenoon of a given day, defendant came there, and, while plaintiff was confined in bed, as aforesaid, he cursed and abused her, threatened and accused her of committing an abortion, called her a murderer and destroyer of a child, and threatened her with prosecution for murder. She further alleges that the aforesaid abuse and threats caused her much pain and suffering; that she became very weak and nervous; that, during the afternoon of that day, she suffered a miscarriage, effected by said abuse, cursing, and threats; and that the miscarriage caused her much pain and suffering, both mentally and physically, and compelled her to obtain medical treatment; that she was confined to her bed for several days; that the defendant repeated his visit, while the plaintiff was still confined in bed, and again called her a murderer, a destroyer of a child, and threatened to prosecute her for murder; that said treatment caused her a relapse, and to suffer much pain, mentally and physically, to such an extent that it actually endangered her life.

The testimony shows the alleged conduct, and there is corroboration. But the record satisfies us that, even if the accusations were, in fact, unfounded, the husband had reasonable ground for believing them to be true. Their making under excitement and agitation caused by that belief does not constitute the cruel treatment that will base a divorce. No case has gone beyond treating certain accusations made without belief in their truth or wantonly, as such cruelty.

2-a

The appellee urges that the marriage of the plaintiff to

him was the result of a conspiracy on her part to obtain his property; that she entered into marriage while telling

3. DIVORCE: bad faith in consummating marriage: effect. others that she was filled with hate of the defendant; and that this fact has large bearing in sustaining the court in having granted a decree of divorce to defendant on

his cross-petition. The appellant responds that this alleged mental attitude on the part of the wife is immaterial and irrelevant, if it were conceded that the evidence proves the existence of such an attitude. So far as the petitioner of the plaintiff is concerned, it is *not* immaterial that she failed to enter the marriage relation in good faith, and was actuated by ulterior and improper motives only. A court of equity might well deny relief to a suitor seeking a divorce, because it found he did not enter the court with clean hands. See *Chapman v. Chapman*, 181 Iowa 801. But we dispose of this point with the holding that the evidence fails to establish the charged conspiracy and conduct.

For reasons stated, we sustain the denial of divorce to the wife.

III. On the cross-petition, however, this point is to be viewed from a different angle. That a woman who married merely to get property, and while hating her husband, might, therefore, be denied a divorce sought by her, does not establish that the husband may obtain a divorce because the relation was entered into by the wife in that spirit.

4. DIVORCE: bad faith of wife as grounds.

A defense to her application is one thing. Affirmative support of his application is quite another. When it comes to the question of whether he was entitled to a divorce, he must prove statute grounds. Such attitude of the wife or husband is not made one of the causes for divorce. It follows that, so far as the decree entered on the cross-petition is concerned, the alleged conspiracy is immaterial, were it proved.

IV. Did the court fall into error in sustaining the cross-petition? This petition, too, is, aside from said conspiracy, based on the charge of cruel and inhuman treat-

5. DIVORCE:
nonproof of
loss of
health.

ment, such as to endanger the health and life of the defendant husband. The specifications are that, during the month of August, 1916, plaintiff (the wife) ascertained herself to be pregnant, and immediately insisted upon a criminal operation; that defendant refused his consent, and warned different doctors in the neighborhood of this intention on the part of the plaintiff, and advised her not to be guilty of such an act; that thereupon, and about the middle of August, 1916, plaintiff left his home, and shortly thereafter caused an abortion to be performed on herself, and thereafter became very sick, at the home of her parents; that she had stated, prior to the act, that she would cause same to be done, and would never bear a child to defendant; said that she despised, hated, and loathed him, and had no intention to act as a wife to him; that, after the act had been, in fact, performed, she stated that she had procured it to be done, and was glad of it, and had no intention of bearing a child to defendant; that he had protested against her declared intentions, and made every effort in his power to prevent same; that he did not know it had actually been performed until sometime thereafter, and is unable to state by whom it was, in fact, performed.

It proves unnecessary for us to decide whether this charge is established. For, assuming that it is, the cross-petitioner has utterly failed to establish the vital allegation that said conduct has endangered his health or life. He pleads that, "as a result of the conduct of the plaintiff, as hereinbefore set forth, the defendant has become seriously sick physically; that he has been advised by his physician that his heart condition is dangerous, and has been brought about by worry, excitement, and trouble," and he pleads further that he should not be required to longer live with or support the plaintiff herein.

True, his counsel states in argument that, after the abortion, the husband was sick and in poor health, as a result of his grief and sorrow; that his health was broken and his life endangered, as a result of grief and worry because of

plaintiff's conduct. But, of course, we must be governed by the evidence, rather than counsel's deductions from it; and, in considering the evidence, we must note, too, the rule that what will be deemed sufficient impairment of the health of the wife will not always be deemed sufficient as to the husband. See *Moir v. Moir*, 182 Iowa 370.

The wife raises squarely that decree on the cross-petition was erroneously entered because there was no proof that the alleged conduct of the wife had endangered the health or life of the husband. What is the evidence? A son of the defendant's stated as a witness that "lately" the father had not been able to work in the field, because he was sick; but he makes no statement as to what the ailment was, or how serious or otherwise it was.

The defendant weighed, at the time of trial, about 240 pounds. Another son of his testifies the father had grown heavier and much fleshier, within the last year or two. Nellie Pierce, a nurse in attendance in the house, had it suggested to her by a question that defendant appeared like a man that wasn't in good health, and answered, "I didn't notice that at all." Being asked whether she did not notice that he would go to sleep as soon as he would lie or sit down, she answered, "Well, I think this was only natural; he was up a good deal at night." This would seem to be literally all the evidence that the alleged conduct of the wife caused a physical and mental condition, or both, that endangered the life or health of the husband. It clearly does not establish what is claimed for it. We are well satisfied the evidence fails on this point. Waiving all other questions, then, it seems manifest that it was error to grant the husband a divorce on his cross-petition. See *Welch v. Jugenheimer*, 56 Iowa 11.

On the appeal of the plaintiff, the decree denying her a divorce must be affirmed. The decree granting the husband divorce must be reversed.—*Affirmed on appeal of plaintiff; reversed on appeal of defendant.*

LADD, PRESTON, and STEVENS, JJ., concur.

BERTHA WHELTON, Administratrix, Appellee, v. **CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY**, Appellant.

NEGLIGENCE: Contributory Negligence Per Se. One who, in full
 1 possession of sight and hearing, and without distracting circumstances, walks at night on a railway track and up a heavy grade, and permits himself to be hit from the rear by a heavy freight train, drawn by two engines without headlight, but with unusual noise, is guilty of contributory negligence *per se*.

NEGLIGENCE: "Last Clear Chance." The "last clear chance"
 2 doctrine is not available to an injured party who, by his own pleadings or otherwise, negatives wantonness or the essential fact that the injured party was seen at any time prior to the injury.

Appeal from Woodbury District Court.—**W. G. SEARS**, Judge.

OCTOBER 2, 1920.

PLAINTIFF has verdict and judgment on a claim that the negligence of the appellant injured her intestate. The defendant appeals.—*Reversed*.

Hughes, Sutherland & O'Brien and *J. U. Sammis*, for appellant.

George Yeaman and *Jepson & Struble*, for appellee.

SALINGER, J.—I. Decedent was not a trespasser, but a licensee. The claim and theory of the plaintiff is that decedent was walking on the track, and was killed by the negligent operation of a train that overtook
 him.

1. **NEGLIGENCE:**
 contributory
 negligence
per se.

It is suggested for the appellant, in effect, that the physical facts negative that dece-

dent was killed by being struck by the front end of the train. And appellant suggests other theories as to how the decedent came to his death. If, on assuming the theory of plaintiff to be correct, we must still hold that plaintiff cannot recover, we shall have no need to consider the validity of opposing theories advanced. It is one branch of the claim of the plaintiff that, on the train behind plaintiff, no bell was rung and no whistle blown. Let us assume that this is so. Let us further assume that the witness who speaks to it says he does not know when decedent looked back, does prove that decedent "looked back occasionally." Now it is shown without dispute that decedent had good hearing, and that it was night when decedent was struck. Concede, for the sake of argument, that the sense of sight was made proper use of. But, if the approaching train must have been heard in ample time to step off the track, what does it matter that its approach was not announced by either bell or whistle?

What is the state of the evidence on warning other than by bell or whistle?

The train was running on a very steep grade,—15 feet in 1,200,—and there were curves and reverse curves. It consisted of 26 loaded freight cars, and needed and had two engines. As decedent and his companion were walking the track in front of this train, they were able to understand what each said to the other. It is conclusively shown the train was making an unusual amount of noise, and it was a physical impossibility for these engines to haul that train up these grades without a great deal of puffing and noise; and it is testified to without dispute that the two continued to walk right on their way, and paid no attention to the train.

Not only is it so shown that the train must have been heard by decedent, but it is established that a witness who saw decedent on the track did at that time see and hear the train very plainly. True, whether one is guilty of contributory negligence is ordinarily a jury question. That proposition requires no citations. But all fact questions

in a trial at law are usually for the jury. But as clear as all this is, is it that what is ordinarily a fact question may become a law question. It does become one when such fact is not in dispute. There is created a law question: to wit, the effect in law of the established fact. That is the situation here. That decedent had the duty to use his sense of hearing needs no support by citation. It is conclusively shown that he did not perform that duty, that he had ample opportunity to perform it, and that he was injured because he did not obey what his hearing must have suggested—leaving the track.

Contributory negligence bars recovery, unless the doctrine of last clear chance may be submitted to a jury.

II. In the first place, the last clear chance rule is not relied on in the petition. It need not be pleaded to, but, when pleaded, it throws light on what the plaintiff asserts

in doctrine. There is no allegation that the
 2. NEGLIGENCE: employees of the defendant acted wantonly,
 "last clear or that they actually at any time did dis-
 chance." cover the presence of decedent on its tracks.

The allegation is that the employees were negligent in that they could and should, in the exercise of ordinary care and diligence, have discovered the decedent upon the tracks; that they were negligent in failing to discover the perilous position of decedent, and were careless and negligent in not stopping the train in time to have avoided striking and running over him. This is all a plea of *original* negligence.

Second, the petition negatives that the decedent could be or was seen. One ground of negligence relied on is that the engine was not equipped with any headlight, and that it was negligent not to have sufficient headlight to have enabled decedent to become aware of the approach of the train. Another allegation of negligence is that the train was running at a high and dangerous rate of speed, and in excess of 35 miles an hour. It may be conceded there is a conflict on whether these allegations are true. But, be that as it may, these allegations bind the one who makes them. When their truth militates against the one who pleads

them, they must be taken to be true, as against him. How can it be said that the employees of the defendant wantonly ran over the decedent though they saw him in time to avoid injuring him, when these employees were operating a train in the nighttime, running at over 35 miles an hour, and without a headlight? To do these things is, of course, negligence. But certainly, it is no evidence that the decedent was, in fact, seen at all, or seen in a position of peril in time to avoid striking him. Under the allegations of the petition, and under the assumption that these allegations are true, not only has plaintiff failed to make a jury question of the last clear chance, but presents a record which negatives what must be shown to invoke the doctrine.

It follows that the judgment below must be—*Reversed*.

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

JENNIE WRIGHT et al., Appellees, v. LESTER WRIGHT et al.,
Appellants.

DEEDS: Deed to Wife with Consideration Paid by Husband—Presumption. A deed made to a wife at the instance of her husband, who furnished the consideration, creates a presumption of gift to the wife; and such presumption, after the death of the parties, can be overthrown only by evidence which is clear, satisfactory, and convincing. Evidence reviewed, and held insufficient.

WILLS: Devise (?) or Dower (?)—Election. A husband who was devisee under his wife's will, and who, as executor, claimed to take under the will, and never claimed to take dower interest, will be held to have elected to take under the will.

Appeal from Lucas District Court.—F. M. HUNTER, Judge.

OCTOBER 2, 1920.

ACTION for partition of certain property in Iowa and lands in Colorado and Nebraska. There was a decree for plaintiffs, finding that some of them were the owners of certain portions of the property in controversy, and ordering partition of the remainder. The defendants appeal.—*Reversed.*

Hickman & Wells and *E. A. Anderson*, for appellants.

J. A. Penick, C. W. Stuart, Wm. Collinson, and J. W. Purinton, for appellees.

PRESTON, J.—The real contest is over the ownership of the property. The legal title to the property was in Mary J. Wright, at the time of her death, March 16, 1910, except that some of the property had been conveyed by George B. after her death, and, as defendants allege, reinvested in other lands, some of which was thereafter conveyed without consideration, to others who are parties to this suit. The issues, which we cull from the pleadings contained in 43 pages of the abstract, stated as briefly as may be, are that the plaintiffs at first alleged that plaintiff Jennie Wright, the second wife, and the surviving spouse of George B. Wright, deceased, was the owner of a one-ninth share, the other appellees of two ninths, and the appellants of six ninths of the real estate in controversy; that the real estate involved was what remained, undisposed of, of the real property of which Mary J. Wright, the deceased first wife of George B., died seized, and in which George B. had, at the time of his death, a distributive share of one third. Defendants denied that appellees had any interest in the real estate; denied that George B. had a one-third share; but alleged that he, in his lifetime, elected to take a life estate, under the will of his deceased wife, Mary J., in lieu of a distributive share. Defendants also pleaded former adjudication, for that the said George B., in an application

1. DEEDS :
deed to wife
with consideration paid by
husband :
presumption.

by him to construe the will of his deceased wife, was adjudged to have only a life estate in the property, and that such decree and finding of the court was not appealed from; also estoppel and laches; and, by cross-petition, asked partition of the real estate of which Mary J. died seized, including the real estate described in the petition, among themselves, as heirs of Frank P. Wright, deceased, the nephew of George B., who lived with and worked for George B. and Mary J. from the time he was 15 years of age until he was married, at 30, and who was the devisee of the property, under the will of Mary J. Mary J. and George B. had no children, and no direct heirs. Frank was treated as a son. In the view we take of the case, it will not be necessary to determine all of the foregoing issues presented.

Before the trial, plaintiffs filed their amended petition, in which they claimed absolute ownership of all the real estate, under an express oral agreement between Mary J. and George B. that she should hold the legal title of said property in trust for him until his death, when it was to vest in her. Plaintiffs further alleged that Mary J. had no money or property of her own, and that her husband, George B., purchased the real estate in controversy, from time to time, and paid the purchase price therefor himself, and had the title of the same conveyed to Mary J., his wife, under the express oral agreement before stated. Though plaintiffs allege that there was an express oral agreement, they do not claim to have any written evidence thereof, and do not now claim an express trust. They rely on the claim that there was a resulting trust.

Ida M. Purinton and Edith Buckalew, the nieces of George B. and Mary J. Wright to whom George B., in 1917, conveyed 160 acres of land in Colorado, intervened, claiming to be owners of that land. They alleged that such land was purchased by George B. in 1913, and paid for in part by the conveyance of certain town lots, standing in the name of Mary J. Wright. It was conceded that there was no consideration for these conveyances; and one of the interveners testified that she was surprised when she was notified that

George B. had made the conveyance to her. Plaintiff Jennie Wright, the surviving spouse of George B., claims to own some of the property situated in Nebraska, under a deed from her husband to her, executed after the death of his first wife, and on April 29, 1913. This was about a month after he married Jennie, which marriage was on March 26, 1913. It appears that this land was purchased with proceeds of property, real and personal, which had before stood in the name of the first wife, Mary J. The stallions, jacks, and other personal property were assessed a part of the time to him, and a part of the time to her. There seems to have been no consideration for this deed, and the testimony shows that, when George B. passed the deed to his wife, he made the remark that it was a good present for her. Defendants deny that George B. bought the Colorado land with his own money, and allege that interveners acquired the title with full knowledge of the facts, and without paying any consideration.

The will of Mary J. Wright, executed August 18, 1892, and probated August 23, 1910, omitting formal parts, provides:

"First. I will and bequeath to my beloved husband, George B. Wright, the use and control of all my estate both real and personal of whatsoever kind or character it may consist of at my death, for his use and benefit during his natural lifetime with full power and authority to sell and convey any and all real estate I may die seized of and to reinvest the proceeds as he may think best and for the best interest of my estate.

"Second. At the death of my beloved husband, George B. Wright, I will and direct that whatever part or parcel of my estate, if any, then remaining unexpended, both real or personal, shall go to our nephew, Frank P. Wright, son of S. J. Wright, deceased."

It appointed George B. Wright executor, and he qualified and acted as such. In August, 1910, George B. Wright asked the court to construe said will to mean that he is vested with the absolute title to all the property belonging

to said Mary J. Wright. Notice of such application was served on the defendants herein: and, in November, 1910, the court, Judge Vermilion presiding, made an order construing the will to mean that, by the first paragraph, George B. was given the use and control of the entire estate during his natural life, with power to sell and convey the real estate belonging to the estate, and reinvest the proceeds as he might deem for the best interest of the estate, and that the remainder of said estate, at his death, be disposed of as in said will directed; that George B. was given a life estate in the entire property, with power to sell and convey, and to invest the proceeds for the benefit of the estate, with a remainder at his death to the heirs of Frank P. Wright. This order was not appealed from. As stated, some of the properties were sold by him thereafter, and the proceeds reinvested, and the title changed, as stated. On December 7, 1916, George B. Wright executed his will, which, omitting formal parts, follows:

“Second. I will and bequeath to my wife, Jennie Wright, the one third of my estate both real and personal.

“Third. I will and bequeath all the remainder of my estate, both real and personal, and share and share alike, to my following named nephews and nieces: Della M. McDonald, Georgiana McMains, Ida Histed, Maggie Brown, both residing at Buffalo, New York; George B. Huyck, William Huyck, William Wright. Austin Wright. Mary Funk, Ollie Wright, W. P. Beem, Frank Beem, Frank Coles and Lulu Coles.”

The trial court found that the different properties were purchased by George B., and the title taken in his wife in trust; that he did not intend to convey to her any present beneficial interest; that interveners are the owners of the Colorado land; that Jennie Wright is the owner of the Nebraska property; and that plaintiffs are entitled to partition of the remaining real estate, describing it. George B. died on May 8, 1917.

Mary J. and George B. were married in 1863. They were living on a rented farm, until they bought a farm, in

1873. It is claimed that, some time between 1863 and 1873, when the first property was purchased, he inherited some \$1,100 or \$1,200 from his father. The trial court so found, and that the proceeds thereof went into the land first purchased. Appellants challenge the sufficiency of the evidence to sustain such a finding. One of the witnesses says that George B. at one time boastfully said he had inherited \$800 from his father. But, conceding that he inherited the amount first stated, there is no direct evidence that this was invested in the land. Plaintiffs seek to draw the inference that he did so, from the fact that, as they say, Mary J. had no property and no separate occupation; but the evidence shows that George B. was sickly all his life, and further shows that Mary J. was an industrious and hard-working woman; that she sold butter, eggs, chickens, etc.; and that, at one time, she had a one-fourth interest in a small house and lot, of the total value of about \$600 or \$700. One of plaintiffs' witnesses testifies that George B. bought the interest of the other three heirs. It is strongly urged by appellees that this was, in fact, her property, and that this small amount of property is the property referred to in her will; though she does not, in the will, specifically describe or devise any particular property. But George B. appears to have managed and treated this the same as he did all the property standing in her name. The first property purchased was bought on September 10, 1873, and was a farm of 83 acres, with a few acres of timber, and was deeded by Hunt to Mary J. Wright. The consideration expressed was \$3,130. Money was borrowed to pay a portion of this. This 83-acre tract was conveyed by Mary J. Wright and her husband to Hall, March 5, 1908, for \$8,000. On the same date, Hall and wife executed a mortgage to Mary J. on the same land for \$3,500. After the purchase of the farm in 1873, other tracts and city properties were deeded to her at different times, in 1888, 1893, 1900, 1902, 1903, 1904, 1907, and so on. The consideration for the different transfers is: One for \$1.00, another for \$50, \$482, \$500, \$650, \$1,000, \$1,500, and so on. As said, after the death of Mary J., and

after George B. had been appointed executor, he conveyed some of the properties, and reinvested in other properties, taking the title in his own name, and thereafter conveying to different ones; and, 5 or 6 days after the death of his first wife, he procured quitclaim deeds from one or two of Mary J.'s relatives for the consideration of \$1.00, taking the title in himself, and conveying whatever interest they had, if they had any, to all the property standing in her name; and one of such quitclaim deeds recites that she died intestate. It is claimed by appellees that these circumstances tend to show that, in making the conveyances to his wife, Mary J., or having others do so, it was not his intention to vest her with any beneficial interest, but that such conveyances were made to her as trustee. This matter will be referred to later; but we may say in passing that these matters might also show that he was seeking to procure a title in himself, and then convey it to others, for the purpose of defeating the devisees under the will of Mary J. It appears to us that conveyances by him after her death do not have a very important bearing on the question of his intention at the time the prior conveyances were made to her.

1. On the proposition as to whether George B. did furnish the money to purchase the property, the title of which was taken in Mary J., we may say that though, as said, there is no direct evidence, there are some circumstances tending to so show. Some of them have already been referred to. Neither seems to have had any considerable amount of money, and the properties purchased at different times may have been made off the properties. George B.'s sister testifies that he told her he did not have a 50-cent piece, when he moved onto the farm. Perhaps the strongest circumstance relied upon is the testimony of two or three relatives of George B.'s, and interested witnesses, as to declarations by Mary J. that George B. had bought the properties, or some of them, and that she was willing to execute deeds as he should request. These declarations were made a long time ago, and at least one of the witnesses so testifying was very old. Such testimony is, under the

rule, subject to much imperfection and mistake. Furthermore, there is evidence, under the record, of contrary declarations by her. There is testimony as to improvements, the carpenter or contractor testifying that he made the contract with George B. to improve or partially rebuild a house, and in the sum of some \$2,500 or \$2,800, also for a furnace; but that the property so improved was, for the most part, the homestead of both, and that the benefit would inure to her, as to property which was their homestead. It does not appear to us that it has been proven clearly that George B. did furnish the money for all these properties, the title of which was taken in his wife. But conceding, without definitely deciding, that he did so, it is contended by appellants, and conceded by appellees, that the fact that it was so taken in his wife's name raises no presumption that the title was so taken in trust, but that, on the contrary, it is presumed that the wife was intended to be a beneficiary.

2. The rule being conceded, the burden is upon the plaintiffs. The deeds themselves are strong evidence of title. In addition to this, if George B. did furnish the money, the presumption is that he procured the title to vest in her as a gift, or for her protection. Under such circumstances, the rule is, and, where both parties are dead, ought to be, that, to overcome the deeds and the presumption, the evidence must be clear, satisfactory, and convincing. *Smith v. Smith*, 179 Iowa 1365, 1372; *DeFrance v. Reeves*, 148 Iowa 348; *Murphy v. Hanscome*, 76 Iowa 192. The rule is conceded. We are not so satisfied. We shall not go into the evidence very much in further detail. The circumstances relied upon by appellees have been, for the most part, related. Other circumstances are that George B. took possession of the property as he acquired it, and enjoyed its income; that he listed it with agents for sale, fixing the price and terms. But Mary J., too, was in possession, as well,—at least of a part of it; and he could well have been acting for her in listing it. His conduct after her death has been referred to, and his possession and acts are not inconsistent with possession and sales of the property as

executor; although appellees argue that he was treating her will as a nullity, except as to her property, which she inherited from her father. There may be other circumstances. It is, as argued, a question largely of intention. On the other hand, the aged sister of George B., testifying for plaintiffs, says that he put the property in her name for her protection; that he thought it was best to protect her; that he was poorly; and that it was to protect her, if he was taken away. Two of the witnesses apparently most strongly relied upon by plaintiffs gave testimony tending to show that the property was deeded to Mary J. for her benefit and protection. One of these, a nephew, testifies that Mary J. said that the record title was taken in her name because they figured that George B. would die first, and he wanted everything to go to her—to be left to her. Another says that she said that a reason the title was in her name was that, in case he should drop off, she would never have any trouble with the title, and no bother with lawyers. Indeed, it is alleged by plaintiffs, in one of the amendments to their petition, that the properties were conveyed to Mary J. with the express oral agreement that she should hold it in trust for him until his death, and at his death it was to vest in her. Taking into account all the circumstances, we are satisfied that it was George B. Wright's purpose to confer on his wife, Mary J., a benefit; or at least that plaintiffs have not overcome the presumptions by showing that such was not his purpose. If she was a beneficiary, she was not a trustee. Protection to her as grantee is inconsistent with a claim of resulting trust. George B.'s sister, 85 years of age, who had testified as to declarations by Mary J., in addition to testifying that the conveyances were made for Mary J.'s protection, as before stated, testifies in regard to Mary J.'s making her will, and that she said she wanted George B. to have the property, to handle it, and that she was willing to sign any papers in his trading; that George was quite a hand to trade around, and that she had it fixed so that George could handle the property just as he wanted to; that she said, "I am willing to sign everything, any

papers, if he has a mind to trade or sell." This was a long time after she had made the will. She said George wanted her to make a will.

It is not probable that she would make a will solely to dispose of the interest she had inherited from her father, amounting to about \$150. The making of the will to dispose of all the property was but natural, and, we think, was in accord, at that time, with the wishes of both herself and her husband. Her will gave George B. just what she had said she wanted him to have. The inventory, filed by George B. as executor, does not list real estate, and appellees think this has a bearing upon his intention in taking the title to the different properties in her name, and shows that he considered that it was his property, and not hers. It is true that the inventory does not refer to any real estate. It does state, among other things, that the indebtedness of himself and wife amounted to \$2,180, and recites, further:

"By virtue of the will of Mary J. Wright, and duly probated, I am the beneficiary, and the property, both real and personal, was by Mary J. Wright willed to me, to use, convey, sell, and control during my life."

And this is signed and sworn to by George B. It does not appear that George B., during his lifetime, made any claim to being the owner of these properties, but he remained silent at the time she made her will, at the time the farm was sold, at the time the homestead was purchased in her name, at the time the will was offered for probate, at the time he made his inventory, and during the seven years between his wife's death and his own. True, he managed, used, and sold the property after her death, but this was not inconsistent with his rights under her will, except as to some of his acts, which seem to indicate that he was attempting to get the property in his own name. Without enumerating other circumstances in the record, it is enough to say that we think plaintiffs have not overcome the presumptions by that clear and satisfactory evidence required in such a case, and that the trial court erred at this point.

Appellees cite, and the trial court relied upon, the fol-

lowing cases, to sustain its conclusions: *Cotton v. Wood*, 25 Iowa 43; *In Re Estate of Mahin*, 161 Iowa 459; *Copper v. Iowa T. & S. Bank*, 149 Iowa 336; *Smith v. Smith*, 132 Iowa 700; and *Culp v. Price*, 107 Iowa 133. These cases announce the rule of law as contended for by both parties hereto. It is more a question of evidence. The *Cotton* case was decided on demurrer, which admitted the allegation in the petition that the conveyance was made upon an express agreement to reconvey. The case is referred to and followed in the *Mahin* and *Copper* cases. In the *Mahin* case, it was proven that the money was not furnished by the grantee, but was by the other party, and that the evidence was sufficient to show that it was not a gift. In the *Copper* case, it was proved conclusively by the evidence that the wife furnished the money, and the title was taken in her husband. The question as to the presumption that it was a gift because of the relationship was not discussed, but it was held that there was no evidence to show it was intended as a gift. The *Smith* case does not bear directly on the point now under consideration, but was decided more on the question of estoppel, laches, and limitations. In the *Culp* case, it was held that the evidence was not sufficient, as against creditors, but was sufficient to show that the conveyance was not intended as an advancement to the son. The *Cotton* case is also cited in *Hayes v. Dean*, 182 Iowa 619, 626, where the rule is again stated as to the quality and quantity of proof required to ingraft a trust on the legal title, and it was held that the evidence there was not sufficient to establish a trust. The discussion in that case has a bearing, also, on some of the circumstances relied upon in the instant case. In that case, the title was taken in the wife, and the husband claimed to have furnished the money. We said that the mere fact that the husband paid the purchase price had no tendency to prove the alleged trust, and that the presumption in favor of plaintiff's title rested upon the fact that he did pay it, and caused the deed to be made to the wife. It was also said that the fact that the husband remained in pos-

session, and managed or used the land, did not afford the necessary proof, and the opinion quoted from another case that it was the natural thing for the husband to remain in possession of the land, and that his labor and service would be presumed to be in furtherance of the same purpose which prompted the original gift. It seems to us that this would be so in the instant case, where the original farm was purchased many years before, and other smaller properties were bought, from time to time, during the following 30 years, or thereabouts. We think the instant case is, in its facts, more like *Mossestad v. Mossestad*, 183 Iowa 311. It was held there that evidence that the husband, who paid for the land and had the title taken in his wife's name, to protect her from claims of his heirs if he died first, did not show that she held as trustee for him; and further, that such evidence did not show her to be a qualified beneficiary, depending on her surviving him. Appellees cite *Stonecipher v. Kear*, 131 Ga. 688 (127 Am. St. Rep. 248), in addition to the *Mahin* case; as holding that the presumption of gift, where the conveyance is to a wife, is not conclusive, but may be rebutted by proof, and that it is a question of intention and proof. Without further discussion of the cases or facts, we reach the conclusion that the presumption of gift has not been overcome by the appellees, and that Mary J. Wright had not only the legal title, but the equitable or beneficial title as well, to all the lands, and that the Nebraska and Colorado lands likewise belonged to her estate.

3. No notice was ever served upon George B. Wright, requiring him to elect whether he would take distributive share or take under the will; but appellants contend that

2. WILLS:
devise (?)
or dower (?) :
election.

his acts and conduct show that he nevertheless did elect to take under the will.

Some of the circumstances bearing on this question have already been referred to, and we shall not take the time or space to refer to other evidence bearing thereon. There is nothing in the record tending to show that he was claiming a distributive share.

The circumstance, with others, that he, in writing in the inventory filed by him, which was of record, claimed to take under the will, is, we think, one of the strong circumstances in the case. His conduct, which is in the nature of an estoppel, shows an election to take under the will.

These questions are determinative of the case, so that it is unnecessary to discuss other questions argued. The decree of the district court is reversed, and the cause remanded for a decree in harmony with this opinion.—*Reversed and remanded.*

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

IN RE CONTINENTAL CASUALTY COMPANY et al.

TAXATION: Insurance—“Gross Premiums Received.” In computing the “gross amount of premiums received” annually by an insurance company “for business done in this state,” as a basis for the state tax, consideration must be given solely to premiums *earned* by the company—not to premiums received, but returned to the insured on cancellation of the policy. (Sec. 1333, Code Supp., 1913.)

STATUTES: Amendment as Bearing on Construction. The rights of one class of parties embraced within a statute may not be controlled by an amendment dealing exclusively with another class.

STATUTES: Implication from Amendment. The construction of a statute as to one class of persons may not be controlled by a merely *implied* construction arising from an amendment to the statute dealing with a different class of persons.

TAXATION: “Insurance upon Property in this State” Defined. A contract between two foreign insurance companies doing a general insurance business in Iowa, under which each recip-

cally pays to the other, in the state of their domicile, a *portion* of the premium received on its policies issued on property in this state, and under which the company receiving such portion agrees to pay to the company paying the portion a proportional amount of the loss, if any, does not constitute "*insurance upon property in this state*," within the meaning of Sec. 1333, Code Supp., 1913, and therefore no state tax is due on the portion so paid for indemnity.

INSURANCE: Reinsurance. The requirement of our statute (Secs. 5 1710, 1711, Code Supp., 1913), that insurance companies authorized to do business in this state shall not expose themselves to a loss on one risk in excess of 10 per cent of their capital stock, unless they reinsure such risk in some like company authorized to do business in this state, has no application to voluntary reinsurance, entered into wholly outside this state, on policies the amounts of which are not shown.

Appeal from Polk District Court.—THOS. J. GUTHRIE,
Judge.

OCTOBER 4, 1920.

THE controversy herein was submitted in the district court upon an agreed statement of facts, under the provisions of Chapter 13, Title XXI, of the Code (Sections 4377 to 4384, inclusive). It involves the construction of Section 1333, Code Supplement, 1913, as to what shall be deemed the "gross amount of premiums received," for the purpose of collecting the 2½ per cent taxes thereon. Upon trial had, there was a judgment for the Continental Casualty Company against the state of Iowa, to recover an excess amount of tax, paid under protest. Judgments were entered respectively against the last-named two companies in favor of the state of Iowa, for a balance due of premium tax. From the first-named judgment, the state of Iowa has appealed; and from the second judgment, the Great American Insurance Company and the American Alliance Insurance Company have respectively appealed.—*Affirmed on State's appeal; reversed on other two appeals.*

H. M. Havner, Attorney General, *B. J. Powers*, Assistant Attorney General, and *Stipp, Perry, Bannister & Starzinger*, for appellants.

George R. Sanderson, for appellee.

Jesse A. Miller, Amicus Curiae.

EVANS, J.—All the above-named companies are insurance companies. The first-named company, as indicated by its name, is a casualty company, and, for the sake of brevity, will be so referred to herein. The other two companies are fire insurance companies, and will be designated as such. The casualty company has no interest in the controversy of the fire companies; nor have the fire companies any interest in the controversy of the casualty company. The controversy between the State and the two fire companies involves precisely the same question of construction as to each company. We have before us, therefore, the equivalent of *two* cases, and we shall deal with them in separate divisions hereof, taking up first the case of the casualty company.

I. Section 1333, Code Supplement, 1913, was as follows:

“Every insurance company or association organized or incorporated under the laws of any state or nation other than the United States, and every other insurance company whose charter may be owned or a majority of whose stock may be controlled or whose business shall be carried on in the interest or for the benefit of any insurance company or association incorporated under the laws of any state or nation other than the United States, shall, at the time of making the annual statements as required by law, pay into the state treasury as taxes two and one-half per cent of the gross amount of premiums received by it or its agents, in cash, promissory obligation or other form of

settlement for business done in this state, including all insurance upon property situated in this state and upon the lives of persons resident in this state during the preceding year. Every insurance company incorporated under the laws of any state of the United States other than the state of Iowa, not including associations operating under the provisions of Chapter seven, Title nine of this Code, or fraternal beneficiary associations doing business in the United States, shall, at the time of making the annual statements as required by law, pay into the state treasury as taxes *two and one-half per cent of the gross amount of premiums received by it* for business done in this state, including all insurance upon property situated in this state and upon the lives of persons resident in this state during the preceding year. At the time of paying said taxes, said companies and associations shall take duplicate receipts therefor, one of which shall be filed with the auditor of state, and upon filing of said receipt, and not till then, the auditor shall issue the annual certificate as provided by law. No deduction or exemption from the taxes herein provided shall be allowed for or on account of any indebtedness owing by any such insurance company or association."

This was amended by the thirty-second general assembly, by adding thereto the following proviso:

"Provided, however, that companies doing a fire insurance business may deduct from the gross amount of premiums received, the amount of premiums returned upon canceled policies issued upon property situated in this state."

The question is, What items should be included and what excluded, in ascertaining the "gross amount of premiums received" for the particular year in question?

The concrete case is that the Casualty Company received and retained as earned premiums for the particular year approximately the sum of \$51,000. This item presents no dispute. It was claimed by the State of Iowa in the district court that two other items, amounting

approximately to \$22,000 and \$20,000 respectively, should have been included, as gross premium.

The item of \$22,000 was made up of charges appearing upon the books of the company for premiums upon policies issued, but not yet delivered. The fact is conceded that such policies *never* were delivered, and that no part of the \$22,000 thus charged as premiums was ever earned or received. The claim upon this item, however, has been abandoned by the State, and we have no occasion to give it further consideration.

The item of \$20,000 claimed by the State represents premiums actually received in the first instance by the company, but afterwards *returned* to the policyholders, upon cancellation of their policies before the expiration of their terms.

The contention for the State is that, inasmuch as these premiums were *received*, they became part of the gross premiums, regardless of their subsequent return; whereas the Casualty Company contends that, though it received the premiums in question, it received the same, under the law, subject to the right of the policyholder to demand the return of all unearned premiums, upon cancellation of the policy; that its right to any premium received was not complete until it had *earned* the same; and that no premium should be deemed "received," within the meaning of the statute, until the legal right of the company to retain it is complete and irrevocable. The district court sustained this latter contention.

The argument for the State rests upon two general grounds. The first is that the item in question is covered by the literal terms of the statute, and that there is no fair room for a different construction. We cannot adopt this view. While it is true, in a literal sense, that the company did receive these premiums from the policyholders in advance of their earning, it is also true, in a legal sense, that it received the same subject to the right of the policyholders to demand the return, upon a cancellation of their policies at any time before the earning of the

premium. Until such time, therefore, as the premium should be fully earned, the right of the insuring company thereto was a qualified one, and, speaking broadly, was impressed with a trust, created by the statute. Until the premium was earned by the insuring company, it was a quasi trustee for the policyholder, as to the unearned portion. The only fair construction of the statute, therefore, is that "premiums received" can refer only to those premiums which the company has a right to retain, as its own absolute property. There is a quality of unreasonableness in the contrary contention which forbids its adoption, unless required by the clear direction of the statute. We have little hesitancy in sustaining the trial court at this point. The construction which we thus put upon our statute is in accord with the holding of other courts in the construction of similar statutes. *German Alliance Ins. Co. v. VanCleave*, 191 Ill. 410 (61 N. E. 94); *People v. Miller*, 177 N. Y. 515 (70 N. E. 10); *State v. Continental Ins. Co.*, (Ind.) 116 N. E. 929; *State v. Fleming*, 70 Neb. 523 (97 N. W. 1063); *State v. Wilson*, 102 Kan. 752 (172 Pac. 41); *Mutual Ben. Life Ins. Co. v. Commonwealth*, 128 Ky. 174 (107 S. W. 802).

No case is cited to us to the contrary. In *People v. Miller*, 177 N. Y. 515 (70 N. E. 10), *supra*, the question was fully discussed in the opinion. The following quotation therefrom is illustrative of the argument in all the cited cases:

"The consideration for the tax is the insurance business done during an entire year, ascertained after the expiration of the year and expressed in the gross amount of premiums received during the year * * * Every insurance policy in this state, by its terms, is subject to cancellation, and in that event, it is provided both by the policy and by statute that the unearned premiums shall be refunded by the company. (Ins. Law, Sec. 122.) Thus, a policy for a specified time continues in force no longer than both parties elect, for either may end it at will. If a policy is written for one year, but is canceled after it

has run six months, the business done by means of that policy is insurance of the property affected for six months. That period covers the entire life of the policy, and the company furnishes no insurance after it has expired. It then ceases to do business, so far as that policy is concerned, and if all its policies were canceled at the same time, it would cease to do business altogether. * * * It may be asked, Why does the statute say gross premiums, unless it means all premiums received, whether refunded or not? We think the use of the word 'gross' was intended to include all premiums that remain in the treasury of the company, and to exclude any deductions for the commissions of agents or the expenses of doing business. The gross amount collected from canceled policies means the gross amount collected and retained by the company. The amount paid back is not collected for business done, but received for business expected to be done. The key to the construction of the statute is business done, for that is the basis of the tax. The state allows the corporation to do business and taxes it for such business as it actually does,—not for business attempted but never completed. A canceled policy does not represent business done after the date of cancellation; for no business is done through that policy after that date. The exercise of the right to cancel interrupts the business being done by the policy, and *ipso facto* renders the company liable to repay the unearned premium, and we think it would be unreasonable to hold that the sum refunded is, for the purpose of taxation under this statute, actually collected."

Appellants' second ground of argument rests upon the proviso added to the original section by Chapter 56, Acts of the Thirty-second General Assembly. . It will be seen

from this proviso that returned premiums upon canceled policies are expressly withheld from inclusion in the "gross premiums," in so far as *fire* insurance is concerned. The argument is that this proviso, by implication, requires the inclusion of returned premiums as to all in-

2. STATUTES:
amendment as
bearing on
construction.

surance companies except fire insurance companies. The appellee herein is only a casualty company. So far as it is concerned, the proviso in question added nothing to the original statute, and took nothing away therefrom. The rights of this company, therefore, are to be determined by the provisions of the statute in its original form. This is precisely what we have done in our foregoing discussion.

It is urged, however, that the terms of the proviso indicate by implication the legislative construction of the original statute, and that they indicate such construction

3. STATUTES :
implication
from
amendment.

to be that for which appellants now contend. It is perhaps true that the adoption of such amendment by the thirty-second general assembly indicated the legislative view that such amendment was proper and desirable legislation. It clearly indicated the legislative purpose of that general assembly to fully protect fire insurance companies against the payment of a premium tax upon unearned premiums returned upon cancellation of policies. If the legislative mind construed the original statute as imposing a premium tax upon unearned and returned premiums, or if it deemed the construction of such original statute *doubtful* on that question, then, in either event, a proviso by amendment could naturally be deemed a proper precaution. The adoption of the amendment was manifestly precautionary. It did not necessarily indicate a legislative construction of the existing statute. A doubt as to the proper construction of the statute would sufficiently account for the precaution. Moreover, if there had been a legislative construction, it would adjudicate nothing. The only effective thing which such legislature could do would be to enact new legislation, or to repeal or amend the old. It could not change existing law by mere construction. We have little occasion, therefore, to deal with the mere implication of legislative construction which is contended for by appellant. The amendment enacted by the thirty-second general assembly speaks for itself. It is effective according to its terms,

and within the scope thereof. It is not effective beyond its terms. These terms in no manner affect the appellee, or its rights involved herein. We reach the conclusion, therefore, that the trial court properly construed the original statute in accord with the contention of the appellee, and that its judgment should, accordingly, be affirmed.

II. The controversy presented between the State of Iowa and the two fire insurance companies above named, involves the construction of the same provision of the same

4. TAXATION :
"insurance
upon property
in this state"
defined.

Section 1333, as applied to a different subject-matter. The question involved in this controversy is whether the "gross amount of premiums" upon which the $2\frac{1}{2}$ per cent tax is to be computed should be deemed to include premiums for so-called *reinsurance*. The concrete case, as made by the stipulation of facts, is that these two insurance companies are organized under the laws of the state of New York, and that they do business therein; and that each is authorized to do insurance business in the state of Iowa. Each of them did business in the state of Iowa by issuing their policies upon property situated within the state, and by collecting premiums therefor. Each of them has paid to the state its full premium tax of $2\frac{1}{2}$ per cent upon all the premiums received by it for insurance upon property in this state. It appears, however, that there was in existence between these two companies a certain contract, whereby it was agreed, in effect, that each should insure or indemnify the other to the extent of all its excess insurance under any policy. For instance, as a matter of business policy, each of these companies limits itself to a certain maximum of liability upon any single risk. Nevertheless, it will issue policies in excess of such maximum, and collect the premium therefor. It will, of course, be liable to the policyholder for the full undertaking of its policy, regardless of its own maximum. In such case, the excess insurance is carried, so to speak, by the *other* company under said contract. The pro rata share of the premium received is paid by the

insuring company to such indemnifying company, less actual cost of obtaining the business. In the event of loss, the excess is paid by the indemnifying company *to the insuring company*. The following quotation from the stipulation of facts is a succinct and sufficient description of the contractual relation of these two companies in that regard.

"IV. It is agreed that, whenever the American Alliance Insurance Company issues an insurance policy on any piece of property in the state of Iowa, that the liability thereon is *automatically* reinsured by the Great American Insurance Company, in accordance with a contract entered into between the two companies; that said contract between said companies was executed and entered into in the state of New York, and that the American Alliance Insurance Company pays to the Great American Insurance Company on such insurance so ceded, the entire amount received therefor, less actual cost of writing same; that, in case of a loss, the amount of such loss is paid to the American Alliance Insurance Company in the state of New York, and that the contract for such reinsurance between the said two companies was made and is carried out in the state of New York. * * *

"VI. That the American Alliance Insurance Company, by contract entered into outside of the state of Iowa, and carried out outside of the state of Iowa, reinsures the excess lines of the Great American Insurance Company, and that the insurance commissioner of the state of Iowa, in making up the tax of the American Alliance Insurance Company for 1918, contended that the 2½ per cent tax was due, not only upon the face of the policies written by the American Alliance Insurance Company, but upon the premiums received for reinsurance of excess lines from the Great American Insurance Company, which premiums had, for the purposes of taxation, been once charged to and the tax paid thereon by the Great American Insurance Company; that the contract for reinsurance between the Great American and American Alliance Insurance com-

panies was entered into outside of the state of Iowa, the premiums were paid to the American Alliance Insurance Company thereon, outside of the state of Iowa, and the amounts due thereunder on account of losses were paid over to the Great American Insurance Company outside of the state of Iowa."

It is made to appear, for instance, that the American Alliance Insurance Company collected from the policyholders approximately \$48,000, in round numbers. It paid the full premium tax thereon. Likewise, the Great American Insurance Company received from the policyholders a gross amount of premiums, and paid the full premium tax thereon. To this extent, there is no dispute as between the state of Iowa and either of these companies. But, under their indemnity or reinsuring contract between each other, each ceded to the other its excess business, and paid therewith the pro rata premium collected respectively by each from the policyholders. The excess business ceded to the American Alliance Insurance Company brought with it pro rata premiums to such company amounting approximately to \$13,000, in round numbers. The premium tax on these premiums had been fully paid by the ceding company. Likewise, excess business was ceded to the Great American Insurance Company, carrying with it pro rata premiums amounting to thousands of dollars, the premium tax on which had been fully paid by the ceding company. Upon the \$13,000 thus received by the American Alliance Insurance Company, the state claims the premium tax. A similar claim is made against the Great American Insurance Company for the amount of premiums received by it pursuant to such distribution of business. The question presented, therefore, is whether such distribution of business between these companies, and perhaps others, amounts to a receiving of additional premiums, upon which an additional premium tax should be paid.

It is conceded that the contract of indemnity or reinsurance in question was entered into between these com-

panies in New York, the state of their domicile, and that all the distribution of business and the pro rating of premiums pursuant thereto was done in such state. Clearly, therefore, the business was not done in Iowa. It is urged for the State, however, that such premiums were received for "insurance upon property situated in this state," and that, therefore, it comes within the terms of the statute. It appears from the stipulation of facts that the contract in question fixed the rights and relations of each party to the excess business of the other. By virtue of the contract alone, the excess business of each of the contracting parties inured to the benefit of the other. It entitled such other to the pro rata share of the premium received, and fixed upon it the obligation to indemnify in case of loss. There was no issuing of policies by the indemnifying company upon any particular property. The contract was made in advance, to operate upon future business. Strictly speaking, it was a contract of *indemnity*, rather than of *reinsurance*, although it operated, in practical effect, as reinsurance. If two individuals should form a quasi partnership in the insurance business, or should pool their business upon the plan provided in this contract, and each should account to the other thereunder, and distribute a pro rata share of the premiums received upon his own business, it would hardly be claimed that such distribution subjected the mutual recipients to an additional tax. Under the stipulation of facts herein, the liability of the indemnifying company in the event of loss was *to the insuring company*, and not to the policyholder. The policyholder paid one premium. This premium paid for his insurance. The full premium tax upon it was paid. In the state of New York, this premium so received by the insuring company was apportioned pursuant to the pre-existing contract. A division of the premium worked a division of the loss, if any. Did this apportionment create "insurance upon property within this state" in any other sense than that the original policy covered property within this state? Was there any *new* insurance created upon

property in this state? We think not. Indeed, we think that the distribution of these premiums in the manner indicated by the stipulation of facts, was business done by these companies in the state of their domicile. We see no fair reason for saying that such business should be deemed to be constructively done in Iowa, or should be deemed to come within the letter or spirit of our statute.

This conclusion has the support of holdings in other states, and no contrary holding is cited to us. See *State v. Continental Ins. Co.*, (Ind.) 116 N. E. 929; *American Fid. Co. v. Leahy*, 189 App. Div. 242 (178 N. Y. Supp. 511); *State v. Connecticut Mut. Life Ins. Co.*, 106 Tenn. 282 (61 S. W. 75); *City of New Orleans v. Virginia Fire & Mar. Ins. Co.*, 33 La. Ann. 10; *Knights Templar & M. L. I. Co. v. Jarman*, 187 U. S. 197.

One argument urged for the State is that, under Section 1711, Code Supplement, 1913, it was obligatory upon the insuring company to reinsure only with a company authorized to do business in the state of Iowa. It is urged that the implication of this provision is that *reinsurance* premiums were contemplated. Section 1710, Supplement to the Code, 1913, prohibits every insurance company authorized to do business in this state from exposing itself to a loss on *one* risk greater than 10 per cent of its capital stock, unless it reinsures its excess loss in some reliable company. Section 1711 requires such reinsurance to be made with some company authorized to do business in this state. In the record before us, it does not appear that there was any excess risk taken by the insuring company, within the meaning of Section 1710. The maximum adopted by these companies as a limitation of liability upon a single risk was of their own choosing. It was merely a voluntary adoption by the companies themselves of a business policy, with a view of safeguarding against extraordinary disaster. What that maximum was, does not appear in the stipulation. Neither does it appear that any of the risks reinsured exceeded the statutory maximum. These two

5. INSURANCE:
reinsurance.

sections, therefore, are not applicable to the facts of the stipulated case, and we have no occasion to consider whether, if applicable, they would bear the implication suggested in argument for the State.

The legal right of these companies to enter into such indemnifying contract in the state of their domicile, and to perform such contract therein, was in no manner dependent upon any Iowa statute. If the contract was legal under New York law, authority under Iowa statute was not requisite. If such authority were, in fact, given, the legality of the contract could not thereby be increased; and if such authority were withheld, its legality could not thereby be diminished.

This of itself is a sufficient reason for saying that Sections 1710 and 1711 have no application; and also that Section 1333 should not be construed as attempting to operate upon such transaction.

In holding that the premiums thus distributed between these companies in New York became subject to an additional premium tax, the trial court erred, and the judgments entered against each of these fire companies named respectively are, accordingly, reversed.—*Affirmed on appeal of State; reversed on other two appeals.*

WEAVER, C. J., LADD, PRESTON, SALINGER, and ARTHUR, JJ., concur.

ANNA MELICKER, Appellee, v. JOHN SEDLACEK, SR.,
Appellant.

NEGLIGENCE: Non-Duty to Apprehend Unusual Occurrence. Even
1 though a person may, in a measure, know that his dog, of mature years, cherishes a lurking antipathy against a Ford automobile, yet such owner is under no legal obligation to apprehend that said dog, after wandering afield in the nighttime for a distance of 80 rods from home, may fall asleep upon a 2-foot bank bordering the public highway, and may feel displeased

when his rest is disturbed by the sudden approach of his arch enemy, and may express his displeasure by jumping into the roadway and hurling one "bark" at his disturber, and may thereupon be unceremoniously run over, with far greater resulting damages to the Ford and its occupants than to the dog. *Damnum absque injuria.*

ANIMALS: Collision with Dog in Highway. Evidence reviewed, 2 and held insufficient to sustain a verdict for damages by reason of a collision with a dog in the public highway.

Appeal from Johnson District Court.—R. G. POPHAM, Judge.

OCTOBER 4, 1920.

ACTION to recover damages to the person of plaintiff and her husband, and to the Ford automobile of the latter, by reason of the automobile's striking a dog, alleged to have been owned or harbored by the defendant. The first count claimed damages for personal injuries to the plaintiff, and the second count for injuries to her husband and damages to his car, and alleged that her husband's cause of action had been assigned to her. Trial to a jury, which resulted in a verdict for plaintiff in the sum of \$200, upon which judgment was rendered by the court. The defendant appeals.—*Reversed and remanded.*

Hart & Hart, for appellant.

Dutcher, Davis & Hambrecht, for appellee.

PRESTON, J.—The petition alleges, in substance, that defendant was the owner of, or harbored on his premises, a vicious dog; that the dog was in the habit of running out in the highway, and barking and biting at automobiles traveling thereon, and running in front thereof, greatly endangering the occupants of the car; that this fact was well known to defendant, prior to the

1. NEGLIGENCE :
non-duty to
apprehend
unusual
occurrence.

transaction in question, and that defendant made no effort to restrain the dog from continuing such practice, but continued to keep and harbor him; that, about 9:30 o'clock in the evening of October 27, 1918, plaintiff was riding along the highway near the premises of defendant, in a Ford car, belonging to and being driven by her husband; that, a short distance from the house of defendant, the dog jumped from the roadside in front of the car, and began barking and biting at the front wheel; that the dog so jumped in front of the car without warning to plaintiff, and ran directly in front of the car, and, through no fault of plaintiff or her husband, the front wheel of the car struck the dog, and caused the car to be thrown from the roadway into a ditch, and against an embankment, turning the car over; that plaintiff and her husband sustained injuries; that she was confined to her bed for a time, and was unable to do her ordinary work; that she suffered severe pain; that she was damaged in the sum of \$50 for loss of time and inability to perform her usual labor, and incurred a doctor's bill of \$50, and claims damages for pain and suffering by reason of the negligence of defendant. The second count describes her husband's injuries, and states that he lost 2 weeks' time, by which he was damaged in the sum of \$25; that the car was broken and damaged in the sum of \$173.75.

Defendant denied any responsibility; denied ownership of the dog; denied knowledge of its evil propensities, if any; and alleged that the injuries sustained, if any were sustained, were caused by the negligence of plaintiff and her husband.

There is no dispute as to some of the facts, and at other points there is a conflict. According to defendant's contention, on the night in question plaintiff and her husband drove out to visit her parents, passing defendant's farm. The night was dark and mist was falling as they started home, about 9:30 P. M. They had passed over this road earlier in the evening. The road was slippery, and, at the place of the accident, and for some distance in

either direction, had been recently worked, leaving clods in the center. It was a narrow road, 25 to 30 feet wide, winding, one fairly smooth track on the south side. The road was made darker by reason of timber on the north side of the road. The general direction of the road was northwest and southeast. They were going west, or northwest, at the rate of 12 or 15 miles an hour. The road was slippery and rough, out of the beaten path. The accident happened at a point about 80 rods from defendant's home. On the other hand, appellee contends that the evidence does not show that the road was particularly winding, where the accident occurred; that it is shown that, at the point in question, the road bears to the northwest; that the evidence does not show that the road was darkened by trees, since plaintiff's husband testified that there was no timber, where he hit the dog. They also claim that the evidence shows it did not rain until after the accident, and they deny that the road was slippery, and say that the road had been worked, a month before, and that it was a fairly well traveled road,—the main portion at the point of the accident along the south side, and in a well beaten track. There is evidence that the traveled track was pretty good, but that the road in the middle was rough. There is evidence that, on the following morning, a witness saw the track of plaintiff's car, where it crossed the roadway diagonally, immediately before the accident. This, too, is denied by other witnesses. The plaintiff's husband testified, in regard to this:

“Q. Isn't it a fact that you were on the north side of the road at that time, just before you turned to where you had the accident? A. I cannot state; I don't remember. Q. You can't remember? Don't you know that you were on the north side of the traveled section of that road, and darted to the southwest, where you had the accident? A. No, sir, I was driving on the south side of the road. Q. Then why did you say—why did you just answer that you couldn't say? A. I was driving on the south side of the road when I hit the dog. Q. Will you swear to

this jury that you were not on the north side of that traveled track? A. I didn't cut across to the southwest, diagonally to the southwest, when I hit the dog. Q. Before you hit the dog? A. I cannot state to that. The road was graded up, and I don't know which side the track was on."

It is undisputed that plaintiff and her husband were driving at 12 to 15 miles an hour, and that it was about 9:30 P. M. As to the immediate transaction of the striking of the dog, plaintiff's husband says that the general direction of the road in front of defendant's house is northwest; that there is a bend in the way; that the general direction turns from the north to the west,—a bend; that, after passing his house, one goes west for a ways, and then there is a gradual bend to the northwest; that, as he passed defendant's house, he did not see the dog.

"First saw him 60 or 70 rods west of the house. We were driving along, and we got to the gate, and the dog jumped off the bank, 4 feet distant, and just barked, and we hit the dog with the front wheel of the car. There wasn't sufficient time to try to avoid striking the dog. The left front wheel struck the dog. When the wheel struck, it bent the steering bar on the right wheel, causing the car to run to the left, and up the bank. The front wheels were up on the bank, and the hind wheels in the road. When the right wheel hit the bank, it struck the front spring and upset the car, and we were both under."

After he got his wife out, he didn't see the dog, but heard him howling. The dog was lying in the road, and witness thought he had killed him, the way he was howling; then he started to move up the road east towards defendant's house. He says he saw the dog distinctly, so he could recognize him; that it was larger than a medium sized dog, dark brown on the back, yellow on the legs, white breast, 16, 18, or 20 inches high; that he lit a match, and could see that his wife was hurt,—she was bloody; that he took her to John Sedlacek's house, 3 blocks off the road, and sent for the doctor. He describes her injuries

and his, and the damage to the car. The next day, he went to defendant's home, and saw and conversed with him; saw the dog there in the yard, and recognized it as the same dog he struck; didn't examine the dog to see whether he was hurt or not. The dog was limping,—can't say which foot; thinks the left hind foot. He says defendant wanted to know how it happened; that he told him, and asked defendant what he was going to do about it; that defendant said he didn't know; that defendant said he wouldn't do anything about paying the damages; that defendant asked if witness knew it was that dog, and witness said he had seen the dog before, and it was, and that the dog had run out at him before; that the defendant admitted that the dog had run out at people, but not that far from the house. He said the dog belonged to his son; that he wouldn't stay at his son's house, and went back and forth, and stayed there with him. The dog had run out at witness as he passed there before, nearly every time he went by. He thinks the car went a rod or two, after he saw the dog, before the contact.

"He jumped in front and barked, and jumped in front of the front wheel, and I hit him with the front wheel, and the car ran over him. He lay there in the road afterwards. Q. Now, that is all the dog did, just as you testified here? A. Yes, sir. Q. And that was, that he barked at the front wheel, and after he did, you struck him with the automobile? A. Yes, sir. It turned the car to the left. Q. Now, when you saw the dog coming, what did you do, if anything? A. I didn't have a chance to do anything. I hit him so quick. Threw the clutch out, and put on the brake, and tried to stop, but there was no chance. The traveled road was all right up close to the bank. The wheel track was close to the bank, 2 feet or 3 from the bank. The bank was probably 4 feet high, and the dog was on that side of the road, on the south side of the car, and I was 2 feet from the edge of the bank. The bank was a bank sloping down, not straight up. The wheel didn't run over the dog; it hit him and threw him under the car.

I think just the middle part of the car ran over him. The dog still lay there, after I got out from under the car. After I got my wife out, I went to see the dog, and he was going up the road, squealing. That is the dog I saw at defendant's the next morning. Q. When the dog came towards you, you knew it was the Sedlacek dog? A. I wasn't quite sure. I thought it was his dog; I wasn't sure. His nephew told me it was his. I seen the dog just before I hit him. I got his description just before I hit him. Q. You tell this jury that you minutely examined this dog when he was coming at you and you were turning off the gas and throwing out the clutch and putting on the brakes, and that you took this dog's inventory and found that he was a brown dog, 18 or 20 inches tall, and had a white ring around his neck? A. No. I didn't. I say I seen the size and the color of the dog,—I couldn't just exactly tell. I seen him jump off the bank. Q. You didn't know then whether that was Sedlacek's dog or not, that jumped off the bank? A. No, only what his nephew told me. Q. That is all you did know about it then, what his nephew told you? A. No, I knew it was his dog; but to make sure, I asked him, and he told me. Q. Why did you ask him? A. I thought maybe it was somebody else's. I didn't see the dog there before he jumped out of the weeds off the bank. The next morning, defendant said that the dog was his son's, but that he stayed down at his place. John F. Sedlacek said that this dog belonged to his uncle John. There was nothing said about the dog running out at automobiles."

Mrs. Melicker, testifying with less detail, says she saw the dog.

"He just ran off the bank in front of the car, and that is all I saw. There was not much time between the time I saw the dog jump off the bank in front of the car before the car struck him. Didn't see the dog in the road after the accident. Heard him squealing. Had a moment's glance of him when he jumped down in front of the car. Noticed he was brown, with a white collar around his neck, and a

white breast. He ran off the bank and right toward the car, in front of the car. He started to bark, and then ran in front of the car, and that is all I saw. I have told all the dog did there at that time."

She also describes her injuries, and tells where they had been, where they were going, and so on. Another witness testifies to being with plaintiff's husband at defendant's home the next day. Says there was quite a conversation, but witness didn't remember much of it; didn't pay much attention. Defendant said he didn't think his dog would go out that far from the house. The dog was there. Says the dog was a medium dog, dark on the back, brown and white around the neck. Defendant said his dog wouldn't run that far from the house; said the dog would run out and bark at people in front of the house, but wouldn't go that far; said it was his son's dog, but the dog made his home there at the present time, at the defendant's house; says the dog ran out and barked at his front wheel twice that summer. Witness passed defendant's house eight or ten times during the two months. He thinks defendant's son Frank was present at the conversation. Another witness says that a dog, which he describes as a brownish dog, yellow back and white collar, a little white on his neck, came out twice, as he passed defendant's place; that he would come bouncing, as if he would chew the tire off the car; would follow for a rod or so, and, if you would speed up, he would slow up and go back.

"This was in the summer of 1918. We were out pleasure riding. I was going 12 or 15 miles an hour, and the dog couldn't catch me. I would be pretty far along, before the dog got to run out there. He wouldn't follow far."

This is the substance of plaintiff's testimony in regard to the transaction itself, although we have not attempted to go into any detail as to the injuries, damages, and so on.

Defendant testifies that, the next day after the accident, when plaintiff's husband came, his son and John F. were there. Witness examined the dog, to see if there were any wounds or sore spots, or whether the dog flinched. There

were none, and the dog didn't flinch or limp. He tells how the dog came to be on his premises: that his brother-in-law rented his farm, and brought the dog with him; that the brother-in-law lived there about a year and a half, and moved to town, and a neighbor took the dog; that a hog bit the dog at the neighbor's, and he ran away, and went to another neighbor's, adjoining defendant's farm, and this dog came to his place; that defendant's son was to move on the neighbor's place, but, not having yet moved, was living with defendant.

"The dog, after staying a week or so at the neighbor's without anything to eat, came to my place. Don't know whether he followed us, or the other dogs that were with us. My son moved to the neighbor's place about the first of January. After my son moved, I took the dog over there and tied him up. After he kept coming back, I took a switch and switched him, trying to drive him back to where he used to stay; switched him 5 or 6 times. I did not have knowledge that this dog had the habit of running out after cars. Twice I saw him run out into the road and bark at an automobile. The last time was in the spring of 1918. Never saw him run out and snap at automobiles. The second time he ran out, I called him back and switched him. Since then, I have taken particular notice to see whether he went out, and I never saw him."

He denies the conversation testified to by Mr. Melicker, the next day, and gives his version of it; and says the dog might have been at his place for a little more than eight months before the accident; that, after witness switched the dog to make him go away, he wouldn't go, but after that, he stayed at defendant's place all the time; that he didn't feed him,—his folks did; that he has one dog there besides this one. He says he thought he had broken the dog of running out; that the dog has stayed at defendant's place since the accident; that some days, Sunday afternoons, there would be 25 cars pass by, and the dog paid no attention; that he knows this, of his positive knowledge.

Witness Dehner says he was at the place of the accident

about five minutes afterwards; that it was dark and a foggy night, misting heavily, more like rain; that it was impossible to see through the wind shield (last answer stricken on plaintiff's motion). He says he has passed defendant's place 75 or 100 times, during the year 1918; that he saw the brown and white dog in the yard; that the dog never ran out at the automobile of the witness.

"I am 46; my eyes are good; and I say it would be impossible to see more than two feet out in the dark that night, and see an object."

Another witness testifies to having passed defendant's place many times, 50 or 100, in 1918, and at none of these times did the dog ever run out or bark, or attempt to bite the car. He says he noticed the dog there in the yard; that other dogs had run out and barked at his automobile. Other witnesses gave similar testimony.

John F. Sedlacek denies telling Mr. Melicker that the dog was his uncle's. He says he examined the dog at defendant's house the next day, and that there were no bruises, and there was no flinching; that he made a careful, critical examination; that he has passed defendant's place 10 to 20 times a month, prior to the accident; that sometimes he saw the dog in the yard, and sometimes he would not; that the dog never came out to chase his automobile, and never followed him; that Melicker and wife came to the house of witness after the accident; that he went out with a lantern; that they had no light; that they told of the accident, mentioned the accident, and said the automobile ran into a little brown dog; that he examined the dog the next day, and there was nothing the matter with him.

Defendant's son Frank, 19 years of age, says he saw the dog examined the next day, and saw him walk and run, and there were no signs of lameness; that, in the conversation next day, Mr. Melicker complained of the road's being rough. Another witness says the road was rough, with sods in the middle; that, the next morning, he was at the place of the accident, and noticed where the automobile was sitting, and that the tracks came diagonally from the

north side of the road to the south side, across the rough part, over the sods; that the automobile had been turned back on its wheels; that he heard a conversation the next morning between someone who gave his name as Melicker, and another, Ellis, who lived at the county farm, where plaintiff and her husband lived, as follows:

“ ‘This is Melicker talking.’ He said he couldn’t come back to work the next morning,—that he had an accident; and Ellis says, ‘You better sell the damn thing,—that’s not the first one you had.’ ”

He testifies further that there was a little bank on each side of the road at the place of the accident, and a small depression each side of the roadway, for the water to run,—a good track on each side of the road, one side as good as the other; that he could see no reason why a man driving along there should cross over to the other side; that the track going across there went up to the automobile, and didn’t go any farther.

Another witness says that the dog in question was more than 12 years old; that he has known him that long; that, 12 years ago, the dog was at Dvorsky’s (his neighbor across the road, who is the neighbor referred to by defendant); that, during the 12 years he has known the dog, he never saw him run out at automobiles; that he barks, and that is about all; that he never saw him outside the house yard; that he lives about a mile and a half from defendant.

In rebuttal, Mr. Melicker denies the phone conversation, and denies crossing the road diagonally.

By the errors assigned, the defendant challenges the sufficiency of the evidence to sustain the verdict, and claims that the court erred in not sustaining the motion to direct a verdict for defendant at the close of plaintiff’s testimony, and of all the testimony; that the court erred in admitting and excluding evidence; and erred in refusing instructions asked by the defendant, and in the instructions given.

1. Appellant argues at some length that he is not liable under Section 2340 of the Code. They cite *Brown v. Moyer*, 186 Iowa 1322, and other cases, to sustain their position

that, to authorize a recovery under the statute, it must be shown that the dog was worrying, maiming, or killing a domestic animal, or that it was attacking or attempting to bite a person. Counsel state in argument that the purpose of arguing that the case is not within the statute, is that there is no statement in the record by appellee that they are not claiming under the statute, and that they, therefore, argue the question, lest it may be presented by appellee. There is no evidence in the record to show that the dog in question was doing any of the things enumerated in the statute. It will not be necessary to consider this question, because appellee says that the plaintiff is not claiming under the statute, but that a recovery is sought under the common-law rule; that there is no claim that the dog in question attacked or attempted to bite a person. Appellee contends that the owner, or one who harbors a vicious dog, is liable for the injuries committed by it, and that the liability is imposed, not because of ownership, but because of possession, and the duty to care for the animal. They cite *Alexander v. Crosby*, 143 Iowa 50; *Marsel v. Bowman*, 62 Iowa 57; *Sanders v. O'Callaghan*, 111 Iowa 574. Appellee concedes that it is the law in this state that, at common law, the owner of the dog cannot be held responsible for the acts of the dog, unless it was made to appear that the dog was vicious, and that the owner had either actual or constructive notice of its vicious propensities. *Brown v. Moyer*, 186 Iowa 1322. They further contend that the common-law rule is changed by the statute in two particulars, namely, that it makes the owner alone responsible, and dispenses with proof of *scienter*; and that, in this action, it is immaterial whether the defendant was the owner or harborer of the dog, his liability remains the same; and that the difference is the question of *scienter*, which, they contend, has been established by the evidence.

2. The dog in question had a right in the highway, unless it was a vicious dog, within the meaning of the law; and in that case, he would be a nuisance, or perhaps there would be negligence in failing to restrain him; and if the

defendant, as the owner or harborer, had knowledge of its vicious propensities, and plaintiff was injured because of such viciousness, defendant would be liable, unless, perhaps, he was excused by the fault of the plaintiff. *Brown v. Moyer*, 186 Iowa 1322; *Alexander v. Crosby*, 143 Iowa 50, 52. If the dog was not a vicious dog, it follows, of course, that defendant could have no knowledge thereof. Was the dog a vicious dog? Plaintiff's evidence shows that, about four times during the summer, the dog ran out from defendant's yard into the highway, and barked, or chased automobiles, and, on one occasion, attempted to bite the wheel. There is not a word of evidence in the entire record that the dog ever attacked or attempted to bite any person or any domestic animal. On the other hand, a number of witnesses testify to having passed the place hundreds of times, and that the dog did nothing. On the occasion in question, plaintiff's husband testifies in greater detail as to what the dog did, and says:

"He just jumped off the bank about four feet from me, and just as he barked, I hit him with the front wheel on the inside."

And again:

"Q. Now that is all the dog did, just as you testified here? A. Yes, sir. Q. And that was, that he barked at the front wheel, and after he did, you struck him with the automobile? A. Yes, sir."

The wife testifies:

"He started to bark, and then ran in front of the car, and that is all I saw."

This is the sum and substance of it all. Appellee says in argument:

"If a person has a dog in his possession for a considerable length of time, and such dog has, all that time, been in the habit of rushing into the highway, in front of the owner's residence, and of barking at, chasing, or worrying or attacking a passing team, in a ferocious manner, a question is presented to the jury to find whether the owner was aware of such habit," etc.

And again:

"It is immaterial whether the dog was attacking a person, or some other animal, the liability for the damages remains the same."

But it does not appear that this animal was attacking any person or animal, or chasing or worrying or attacking passing teams, in a ferocious manner. An animal, a horse or team, for instance, might be frightened by a dog running at or biting it. Not so with an automobile. Most of the cases are where there was an attack of some kind by worrying or biting, or the appearance of a ferocious attack, and we assume it is for that reason that the definitions for "vicious," or "vicious animal," are not plentiful. One naturally gets the idea that there is an element of savagery or fierceness, ferociousness, or mischievousness, as in worrying other animals, as a sheep-worrying dog, etc. In 40 Cyc. 203, note, it is said, quoting from a Georgia case, that:

"A vicious animal is any individual of a vicious species, or a vicious individual of a harmless species."

And at the same page, it is said that a vicious propensity is not confined to a disposition on the part of a dog to attack every person he might meet, but includes, as well, a natural fierceness or disposition for mischievousness, such as might occasionally lead him to attack human beings without provocation. In 2 Cyc. 415, it is said that one may kill a vicious animal in necessary defense of himself or the members of his household, or under circumstances which indicate danger that property will be injured or destroyed, unless the aggressor is killed; but it seems that such a killing is justified only where the animal is actually doing injury. See, also, *Marshall v. Blackshire*, 44 Iowa 475. The right to kill is, of course, controlled by the statute, more or less; but we are speaking now only of the meaning of the word "vicious." In *Merrit v. Matchett*, 135 Mo. App. 176 (115 S. W. 1066), an instruction was approved in this form:

"The jury are instructed that what is meant by the term 'a vicious propensity' in an animal is such a propensity that

the dog might attack or injure the safety of persons without being provoked so to do."

In 3 Corpus Juris 104, it is said that, under the common law, it is incumbent on one complaining of the savage act of a dog to prove its vicious propensity, etc. In *Sanders v. Teape*, 51 L. T. Rep. (N. S.) 263, cited in note at page 99 in 3 Corpus Juris, where a dog playing in a garden jumped over a wall and struck plaintiff, who was digging a hole, it was held that the owner of the dog was not liable. 3 Corpus Juris 104, in note citing *Briscoe v. Alfrey*, 61 Ark. 196 (30 L. R. A. 607), and other cases, states that:

"The vicious dog in general, and the odious sheep killer in particular, are under the law's especial condemnation."

In 1 Ruling Case Law 1116, we find:

"But a cross and savage disposition on the part of a dog is not necessary in order to impose liability on its owner for its assault; he is equally responsible where it appears that the dog had a propensity to bite only in play, if he knew of such mischievous habit, and injury results."

And at page 1117:

"Also, if a dog is not always dangerous, but is likely, as its owner knows, to bite either man or beast only at particular seasons, or under particular circumstances, then, against those seasons and circumstances, and that kind of mischief to be apprehended in them, the owner insures at his peril."

The same thought is carried into the statute, Section 2340, making it lawful for any person to kill a dog caught in the act of worrying or killing domestic animals, or at-

2. ANIMALS :
collision with
dog in
highway.

tacking or attempting to bite persons, and so on. Clearly, the accident in this case was not caused by any vicious act on the part of the dog. At most, he simply barked at the machine, and jumped down from the bank. He may have been, and doubtless was, at that time of night, asleep on the top of the bank, and surprised, provoked, by the approach of the auto close to him, then jumped down and

barked. These circumstances were somewhat different from those testified to by plaintiff's two witnesses, about the dog's running out from the yard, and, it seems to us, so different that, even though defendant should be held to have had notice of what the dog had done before, it would not be notice of the alleged vicious propensity of the dog at the time in question, or put the defendant on his guard, and require him, as an ordinarily prudent person, to anticipate the injury which did happen. 3 Corpus Juris 96. In the note to the citation given, it is said that, under such circumstances, it is not enough to show constructive knowledge, but that it must be actual knowledge, particularly in the absence of proof that the animal was of a savage and ferocious nature. In 3 Corpus Juris 92, Section 321, it is said:

"It may be necessary further to take into consideration the question whether the act complained of is one which the owner could or could not have anticipated."

See, also, same volume, page 95, Section 326. See, also, *Malony v. Bishop & Bridge*, (Iowa) 105 N. W. 407 (not officially reported).

And in 1 Ruling Case Law 1117, on the question of *scienter*, it is said that knowledge that a dog is ferociously disposed toward cattle is, ordinarily, not notice that it will attack persons, and that, under the modern doctrine, it is sufficient to show that the animal would be likely to commit an injury similar to the one complained of. Many cases are cited by appellant on the question of *scienter*, but, in view of what we have said, we deem it unnecessary to discuss that question further. It should be said in this connection that there is a suggestion, in the testimony of plaintiff or her husband, which is in the nature of a conclusion, that the dog came from the cornfield at the side of the road; but neither testifies that they saw that; but, on the contrary, both say that, the first they saw of the dog, he was on the bank. The dog did not run into the automobile, but, on the contrary, the automobile ran into the dog. The same result would have happened if the dog was not vicious, or if

it had been a sheep or a hog. At any rate, the theory upon which the case was tried was along the lines we have suggested, as to the vicious character. The court instructed along that line in three or four instructions. In Instruction 5, the court said:

"5. It is the law of this state that, if a person owns or harbors a vicious dog at his place which he permits to run at large and on the public highway near his place, and that he knows or should have known, by the exercise of reasonable care, that said dog was vicious and likely to attack and injure persons while passing along said highway, then and in that event the person who owns or harbors said vicious dog is liable for the injuries committed by it."

Again, in the same instruction, the court placed the burden of proof upon plaintiff to show that defendant "knew, or should have known, by the exercise of reasonable care, that said dog was vicious and likely to attack and injure persons, while passing along the said public highway, and that the dog did attack the car in which plaintiff was riding," and so on. The same thought is in some of the other instructions. There is no evidence that the dog did attack the car. There is no evidence in the record to show, or from which defendant had or should have had knowledge, that this dog was likely to attack and injure persons while passing along the highway. The instruction is the law of the case, and the plaintiff did not establish by evidence matters which she was required to show, under the instructions. And this is so, even though it be argued that the trial court placed a greater burden upon plaintiff than should have been done. Appellant makes the further complaint of the instructions just referred to that it is error to instruct on matter not pleaded, or on which there is no evidence. They cite *Zellmer v. McTaigue*, 170 Iowa 534, 538.

Furthermore, the jury may have reasoned that the court thought, and intended to intimate, that, because plaintiff's evidence showed that, on a few occasions, the dog had run out and chased automobiles, it was likely to attack persons. As said, there was no evidence that the dog had ever

attacked any person or domestic animal. It is clear that it cannot be said from the evidence that this dog was in the habit of doing what he did. We hold that, under the record, the dog was not a vicious dog, within the meaning of the law, and that the evidence does not support the verdict, under the evidence and the law, and under the instructions given by the court. It seems to us that, if a recovery is warranted here, nearly every farmer in Iowa who owns a shepherd dog would be liable several times a year. We may say, in passing, that it is a close question whether plaintiff and her husband were able, under the circumstances, to identify the dog as the dog kept by defendant. Possibly this was a question for the jury, and we do not determine the question. It is claimed by appellant that plaintiff's husband drove the car across the road at the dog, and for this reason, and because of the speed of the car on a road that was rough in the middle and the other circumstances, plaintiff and her husband were guilty of contributory negligence. It occurs to us that there is force in some of these suggestions, but there was a conflict in regard to some of these matters, and they were for the jury.

Other questions are argued, some of which are in regard to rulings on evidence, offered instructions, and so on, which are not likely to occur on a retrial of the case, if there should be another trial. As to some of the other questions, it is unnecessary to determine, in the view we take of the case. For the reasons given, the cause is—*Reversed and remanded.*

EVANS, STEVENS, and SALINGER, JJ., concur.

WEAVER, C. J., LADD and ARTHUR, JJ., dissent.

NETTIE R. REID et al., Appellants, v. AUTOMATIC ELECTRIC
WASHER COMPANY et al., Appellees.

MASTER AND SERVANT: Workmen's Compensation Act—Hear-
1 **say Evidence.** Relevant hearsay evidence, received without ob-
jection, must be given due consideration, on hearings under the
Workmen's Compensation Act.

MASTER AND SERVANT: Workmen's Compensation Act—Review
2 **on Appeal.** The refusal of the arbitration committee and of the
industrial commissioner, on review, to consider hearsay evi-
dence (introduced without objection) and an ex-parte affidavit,
under the mistake of law that the same were wholly incom-
petent, is reviewable on appeal. (Sec. 2477-m33, Code Supp.,
1913.)

MASTER AND SERVANT: Workmen's Compensation Act—Ex-
3 **Parte Affidavits.** Ex-parte affidavits material to the issues *may*
be received and given consideration in hearings under the
Workmen's Compensation Act: exceptional circumstances may
imperatively *require* the reception of such evidence. So held
where affiant was in the army. (Sec. 2477-m24, Code Supp.,
1913, as amended by Ch. 270, Sec. 15, 37 G. A.)

MASTER AND SERVANT: Workmen's Compensation Act. An
4 **injury to an employee "arises out of" an employment:**

1. When the injury results from a risk reasonably incident
to the employment and to the duties of the employee thereun-
der; or (as it is sometimes phrased)

2. When it is apparent to the rational mind, in view of all
attending circumstances, that a causal connection exists between
the conditions under which the employee is required to perform
his work, and the resulting injury.

These principles are none the less applicable because of the
intervention of an act of God which the acts or omissions of
man have humanized.

Held, the death of an employee "arose out of" his employment,
when the employee, being warned by the master to cease work
and leave the building, on account of an on-coming storm, re-
mained to close the windows, *which was part of his duties*, and
was killed while so doing, by the blowing down of the building
by the storm.

Appeal from Jasper District Court.—CHAS. A. DEWEY,
Judge.

OCTOBER 4, 1920.

THIS is a proceeding under the Iowa Workmen's Compensation Statute, by dependents, to recover for the death of a workman from an injury alleged to have arisen out of and in the course of his employment by defendants. The claim was disallowed by the arbitration committee before which the evidence was taken. The evidence was all certified, and was properly before the commissioner and before the district court, and is before us. On review before the industrial commissioner, the conclusion of the arbitration committee was sustained. From this ruling, on appeal to the district court, there was a finding for defendants, confirming the decision of the commissioner, and the claimants' appeal was dismissed on the merits, and judgment rendered against them for costs. The claimants, plaintiffs, appeal.—*Reversed.*

O. P. Meyers, for appellants.

Stipp, Perry, Bannister & Starzinger, for appellees.

PRESTON, J.—No question is made but that claimants were dependents, and the committee found that deceased, George M. Reid, was contributing \$20 per month to their support. Deceased, an unmarried man, and claimants, constituted one family. Two of the claimants are his parents. Deceased was in the employ of defendant washer company, and was one of its foremen. The factory was a block long, east and west, with various partitions, and had an exit at the west and another to the east, through the office. The west part of it was two stories high, and the east part, four stories. Deceased worked in the southwest corner of the second floor of the four-story part, with windows near him. He was injured on May 21, 1918, and died a few hours after-

wards. He was injured by debris from the higher part of the building, which crashed through to where deceased was, the crash being caused by a windstorm, about 5 o'clock in the afternoon of that date. The factory was partly destroyed. The regular quitting hour was 6 P. M. There are stairs from one floor to another. The president of defendant factory testifies:

"Foremen were all instructed, especially when weather was threatening, to see that all windows within their jurisdiction were closed when they quit work. At the time of his death, Reid was foreman in his department. His duties as foreman, as regards closing windows when the gong rang, were the same as foremen in all departments: that, upon leaving work for the day, all windows of that particular department must be closed. We sound a gong at regular hours for commencing and closing work. Electric factory horns and signals, operated automatically, by a master clock; and, for an emergency, and dismissing men at odd hours, we have an extension of this system into the office, in the nature of a push button. Pressure on this push button blows the horns. On this particular day, after watching the storm approach, some five minutes,—it was probably going to be severe,—I concluded that the men should be dismissed from the building, which was done by pushing this button, and sounding the alarm all over the building. I operated the horn, when the accident occurred, in a series of short, quick blasts, intended as a danger signal that something was wrong. I wished the men to leave their places of work and hunt places of safety. It was not like the sound at regular quitting hour, when there was no unusual occurrence. He [deceased] also did some work in the northwest corner of the same room and floor, and he would naturally be obliged to close, or see that all windows in his jurisdiction were closed, which would include both southwest and northwest corners. The instructions were to close the windows, because we didn't know how serious a storm was coming up. I tried to arouse the men and women, and get them out quick. They had not

been instructed as to any particular whistle that indicated to them that they must leave the building. The crushing in of south wall caused his death. It was all over in a short time after the gong sounded."

Some of the witnesses refer to the sounding of the gong or horn as a whistle, indicating that it takes the place of a whistle. This sounding of the gong can mean only one of two things: either the commencing or stopping of work. The foremen in every other department did close their windows at this time, as testified by the president. The president testified further:

"In watching the storm, it was five minutes before I thought there was any danger, or was much scared."

A witness testified:

"He censured himself because he had not blowed it sooner."

It is shown that the usual way for the men to leave the factory, when quitting, was in the west part of the factory, through a stairway in the west room of the entire factory, a room beginning some 50 feet west of the four-story part; that the men went west to that room and stairway to get out, when the gong was sounded; that all went west. The four-story part of the building was swept off and went over and fell and crashed on second-story part, and down through. A witness testifies that, as he went west to get out, he met some man going east, near west room of factory. Would not swear it was deceased; were all in a hurry. The father of deceased, who had worked in the factory a few days before the date in question, testifies:

"I was working on the third floor of the defendant's factory. A workman said to me, 'There is an awful looking cloud out there.' I opened a window and looked out, and thought the cloud was high, and would go over us; closed the window, and started back to work, when the gong sounded a warning of closing. The rest started to leave the room, and passed me. I looked out the south window, and began to see boards and other debris flying in the air. I landed on the second floor, and had to go past

the bench where George worked, but he wasn't there. * * * Just as I approached the stairs leading to the first floor, I met him coming back on the run. Where I met him was west of the part that was crushed in. I passed him, I would say, 30 feet—I had got beyond where the crash came. When it came, I stopped, knowing it useless to go farther. The instant I stopped, I commenced calling, and started back, realizing he might be caught in that crash. I saw the limbs of a man, projecting from under the debris; the rest of the body was covered. I commenced uncovering, and saw it was my son. * * * I was working in east part, on third floor. When I heard the gong, I went to stair leading from the third to second floor, and then went west, on the second floor, right past the bench where my son, George, worked, and kept on going west; and met him right near and little this side of the stairs leading from the second floor to the first, in west part of factory. This was approximately about 60 feet west of bench where he worked. He was then going east, and I was going west to get out. * * * I was on the run—was walking fast. I met nobody else. Several others were just ahead of me, but all going west, toward the exit. * * * The gong is used the same as a whistle in a factory. It was a violent storm. Would have been extremely bad, if it had been closer to the ground. Several factories and residences were damaged. My son was the only one killed, and Mr. Newquist was the only one severely injured, as I recollect. Defendant's factory was damaged the greatest."

This witness testified further, on cross-examination by defendants, and without objection, as follows:

"Mr. Newquist was injured the same time as my son. His position in factory was timekeeper. Q. Do you know what he [Newquist] was doing at the time of the accident? A. Yes. Q. State what he was doing. A. He was going over from his office to the factory, and he started to leave [help] my son to close some of the windows, and the crash came and caught both of them."

On redirect examination of witness by claimants, this appears:

"Q. You were asked in regard to where Mr. Newquist was at the time of this storm, and what he was doing, and so on. Can you state more in detail about Newquist, as to what he had done, or said to your son, and what your son was doing? A. This I can state from the statement I have from him. Q. I would not refer to that. State a little more in detail. You spoke of him a while ago. A. Newquist told me he was in the act of——

"Mr. Parmenter (for defendants). We object to the statement of what he was told, as hearsay evidence as to what Newquist said. He, perhaps, will be available as a witness.

"Mr. Meyers (for claimants). You went into it.

"Court. Objection overruled.

"Mr. Parmenter. Ruling of court objected to.

"A. (continued). Mr. Newquist said that George was in the act of closing the windows, and he started to help him, when the crash came, and that was the last that he knew. He was unconscious."

On examination by the chairman of the committee, witness testified further, without objection:

"Mr. Newquist was employed in defendant's factory as timekeeper. He was going back through the factory, and saw George in the act of closing the windows. He was injured pretty badly. Think his nose was broken; did not think he would recover, for some hours.

"REDIRECT EXAMINATION (BY CLAIMANTS).

"Mr. Newquist is now at Camp Pike; he was drafted in the military service. I wrote him in regard to this matter, and he sent me this affidavit. [Affidavit is marked "Exhibit B."] This is statement I referred to before. My son belonged to Sunday School."

Exhibit B, the affidavit just referred to, was offered in evidence, and the following objection and record appear:

"Mr. Parmenter: Defendants object thereto because it is not the best testimony; that it purports to be an affidavit of a witness for whom the law has provided a way that he can be reached. It would be decidedly unfair to this defense not to give them an opportunity to cross-examine.

"Chairman: Why could not the deposition be had?

"Mr. Meyers: Well, he didn't know, hardly, where he would be. We knew he was at Camp Pike, just a few days ago. It has practically all been given through his own questions.

"Chairman: Exhibit B, offered by claimants, may go in. It is understood that a voucher of that kind cannot be taken with as much value as a deposition, and can only be taken for what it is worth.

"Mr. Parmenter: Ruling of the court excepted by defense."

Exhibit B is as follows:

"State of Arkansas, County of Pulaski.

"I, Edward J. Newquist, having been duly sworn, in the case wherein L. D. Reid is plaintiff, and is defendant, testify the following state of facts:

"On the 21st day of May, 1918, I was in the employ of the Automatic Electric Washer Company, of Newton, Iowa, in the capacity of timekeeper and had been in their employ for several months. About 5 o'clock of the above date I was in the office of said company when the storm approached, and I started to walk back through the factory. I met George Reid, who went to close a window, and I started to help him, but before I reached him the crash came, catching both of us. I was unconscious for some time. I remember that George had passed beyond the part that was afterwards wrecked by the storm; but came back to close the windows; a duty which his position required him to perform, and so doing, lost his life. Signed and sworn to, October 26th, 1918," etc.

Some of the witnesses refer to the storm as a wind storm; others, as a violent storm; and others, as a tornado.

Such is the substance of the testimony, so far as it re-

lates to the matters presented, which are: Whether it was shown that deceased was, at the time he was injured, engaged in the act of putting down the windows, which was a part of his duty, under his employment; and whether his injury arose out of his employment; and whether his injury was brought about by an act of God, rather than by the employment. The arbitration committee, in finding for the defendant, held that the injury suffered by deceased did not arise out of his employment, and was not a personal injury, within the meaning of the Iowa compensation laws, for the reason that it was brought about by an act of God, rather than by the employment. This position was sustained by the decision of the commissioner. The order and finding of the commissioner states, in part:

"Review is instituted by dependent parents, upon the ground that the facts in evidence do not support the finding of the arbitration committee. George Reid was at work on second floor of his employer's plant, when the alarm was sounded, calling workmen to seek safety from the approaching storm. His father testifies that, as he was approaching the stairs leading to first floor, he met his son coming back on the run,—that is to say, running away from the stairway through which workmen were seeking to escape. Claimants contend that he was returning for the purpose of closing windows in south side of building. Defendant suggests the theory that, finding the stairway, commonly used, in a congested condition from a rush of workmen, he turned back to seek exit at another stairway to first floor. There is no tangible support for the contention of claimant, apart from the affidavit of Edward J. Newquist. * * * Affidavits are admitted in evidence in compensation hearings for the purpose of corroboration, but, standing alone, are not assumed to be available for the establishment of vital issues. The record does not justify the assumption that the purpose of closing windows was in the mind of George Reid, when he was caught in the collapsing building. It is incumbent upon the claimant in all compensation cases to establish by preponderance of evidence vital issues involved.

However plausible conjecture may be, it is not sufficient basis for an award. The question uppermost in this consideration is: Did the death of George Reid arise out of and in course of his employment? The record does not establish this essential basis of compensation, either in fact or in law. If it were assumed that this workman was, at the time of his fatal injury, bent upon the purpose of closing the windows, as claimed, this fact is not established; and, if it were established, there would yet be wanting elements of compensable relationship deemed essential in compensation jurisdiction generally."

The commissioner, in his finding, then proceeds to refer to the case of *Griffith v. Cole Bros.*, 183 Iowa 415, which he considered, to a considerable extent, as analogous to the

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case at bar, and held that the arbitration committee did not err in finding that dependents of deceased were not entitled to compensation, for the reason that his accidental death was brought about by an act of God, rather than by the employment. It may be remarked, in passing, that this case is referred to in note to *Wiggins v. Industrial Acc. Board*, 54 Mont. 335 (L. R. A. 1918 F, 932), where, at page 937, it is thought that the decision is placed upon the wrong ground. On appeal to the district court, a hearing was had upon the transcript, certified by the commissioner, and exhibits; and only matters so transcribed were considered. The district court dismissed the appeal, as before stated.

The first question is whether it was shown, either by hearsay evidence, not objected to, or by the affidavit of Newquist, or both, that deceased was, at the time of his injury, engaged in the act of putting down the windows, which was a part of his employment, or a part of his duties under his employment. It seems to be conceded, inferentially at least, by counsel for appellees and by the commissioner, that, if it had been proven that deceased was putting down the windows, compensation would be due, unless, as counsel for appellees contend, and the commissioner held, the

injury was caused by the act of God. It is contended by appellees that the affidavit was inadmissible to prove that deceased was putting down the windows at the time he was injured. They argue that the rule ought not to be established, in the hearing of compensation cases, that affidavits are admissible, and that it would be a farce to try such cases in that manner; and they urge that the bars should not be thrown down, and frauds encouraged, by decision that these cases may be so tried. Doubtless the same argument was made before the committee and the commissioner, who seem to have taken that view. The hearsay evidence on that point went in without objection, and the affidavit was admitted over objection. But it is plain that both the committee and the commissioner considered and held, as a matter of law, that the affidavit could not be considered; and it is equally apparent that no consideration was given by either to the hearsay evidence or to the affidavit. If they were laboring under a misapprehension as to the law, and for that reason did not consider the evidence, and if either or both may be considered, and establish the fact, then it becomes a question of law for us.

The record as to both matters is before us; and if they may, under the circumstances, be considered, then there is no dispute in the evidence on the point as to what de-

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ceased was doing, and it becomes our duty to enter such decree as will enforce the legal rights of the parties, as disclosed by the facts appearing in the record. Legal conclusions of commissioner may be reviewed.

Griffith v. Cole Bros., 183 Iowa 415, 422; *McNicol's Case*, 215 Mass. 497 (L. R. A. 1916 A 306); *Dietzen Co. v. Industrial Board*, 279 Ill. 11 (116 N. E. 684); *Bradley Mfg. Wks. v. Industrial Board*, 283 Ill. 468 (119 N. E. 615); *Holbrook v. Olympia Hotel Co.*, 200 Mich. 597 (166 N. W. 876). If this evidence, undisputed as it is, may be considered, and it was disallowed and not considered by the commissioner, under a mistake of law, then there was no sufficient competent evidence in the record to warrant the

commissioner in finding that deceased was not engaged in putting down the factory windows, and in such a case his finding would not be conclusive, under Section 17, Chapter 270, Acts of the Thirty-seventh General Assembly.

1. Appellees suggest the theory that deceased turned back to seek exit at the east, or at another stairway to the first floor, and that his going east is compatible with that theory. Some of the cases hold that there may be a recovery when a party is going to or from his work, or the place of the performance of his duty. Appellee contends that there is no evidence that he was closing windows at the time of his injury, and the commissioner seems to have so held, when he said that there is no tangible support, apart from the affidavit of Newquist, that deceased was returning for the purpose of closing windows in the south side of the building. But we think there is more to the evidence than this, even outside the hearsay statements and the affidavit. It seems to us that, considering all the circumstances and the proper inferences to be drawn therefrom, the other proof comes very near establishing, if, indeed, it does not establish, the fact that deceased was in that act, and in the performance of his duty. It appears without dispute that the purpose in sounding the alarm was that the employees might escape to a place of safety; that all others but deceased and Newquist got out of the factory safely, and were uninjured; that deceased was near the west entrance, and doubtless could have escaped as well as the others, but he turned back; that he was found buried under the debris, near the place where he would naturally be in closing the windows; that it was his duty to close them, and the presumption is, not that he was not in the performance of his duty, but rather that he was. *Holland-St. Louis Sugar Co. v. Shraluka*, 64 Ind. App. 545 (116 N. E. 330, 332.) But conceding, for the purpose of the argument, that all these circumstances do not quite establish the fact, slight evidence would be sufficient, if undisputed, to connect up the other circumstances. We think the statements of the father, though hearsay, admitted as they were, and

the affidavit, clearly make the connection, and establish the fact. Taking up now, and considering first, the question as to the hearsay evidence, which, as said, went in without objection, and, further, was brought out by the defendants themselves, on cross-examination. We are considering now the verbal statements of the father of deceased, which, the evidence shows, were based upon the sworn statement of Newquist, in the affidavit. The statute bearing upon the questions, both as to whether hearsay evidence and the affidavit may be considered as proof, provides:

"While sitting as an arbitration committee, or when conducting a hearing upon review, or in the making of any investigation or inquiry, neither the commissioner nor the arbitration committee shall be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, but may hold such arbitrations or conduct such hearings and make such investigations and inquiries in the manner best suited to ascertain the substantial rights of the parties." Chapter 270, Acts of the Thirty-seventh General Assembly.

In referring to another provision of the Compensation Act, we said, in *Rish v. Iowa Portland Cement Co.*, 186 Iowa 443, that the provisions of the act are highly remedial, and should be liberally construed, without regard to technical rules, so as to carry out the purpose and object of the act. See, also, *Holland-St. Louis Sugar Co. v. Shraluka*, supra. The same rule applies to the words "arising out of and in the course of the employment." *United Paperboard Co. v. Lewis*, 65 Ind. App. 356 (117 N. E. 276).

In *Mitchell v. Phillips Mining Co.*, 181 Iowa 600, at 607, we said, in speaking of some of the provisions of the act, that a radical change was made, with reference to the matter of evidence, and that the purpose of the act was to provide a system whereby employers and employed might escape the evils of personal injury litigation, etc. We think it was the purpose of the legislature to relax somewhat the rules of evidence, and that the proceedings should be more informal than an ordinary proceeding at law. We have so

held as to pleadings in probate. *Chariton Nat. Bank v. Whicher*, 163 Iowa 571.

We have a statute (Section 4944-h4, Supplemental Supplement, 1915,) that trial may be had upon affidavits in a contempt proceeding, where a party may be sent to jail. That statute also provides that it may be tried upon affidavits, or that either party may demand production and oral examination of the witnesses. It is the general rule that a material fact at issue may be established by hearsay evidence, where the same is admitted without objection. *Hege v. Tompkins*, (Ind. App.) 121 N. E. 677, 679. Same principle as to secondary evidence. *Kenosha Store Co. v. Shedd*, 82 Iowa 540, 544. In the *Hege* case, *supra*, the court said:

"The reasons for adopting the above rule in ordinary civil actions apply with even greater force in hearings before the industrial board. It is evidently the intent of the Workmen's Compensation Act that, by concise and plain summary proceedings, controversies arising under the same should be promptly adjusted by a simplified procedure, unhampered by the more technical forms and intervening steps which sometimes incumber and delay ordinary civil actions. In harmony with the manifest intention of the act, this court has held that the industrial board is not bound by the rules of court procedure in civil actions. (*Hagenback v. Leppert*, 117 N. E. 531)."

It was further said in the *Hege* case that the board had a right to consider the hearsay evidence which was admitted without objection, and give it such probative force as it might believe it merited, under all the facts and circumstances. In *Western Ind. Co. v. Industrial Acc. Com.*, 174 Cal. 315 (163 Pac. 60), it was held that a provision in the law permitting hearsay evidence of declarations of a deceased employee relating to his injury is not unconstitutional. In *In re Fogarty v. National Biscuit Co.*, 221 N. Y. 20 (116 N. E. 346), hearsay evidence was considered.

In the instant case, neither the board nor the commissioner gave any consideration to the hearsay evidence, since

it is not referred to, doubtless under the same mistaken view of the law that they expressed in holding that the affidavit could not be considered. We think this language is applicable, as applied to our statute, before set out, which provides that, in hearings before the arbitration committee or the commissioner, they shall not "be bound by common law or statutory rules of evidence." As said, this evidence was first drawn out by defendants on cross-examination of claimants' witness, wherein witness had stated that deceased was in the act of putting down the windows, when the storm struck. It is true that, on redirect examination, defendants objected; but the evidence was already in. Defendants may not now complain, after having brought out the evidence themselves. *Riordan v. Guggerty*, 74 Iowa 688.

2. An affidavit is, in a sense, hearsay. Had the lower tribunals the right to consider the affidavit? We think so. It was so held in *In re Moran v. Rodgers & Hagerty*, 180

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App. Div. 821 (168 N. Y. Supp. 410), where it was held that affidavits of parents in Ireland should be received, to prove dependency under the New York Compensation Act, which is somewhat analogous to ours, in so

far as it relaxes, to some extent, the rules of evidence. Some of the discussion in Paragraph 1 of the opinion is applicable here; and we think that, under the statute before quoted, the board and commissioner had the right to consider the affidavit. It may be that they were not compelled to do so; but, as we have shown, it was not given any consideration, under a mistaken view of the law, and their finding was not based thereon. It is doubtless true that the board and commissioner have a discretion in the matter. Circumstances might be such as that they might require that the person should be called as a witness, if that were practicable, or possibly require the party, under the statute, to appear for cross-examination in regard to the statements in the affidavit, or perhaps, in a proper case, that the affidavit should be disregarded. We do not mean to hold

that these cases should be tried on affidavits. But here was an exceptional case. There was no other witness present with the deceased but Newquist. He was in the service, located in a distant state, and liable to be ordered to some other point at any time. So far as we know, he may have been in France, or on his way there, at the time the evidence was taken in this case. It would have been safer for defendant's employees, and a protection to their property from a windstorm, that the windows should be closed. It was the duty of deceased to close them. If it be true that he was in the performance of that duty, and, in attempting to protect the lives of the other employees, and defendant's property, he lost his life, ought his dependents to be deprived of the benefit of the evidence of Newquist, under the statute before quoted, simply because they were unable to produce him in person? We are clearly of the opinion that the affidavit should have been considered, and given weight in connection with the other circumstances, and that, as a matter of law, the board and commissioner erred in not considering it; and their finding that deceased was not so engaged, is without support. Our first thought was to remand the case to the district court, with directions to send it back to the commissioner, that he might make a finding of facts, taking into consideration the evidence referred to in the prior paragraph, and this paragraph of the opinion. But the evidence is all before us, and we think it is undisputed that deceased was putting down the windows at the time he was injured.

3. This brings us to the question whether deceased was killed by an act of God, and not by reason of an injury arising out of his employment. Appellees cite and rely upon

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Griffith v. Cole Bros., 183 Iowa 415; *Pace v. Appanoose County*, 184 Iowa 498; and the statute, Section 2477-m, Code Supplement, 1913. They consider the injury by the windstorm, in this case, as like an injury from lightning; while appellants argue that there is a difference, for that a bolt of lightning is but an instant flash, while the windstorm in

this case was seen in the daytime, for some time in advance, and could have been guarded against, and that the defendants did attempt to give warning, in order that deceased and others might escape to a place of safety. They say, further, that a storm of this kind could be seen a long distance, and guarded against, and that the delay of the defendants in giving the alarm was negligence on the part of defendant factory, and renders the so-called act of God no defense. On this, they cite *Holmquist v. Gray Construction Co.*, 169 Iowa 502; *Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co.*, 130 Iowa 123. Appellees say further that it is apparent that deceased, at work in defendant's factory, was under no greater hazard of being killed by the wind-storm than any other citizen who was within the area of the storm; that he was not subjected to a causative danger, peculiar to the work and not common to the neighborhood; that, at the time of his injury, while in defendant's factory, he was subject to no other or different hazard than that to which he would have been subject, had he been sitting in church, within the area of that storm. This might be so, if there was a general destruction of all, or substantially all, buildings, churches, etc., in the path of the storm. Deceased and Newquist were the only ones injured. The president of the factory company says his purpose in sounding the gong was that those in the factory might escape therefrom, to a place of safety. There seems to have been more hazard for deceased at the place where he was, and where his duty required him to be, than in any other place. In 1 Corpus Juris 1172, a variety of definitions, differing somewhat in their mode of expression, is given. It is there said also that, in a popular sense, every occurrence is mediately or immediately an act of God. One definition is that it is an act of nature, which implies entire exclusion of all human agency,—that which is occasioned by the violence of nature,—and at page 1174, it is said:

“The principle embodied in all of the definitions is that the act must be one occasioned exclusively by the violence of nature, and all human agency is to be excluded from

creating or entering into the cause of the mischief. When the effect, the cause of which is to be considered, is found to be in part the result of the participation of man, whether it be from active intervention or neglect, or failure to act, the whole occurrence is thereby humanized, as it were, and removed from the operation of the rules applicable to the acts of God."

Again:

"If divers causes concur in a loss, the act of God being one, but not the proximate cause, it does not discharge from liability." 1 Corpus Juris 1176.

The wind is doubtless; as many other things are, according to the law books, an act of God. But here human agencies participated. For instance, the defendants made it the duty of deceased, and gave him directions, to be at this particular and more hazardous place, to put down the windows, when the alarm was given for the storm, as it approached, when the men were to be dismissed. Deceased was not struck by the wind itself, as a bolt of lightning might strike him, but by the falling wall, which was built by human agency, and not strong enough to withstand the wind; and was injured through lack of diligence in giving the alarm, perhaps, and other things shown in the record. There is no question of negligence in this case. These circumstances are referred to, to show that deceased was not injured solely by the act of God, but that there was some causal relation between the injury and the employment, a part of his employment being to close the windows; or, as said in *Pace v. Appanoose County*, 184 Iowa 498, "a causal connection between the conditions under which the work is required to be performed and the resulting injury," and, as stated in the *Griffith* case:

" 'The accident arose because of something I [deceased] was doing in the course of my employment, and because I was exposed by the nature of my employment [putting down the windows as the storm approached after the alarm was sounded] to some peculiar danger [the falling wall at that place].' "

In *Fiarenzo v. Richards & Co.*, 93 Conn. 581 (107 Atl. 563), it was held that the words "causal," "cause," and "proximate cause," are not employed in a technical sense, and that the act itself must be construed, and not decisions which may seem to limit the act. Under the circumstances here shown, surely deceased was subjected to "a causative danger, peculiar to the work, and not common to the neighborhood."

In *Ahern v. Spier*, 93 Conn. 151 (105 Atl. 340), it was held that the fact that the employee was not exposed to greater danger than others in the same employment is immaterial. We have such winds or storms here. Houses and factories are built somewhat with reference thereto, and of sufficient strength to withstand all ordinary winds. Not so as to lightning. The evidence does not show that the storm was an unprecedented one. This storm was seen approaching for some time prior to the accident, and some thought it was too high to do damage. It cannot always be known in advance how serious it may be. Sometimes they look dangerous, but nothing comes of it. But it was seen in time to take some precautions, and the president of defendant factory, after some delay, which he regretted, gave the alarm. His purpose was, as he says, in order that the men might escape from the more dangerous position in the building to a safer place—perhaps to a storm cave or cellar. At any rate, all did escape, except deceased and Newquist. Suppose all the circumstances were the same as here,—the directions and duty to close the windows, the alarm, the act of closing the windows, the falling wall, the injury,—but, instead of a windstorm, there had been a fire, could there be any question about deceased's having been injured in the course of his employment, and that the injury arose out of the employment? It is clear to us there could be no question about it. Or suppose the wall in question had been blown down by an ordinary wind, what ought the test to be? That there would be liability under the same conditions if the wind had a velocity of 20 miles an hour, but no liability if the velocity were 60 miles an hour? Mani-

festly, we may not lay down any definite rule. In *Andrew v. Failsworth Indus. Soc.*, 2 K. B. (1904) 32 (90 L. T. [N. S.] 611), an English case, where a bricklayer was killed by lightning, while working on a scaffold some 23 feet from the ground, it was held that the height of his position subjected him to a peculiar danger, and risk from lightning, and that his death arose out of his employment. This case is referred to in the *Griffith* case, at page 431, as being a case where a workman on a high scaffolding was kept at work during a storm. In a like sense, in the instant case, deceased was kept at work during this storm, in that he was directed by the defendants, and it was a part of his duty, to put the windows down for the storm. See other lightning cases cited in the *Griffith* case, at page 430. It is there said that:

"It is not intended to hold that injury from lightning can in no case be due to an industrial employment. It has been rightly said that they can be."

In the *Pace* case, *supra*, we quoted from the *McNicol* case as follows:

"It 'arises out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workman would have been equally exposed, apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event, it

must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

The opinion also quotes from another case, as follows:

"For an accident to arise out of and in the course of the employment, it must result from a risk reasonably incidental to the employment."

And we said in the *Pace* case:

"What the law intends, is to protect the employee against the risk or hazard taken in order to perform the master's task."

In the instant case, under all the circumstances shown, the danger was incidental to the character of the business and the protection of the property and the lives of other employees; it was not independent of the relation of master and servant; deceased would not have been equally exposed to the same danger apart from the employment; the risk or hazard taken by deceased was in order to perform the master's task; there was causal connection between the conditions under which the work and the duties of deceased were required by defendant to be performed, and the resulting injury; the accident resulted from a risk reasonably incidental to the employment and the duties of deceased thereunder. Applying the doctrine of the foregoing case to the instant case, we think the injury to deceased arose out of and in the course of his employment. Other cases are cited by appellants on this point, which they say are somewhat analogous, but they concede that they are not entirely so. We shall not stop to review them, but simply cite them. *State v. District Court*, 138 Minn. 131 (164 N. W. 585) (freezing); *State v. District Court*, 138 Minn. 260 (164 N. W. 917) (sunstroke); *Kanscheit v. Garrett Laundry Co.*, 101 Neb. 702 (164 N. W. 708) (heatstroke); *Young v. Western Furn. & Mfg. Co.*, 101 Neb. 696 (164 N. W. 712) (heatstroke). Other cases where this question is discussed, are *Rayner v. Sligh Furniture Co.*, 180 Mich. 168 (L. R. A. 1916 A, 22), and note at pages 40 and 232. In this note at page 40 it is said:

"The determination of this question presents one most difficult problem in connection with the act. It has been said that each case must depend upon its own circumstances, and cannot be solved by reference to any formula or general principle."

Cases are cited to support the proposition. See, also, in connection with the Minnesota and Nebraska cases above, L. R. A. 1917 D, 114, note. It is said in *Kunze v. Detroit Shade Tree Co.*, 192 Mich. 435 (158 N. W. 851, L. R. A. 1917 A, 252), that, where employees are traveling on the streets, it may be taken into account that they are subjected to the danger of being struck by street cars, automobiles, etc. The court said:

"Deceased received his injury during the hours of employment, while actively engaged in performing work for his master, in accordance with duties imposed upon him by his employment."

In *Mahowald v. Thompson-Starrett Co.*, 134 Minn. 113 (158 N. W. 913), where an employee was kept on the street, in charge of his employer's team, subjecting him to the dangers of collisions with other teams, runaways, etc., the court said:

"If his employment as a teamster upon the streets of a large city, where he not only had to look out for his own safety, but also for that of his employer's team and rig, necessarily accentuated the street risks to him, above those to other occasional travelers, it suffices for the conclusion that this accident arose out of his employment. Although the risk from the accident in question may be said to be external to the employment, yet the employment caused a special degree of exposure to this risk."

See, also, *Brightman's Case*, 220 Mass. 17 (L. R. A. 1916 A 321), where the death was from heart disease of a cook upon a boat, due to exertions in saving his personal effects when the vessel began to sink. *Held* that the death arose out of and in the course of his employment. The court said:

"It was an implied term of such service as this that the employee might use reasonable effort to this end in an ex-

igency like that which arose. * * * It was in the course of his employment to live upon the lighter. Whatever it was reasonable for anyone to do, leaving a sinking vessel which was his temporary home, was within the scope of his employment. The standard to be applied * * * is that which the ordinary man, required to act in such an emergency, might do, while actuated with a purpose to do his duty. * * * In the case at bar, there may be found to be apparent to the rational mind a causal connection between the employment and the thing done by the employee at the time of the sinking of the lighter."

Other instances where it was held that the injury arose out of and in the course of the employment are: *Pekin Cooperage Co. v. Industrial Commission*, 285 Ill. 31 (120 N. E. 530), where there was an assault by one employee upon another, the dispute concerning the employer's work; *Rowland v. Wright*, 1 K. B. (1909) 963, where a workman was bitten by a cat habitually kept on the premises; *Barone v. Brambach Piano Co.*, 101 Misc. Rep. 669 (167 N. Y. Supp. 933), where an employee was bitten by a dog kept with the consent of the employer in part of the premises where employee's duties required him to go; *Nevich v. Delaware, L. & W. R. Co.*, 90 N. J. L. 228 (100 Atl. 234), employee assaulted while reclaiming his employer's property by his direction; *Baum v. Industrial Commission*, 288 Ill. 516 (123 N. E. 625), where a workman voluntarily performs an act during an emergency, which he has reason to believe is in the interest of his employer. In that case, the employee was fatally wounded by strikers, while he was trying to save his employer and other employees from injury. *Muel-ler Con. Co. v. Industrial Board*, 283 Ill. 148 (118 N. E. 1028), where a foreman, a half hour before time to begin work, went to another building to telephone for lumber, and was struck by an automobile. *Held* that ordering materials was an incidental duty, in discharging which the use of the telephone in a near-by building was as much in the course of his employment as if a telephone had been installed in the building under construction, and was being used by the

employee. In *In re Fogarty v. National Biscuit Co.*, 221 N. Y. 20 (116 N. E. 346), the court held that the position of night watch was exposed to the dangers of the bakery business. The court said:

"This court has given a more liberal construction to the compensation law, and held that, 'where * * * an employee is injured while performing an act which is fairly incidental to the prosecution of a business and appropriate in carrying it forward and providing for its needs, he or his dependents are not to be barred from recovery because such act is not a step wholly embraced in the precise and characteristic process or operation which has been made the basis of the group in which employment is claimed.' *Matter of Larsen v. Paine Drug Co.*, 218 N. Y. 252, 256. The principle has been extended to cover injuries to night watchmen. *Matter of White v. New York C. & H. R. R. Co.*, 216 N. Y. 653, affirmed in United States Supreme Court, 243 U. S. 188 (61 L. Ed. 667)."

As a matter of law, on the undisputed evidence before us, we are of opinion that defendants are not relieved from the payment of compensation on the ground that deceased was injured and killed by the act of God. We are of opinion that he was injured in the course of and that the injury arose out of his employment, and that claimants are entitled to compensation. Wages of deceased, and the amount he was contributing to claimants, and the other elements necessary as a basis for the allowance of compensation, were shown or conceded before the board; but this feature of the case has not been argued, and we shall not stop to figure it out. The cause is reversed and remanded to the district court, with directions to allow compensation in accordance with this opinion, and the law and the evidence.—*Reversed and remanded.*

WEAVER, C. J., and EVANS, J., concur.

SALINGER, J., concurs specially.

SALINGER, J. (concurring). No distinction should be based on the fact that one injury was caused by the act of God in creating a windstorm, and that another was due to the act of God in creating lightning. Nor do I deem the naked fact that injury was caused by any act of God to be controlling. And nothing in *Griffith v. Cole Bros.* militates against a recovery in the case before us. That case distinctly holds that death from being struck by lightning may be compensable. The test is not whether the injury was caused by an act of God, but is whether the one injured was, by his employment, specially endangered by the act of God, be it lightning or windstorm. This decedent was more exposed to such injury than mankind generally. If an approaching storm seemed threatening, it was his duty to close windows. That might keep him in the path of the storm after his fellow employees had left the building and gotten out of the path of the storm. I base my concurrence on the fact that the nature of the employment was one that forced the employee to be specially subject to the danger from certain acts of God.

A. F. REIS, Appellee, v. MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Appellant.

CARRIERS: Damage to Baggage Left on Depot Platform. One
 1 who, late in the day, places his baggage on a railway depot platform, preparatory to checking it for carriage on a train leaving on the following morning, is neither a trespasser nor a mere licensee, and may recover damages to such baggage on a showing that such damage was caused by the negligent manner in which the company maintained the premises.

NEGLIGENCE: Jury Question on Undisputed Facts. Undisputed
 2 facts attending an injury present a jury question, when different conclusions may be drawn therefrom.

Appeal from Marshall District Court.—JAMES W. WILLETT, Judge.

OCTOBER 4, 1920.

ACTION at law to recover damages for injury to baggage. There was a verdict and judgment for plaintiff, and defendant appeals.—*Reversed and remanded.*

C. H. E. Boardman, for appellant.

E. N. Farber, for appellee.

WEAVER, C. J.—The plaintiff is a traveling salesman, and defendant, a common carrier of passengers and baggage on a line of railway passing through the city of Hampton, Iowa. At its station in Hampton, it maintained, on the date in question, the usual platform, upon which was a depot building. Near at hand, it also maintained a water tower, or elevated tank. Near the close of

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 damage to
 baggage left
 on depot
 platform.

the day, July 6, 1915, plaintiff, carrying three sample cases and a grip, arrived at Hampton, over the defendant's road, intending to take another of the company's trains in the morning, to another station on its line. Placing his baggage on the station platform, against the depot building, and intending to return and check it to his destination, he went to the post office, two or three blocks away, where he found mail awaiting him. Going back to the station, he stopped in the waiting room, to examine his mail. Thence he stepped into a restaurant near at hand, and, while eating a lunch, heard a loud crash, and, looking out, discovered that defendant's water tower had fallen, sending a very considerable flood of water over the station platform and around through the depot building. Investigation developed the fact that the flood had swept plaintiff's baggage away, to the material injury of the grip, sample cases, and their contents. This action was thereafter brought for the recovery of damages, on the theory that the fall of the tower and the resulting damage were occasioned by defendant's negligence in maintaining the structure in a dilapidated, weak, and dangerous condition. The defendant denies the charge of negligence, and denies that it was under any duty to care for or protect plaintiff's baggage. On the trial, the plaintiff introduced evidence showing the facts as above stated; also, that the water tower had, for a protracted period, been in a visibly weakened and defective condition, being "out of plumb," and leaning in the direction of the depot platform. The defendant offered no evidence in its own behalf, and, the parties having rested, it moved for a directed verdict. The motion was overruled, and a verdict directed in plaintiff's favor. The defendant appeals.

The theory of the defense and of the motion to direct a verdict in its favor was that the plaintiff was not a passenger, and that defendant owed him no duty as such; that the leaving of the baggage on the platform was an act of trespass; and that defendant was, therefore, under no duty to care for it, except to refrain from its wanton or willful injury.

The authorities called to our attention as to the nature of a carrier's duty to passengers, on the one hand, and to trespassers on the other, are undoubtedly correct, and appellant's statement of the rules applicable thereto may be conceded. The fundamental error in the argument is in its seeming assumption that, if plaintiff was not a passenger, with the rights pertaining to that relation, then he was, as a matter of course, a trespasser, with no rights other than those which protect trespassers generally against wanton injury. The very nature of the business of an ordinary railroad company implies and makes necessary meeting and intercourse between its officers and agents and the general public. At its stations, as a rule, are to be found its ticket offices and freight offices. Not infrequently in the same connection are found telegraph and express offices, for the public accommodation. Any person, though not at the instant a passenger or shipper, may lawfully go there for information as to rates and trains, or to meet friends or to accompany others about to depart, or to attend to any of the multitude of matters arising out of or pertaining to the business of railroad transportation. None of them may be able to claim the peculiar rights with which the law clothes a passenger or shipper, yet they are by no means trespassers or mere licensees. If a person intending to become a passenger, and wishing to avoid the hurry and confusion attendant upon the late checking of baggage, causes it to be taken to the station, and placed upon the platform somewhat in advance, intending to follow it and procure his checks, it would be a singular instance of gross injustice to hold that he is a trespasser, and that the company is under no obligation to exercise any degree of care for the safety of his property. It may be admitted that he is not yet a passenger, and that, until the baggage is accepted, the company is not yet charged with the duty of a carrier; but it will not do to say that, when a person intending to become a passenger has come upon the premises where the carrier solicits and transacts business with the public, and he is there for the purpose of perfecting arrangements by which he may be-

come a passenger and complete the delivery of his baggage to the carrier, he is entitled to no protection against the company's negligence.

It is not necessary to hold that a company upon whose platform goods or baggage is deposited for later shipment would be chargeable with liability in such case, if the property is stolen or otherwise lost or injured by the wrong or fault of some third person, or by other cause in no way attributable to its own act or negligence; but, if property which is lawfully there upon its own premises for delivery into its keeping—though such delivery is still incomplete—is destroyed because the premises so maintained for the transaction of such business are made dangerous by its own negligence, there can be no hardship in holding it to respond in damages.

Plaintiff's testimony is undisputed, that, having arrived at Hampton in the evening, and intending to depart on the same road in the morning, he proposed to avoid carrying his baggage to a hotel, by leaving it at the station, and having it checked to his destination; and this was not an unreasonable design. He did so leave it, and had returned to the station to accomplish that purpose, but had not yet completed the delivery by placing it in the hands of the agent and obtaining a check, when the fall of the tower occurred. From his arrival on defendant's train, the goods were at all times on its premises, for the purpose of further transportation. Had plaintiff been waiting at the station, to take a later train that evening, and left his baggage in the same place, while he stepped into the restaurant for a lunch, we apprehend there would be little contention against the validity of his claim for damages. We are unable to see that his intention to remain in town until morning materially alters the situation. He had returned to the station for the purpose of completing the delivery and checking of his baggage, when its injury, occasioned by the dangerous condition of the premises, intervened.

The only question remaining is whether the trial court erred in failing to submit the question of defendant's negli-

gence to the jury. It is the opinion of the majority of the court that, although there is no dispute as to the circumstances under which the injury complained of was sustained, yet the conclusion to be drawn therefrom is one of fact, rather than of law, and the verdict should not have been directed.

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jury question
on undisput-
ed facts.

The judgment is therefore reversed, and the cause is remanded for a new trial.—*Reversed.*

LADD, EVANS, and STEVENS, JJ., concur.

STATE OF IOWA, Appellee, v. JOSEPH OHMAN, Appellant.

INTOXICATING LIQUORS: Manufacture without Intent to Sell.

1 The manufacture in this state of intoxicating liquors, without intent to traffic in any manner in the same, is prohibited. (Sec. 2382, Code Suppl. Supp., 1915.)

INTOXICATING LIQUORS: Nuisance. On the trial of an indict-

2 ment for nuisance, under Sec. 2384, Code, 1897, due consideration may be given to the prohibitions of Sec. 2382, Code Suppl. Supp., 1915.

Appeal from Mahaska District Court.—D. W. HAMILTON, Judge.

OCTOBER 4, 1920.

PROSECUTION for maintaining a liquor nuisance. There was a trial to a jury, and a verdict finding the defendant guilty. Judgment was entered upon the verdict, and the defendant appeals.—*Affirmed.*

Dan Davis and W. R. Lacey, for appellant.

H. M. Havner, Attorney General, *B. J. Powers*, Assistant Attorney General, and *Maxwell O'Brien*, County Attorney, for appellee.

EVANS, J.—The evidence is not greatly in conflict. The charge of nuisance in the indictment is based upon the alleged manufacture by defendant upon his premises of intoxicating liquor. The liquor in question was made from wild grapes. When the manufacturing process was complete, the liquor contained 21 per cent of alcohol. Two or three kegs of the liquor were manufactured, containing a total of about 50 gallons. The contention of the defendant was that, though he had dispensed some of such liquor in a social way, he had not manufactured or kept the same for the purpose of sale, but solely for his own "stomach's sake." The controlling question in the case is whether it be an offense against the law to *manufacture* intoxicating liquor, where there is no intent to sell the same or to traffic therein. The defendant's contention was presented to the court by motion for directed verdict and by requested instructions.

By requested Instruction No. 3, he asked the court to instruct:

"That the defendant had the right to manufacture grape wine from wild grapes grown on Skunk River in the state of Iowa for his own private use and consumption of himself and family where not in unusual quantities, providing he did not sell or intend to sell the same contrary to the laws of Iowa, or keep the same with intent to violate the law."

Complaint is also made because, though the indictment is based upon Section 2384 of the Code, yet the court permitted the jury to consider the prohibition of Code Section 2382. It is enough to say that Section 2384 is predicated in large part upon the prohibition of Section 2382. In Section 2382 is found the following prohibition:

1. INTOXICATING LIQUORS:
manufacture
without in-
tent to sell.

2. INTOXICATING LIQUORS:
nuisance.

"Section 2382. No one, by himself, clerk, servant, employee or agent, shall, for himself or any person else, directly or indirectly, or upon any pretense, or by any device, manufacture, sell, exchange, barter, dispense, give in consideration of the purchase of any property or of any services or in evasion of the statute, or keep for sale, any intoxicating liquor, which term shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquor, and all intoxicating liquor whatever, except as provided in this chapter, or own, keep, or be in any way concerned, engaged or employed in owning or keeping any intoxicating liquor with intent to violate any provision of this chapter, or authorize or permit the same to be done * * *

By Section 2384, a nuisance is declared, as follows:

"Section 2384. Whoever shall erect, establish, continue or use any building, erection or place for any of the purposes herein prohibited, is guilty of a nuisance, * * * and the building, erection or place, or the ground itself, in or upon which such unlawful manufacture or sale or keeping with intent to sell, use or give away said liquors is carried on or continued or exists, and the furniture, fixtures, vessels and contents, are also declared a nuisance, * * *

Under this Section 2384, to maintain a building or place for the violation of the prohibition of Section 2382 is to maintain a nuisance. Under Section 2382, the "manufacture" of intoxicating liquors is included in the same prohibited category as is the sale thereof. We find no exception in the statute in favor of "grapes grown on the Skunk River."

It is strongly urged that Section 2384 has been in force for a quarter of a century, and that the makers of the law had no intention to make it a criminal offense for a person to manufacture a little wine for the use of his own family, and that the present contention of the State and the instruction of the trial court are "too foolish to admit of argument." The foolishness, if any, is one which inheres in the entire

statute. Its folly has been frequently and persistently pointed out, but the demonstration of such folly has never penetrated the legislative mind. The statute itself is free from ambiguity, and will permit no other construction than that given to it by the trial court. The judgment below is, therefore,—*Affirmed*.

WEAVER, C. J., LADD and PRESTON, JJ., concur.

MIKE ADAMI, Appellee, v. FOWLER & WILSON COAL COMPANY,
Appellant.

MASTER AND SERVANT: Workmen's Compensation Act—Cross-

- 1 **Examination.** The fact that the Workmen's Compensation Act casts upon a rejecting master the presumption of negligence, furnishes no reason why the master should not, in the cross-examination of the employee, be confined to the points brought out on direct examination.

TRIAL: Refusal to Order Interpreter. Refusal to order an exam-

- 2 ination of a witness through an interpreter will not be disturbed, in the absence of a showing of abuse of discretion.

MINES AND MINERALS: Miner's Working Place—Instructions.

- 3 Instructions reviewed, relative to the reciprocal duties of operator and miner as regards the miner's working place, and held unobjectionable.

TRIAL: Misconduct of Counsel. Explicit direction by the court

- 4 to the jury to disregard misconduct on the part of counsel has large curative qualities.

*Appeal from Appanoose District Court.—C. W. VERMILION,
Judge.*

OCTOBER 19, 1920.

ACTION for damages. Verdict and judgment for plaintiff. Defendant appeals.—*Affirmed.*

Howell, Elgin & Howell, for appellant.

Porter & Greenleaf and *H. E. Valentine*, for appellee.

STEVENS, J.—I. On the afternoon of March 2, 1916, while employed as a miner by defendant in its mine near Rathbun, plaintiff was severely injured, by the fall of a large amount of slate and coal. He had been working in the room in which the accident occurred, which was known as a deficiency room, but a day or two. By a deficiency room is meant one in which the slate and draw slate fall from the roof with the coal, and additional compensation is allowed per ton to the miner for the slate, the excess of which has to be removed therefrom. The evidence is in dispute as to what plaintiff was doing at the time the injuries were received. When several miners who were working in near-by rooms arrived, in response to plaintiff's outcry, they found him lying with his back against the gob, and about five feet from the face of the coal, with a large amount of slate and coal piled upon his leg, which was fractured. He was alone at the time the accident occurred.

It is claimed by defendant that plaintiff neglected and refused to obey the directions and orders of the mine boss to appropriately prop and sprag the coal, and that his injuries, which occurred in his working place, were due wholly and solely to his own negligence. On the other hand, plaintiff claims that, on the morning preceding the occurrence, he requested the mine boss to permit him to build a crib, to support a block of slate which plaintiff claims extended about 15 inches over the coal, and that he was refused permission to do so. He testified that it was this piece of slate that fell upon him. The mine boss denied that anything was said to him about a crib, but said that the conversation related to the extra compensation plaintiff would receive on account of the slate, and that he then

cautioned him of the danger of mining without sufficient sprags, and directed him to sprag the coal. Numerous witnesses who were employed by defendant as miners testified that a crib was unnecessary; while others admitted that cribs had previously been set up near where plaintiff was working. It appears without practical dispute in the evidence that the room in which plaintiff was working was one in which all of the slate and draw slate fell with the coal, leaving a smooth rock roof. The coal was mined by digging under, or undermining, the face, which caused the coal, by its own weight and the weight of the slate about it, to fall upon the floor of the mine. If the weight was not sufficient to cause the coal to fall, a wedge was driven in between the coal and the slate, thereby forcing it down. This is referred to by the witnesses as "sledging down the coal." To prevent the coal from falling upon the miner, sprags are securely set against the coal, causing it to settle down, instead of falling half over toward the miner, as it might otherwise do. Plaintiff denied that it was necessary, in the room in which he was working, to sledge the coal; denied that he was doing so; and claimed that he had at least three sprags in place. Several of the witnesses testified that they heard him sledging, immediately before they heard his outcry; but plaintiff testified that, instead, he was shoveling dirt when the coal gave way and fell upon him.

The errors relied upon for reversal include rulings upon objections to testimony, and to numerous paragraphs of the court's instructions, together with the refusal of the court to give certain requested instructions on behalf of defendant, and misconduct of plaintiff's attorney, during the trial and during his argument to the jury. On the whole, the case in favor of plaintiff is not a very strong one. Called as a witness in his own behalf, the plaintiff testified in chief that he was working for the defendant, and that, on March 2, 1916, about 2:30 P. M., he was severely injured by some slate and coal which fell upon his leg; and described in

detail his injuries, sufferings, and the treatment accorded his leg.

Counsel for appellant sought, on cross-examination, to show by plaintiff that the accident was due wholly to his negligence; that he was, at the time, engaged in sledging down his coal, without proper spragging; that he had not set sufficient props; and that he was warned by the mine boss not to mine any more coal until he had put up sprags, to keep the coal from falling upon him.

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SERVANT:
Workmen's
Compensation
Act: cross-
examination.

Objections were sustained to all questions propounded to the witness, relative to matters not covered by the examination in chief. Appellant takes the position that counsel was entitled to cross-examine plaintiff as to all matters bearing upon the situation and the cause of the accident, whether covered by the examination in chief or not. The court, however, confined the cross-examination to the matters gone over in chief. We see no reason why the scope of the cross-examination of this witness should not be limited, the same as that of any other witness. The presumptions created by Sec. 2477-m, Paragraph d, Code Supplement, 1913, do not change the rule in this respect. It is possible that counsel for appellant was held a trifle closely to the matters gone over in chief, but plaintiff subsequently testified in detail concerning the accident, thereby opening up the field for full cross-examination. Not only, therefore, was the ruling of the court proper, but no prejudice could have resulted to defendant, if it were conceded to have been erroneous.

II. Many of the alleged errors in the court's ruling upon the admission of evidence are wholly without merit, and frequently the matters sought to be elicited were subsequently received. It would not have been error for the court to have permitted the witness to answer a few of the questions to which objection was sustained, and perhaps not thereafter covered by the answers of the witnesses; but the exclusion of the testimony sought, could not have re-

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fusal to or-
der inter-
preter.

sulted in prejudice to defendant. One of the witnesses claimed he did not sufficiently understand or speak the English language to enable him to intelligently give his testimony, whereupon, counsel for appellant requested that his testimony be given by an interpreter. This request was refused, the court stating that there was no apparent necessity therefor. There is nothing in the record to indicate that the witness was unable to give his testimony in English, and the court did not abuse its discretion in refusing to permit an interpreter to be sworn.

The remaining rulings complained of are not of sufficient merit to justify separate discussion thereof. We have, however, examined the record with reference thereto with special care, and find no reversible error at this point.

III. The court, in the twelfth paragraph of its charge, instructed the jury that, if it found by the greater weight or preponderance of the evidence that, at the time the in-

juries complained of were received, plaintiff
3. MINES AND MINERALS :
miner's work- ing place :
instructions. was sledging down coal, and that he was injured by the coal which fell upon him, then defendant was not guilty of negligence that was the proximate cause thereof, and plaintiff could not recover. The court, however, as a part of said paragraph of its charge, further instructed the jury that, if the injury was caused by a premature fall of coal, and defendant was guilty of negligence in refusing, if it did refuse, to allow plaintiff to build a crib, and if such crib, if built, would have prevented the premature fall of coal, then it would be warranted in finding that such refusal, if any, to allow plaintiff to build a crib, was the proximate cause of his injury; and, if the injuries were received in the usual course of, and arose out of, his employment, he would be entitled to recover, although he was, at the time, working in his own working place. The exceptions urged to this instruction are, in substance, that there was no evidence on which to base same, and that cribs are not customarily, and could not advantageously, be used to prevent the premature fall of coal. Upon plaintiff's theory, the fall of the

coal was due to unusual conditions prevailing in the room in which plaintiff was working, and that, if a crib had been constructed, so as to support the overhanging slate, the alleged premature fall thereof might have been avoided. There was some evidence tending to show that a prop already in position was not strong enough to prevent the fall. Slate and draw slate accompanied the coal when it fell, and plaintiff claimed that he was struck by the piece of slate that projected above the coal, referred to above. This instruction was preceded by a full and comprehensive statement of the duty of defendant to furnish plaintiff all reasonably necessary props and sprags, and of plaintiff to use the same wherever reasonably necessary to make his working place safe, and to observe and obey the directions of defendant's mine foreman to make his working place reasonably safe and to exercise reasonable care, and also as to plaintiff's right to build a crib, and the duty of defendant to permit him to do so. Taken in connection with the charge as a whole, as applied to the testimony, we think the instruction unobjectionable.

IV. The court refused to give 18 separate instructions requested by counsel for appellant. Complaint is also made of this ruling. Proper exceptions were not preserved thereto. *Anthony v. O'Brien*, 188 Iowa 802; *Gibson v. Adams Express Co.*, 187 Iowa 1259. In view, however, of the importance of the case, we have carefully examined the record, and compared the requested instructions with the court's charge, and find that many propositions set forth in the requested instructions were embodied therein; that, in fact, practically all that could properly have been given are covered thereby. The issues were fairly and fully submitted to the jury by the court.

V. Counsel for appellee, while cross-examining one or more of defendant's witnesses, propounded questions of doubtful propriety, to which objections were overruled. It

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misconduct
of counsel.

also appears that, during his argument to the jury, he referred to some matters not within the record, which is somewhat enlivened by the crimination and recrimina-

tion of counsel. The attorneys for appellee seek to confirm, by the citation of several prior decisions of this court, their charges against the senior counsel for appellant that he, with more or less regularity, violates the rules, enforcement of which he prays in this case. Whether it is the desire of counsel for appellee to have the court treat these charges as *res adjudicata* or not, we are not materially aided thereby. The record discloses that, upon objection to the alleged improper argument of counsel for appellee, the court, in its ruling, in effect cautioned the jury not to consider matters outside of the record. As we have often said, some latitude must be allowed to counsel in argument. While some of the remarks complained of cannot be approved, we are convinced, in view of the observations of the court, that no prejudice resulted therefrom.

VI. It is also urged by counsel for appellant that the verdict of the jury is not supported by the evidence. The case is a close one, but there is such dispute in testimony as to justify its submission to the jury.

Since we find no error in the record, the judgment of the court below must be, and is,—*Affirmed*.

WEAVER, C. J., LADD and ARTHUR, JJ., concur.

HARVE DEITRICK, Appellant, v. P. W. SINNOTT et al.,
Appellees.

FRAUDS, STATUTE OF: Personalty—Delivery. An owner of cat-
1 tle, seeking to enforce an oral contract of sale on which no
payment had been made, may not base *delivery* to the buyer
either:

1. On mere words of the alleged contract, when the cattle
were, at the time, in the owner's possession in the stockyards
of a distant state, or

2. On the fact that the alleged buyer received and appro-
priated to his own use the proceeds of a subsequent sale of
cattle, when such transaction was, in view of the relations of
the parties, perfectly consistent with the claim of no sale.

FRAUDS, STATUTE OF: Testimony of Adverse Party. A peti-
2 tion which seeks to enforce an oral contract which is within
the statute of frauds, is demurrable, unless it contains an alle-
gation that plaintiff relies on the testimony of the adverse
party to prove the contract. The Code of 1897 has not changed
this rule.

FRAUDS, STATUTE OF: Defendant as Witness. A defendant
3 against whom an alleged oral contract which is within the
statute of frauds is sought to be enforced, may become a wit-
ness *on his own behalf*, and testify as to the real nature of the
transaction in question, and *plaintiff will not be permitted to
contradict such testimony.*

Appeal from Clarke District Court.—P. C. WINTER, Judge.

OCTOBER 19, 1920.

ACTION in equity for an accounting. Decree dismissing
plaintiff's petition, and he appeals.—*Affirmed.*

O. M. Slaymaker, for appellant.

McGinnis & McGinnis, for appellees.

STEVENS, J.—I. The plaintiff and the defendants, P. W. Sinnott and H. A. Canney, reside at Osceola, Iowa, where they are each engaged in buying and shipping stock. Plaintiff and Sinnott occasionally buy and ship in partnership, as do also the defendants. The controversy involved in this case grows out of the purchase, in July, 1918, and sale of three carloads of cattle on the Chicago market. They were all purchased of one Judd, and shipped in two lots, of one and two carloads respectively. The first carload was purchased and paid for by plaintiff on July 30, 1918, by check upon the Simmons & Company bank, of Osceola; the other two loads were purchased by Sinnott and paid for by check on the same bank, as follows: \$100 on July 30th, and \$4,966 on August 2d. Defendant sold Sinnott a one-half interest in the first carload, and purchased a one-half interest of him in the last lot. All of the cattle were shipped in the name of Sinnott & Deitrick, to the Iowa Live Stock Commission Company, Chicago, Illinois. Canney purchased a one-half interest of Sinnott; so that the cattle were owned, one half by plaintiff, and the other half by the defendants, jointly. The first carload was sold at a net profit of \$124.49, but the last lot was sold at a loss of \$1,413. The last two loads arrived at the stockyards in Chicago on Saturday night, but were sold the following Tuesday. The Sunday intervening is referred to by the witnesses as the day of the "hot winds." The proceeds of the sale of both shipments were forwarded to the bank of Osceola by the commission company, and credited to Sinnott's account. The sales account was, however, made out to Sinnott & Deitrick.

Plaintiff brings this action for an accounting, and asks judgment for the amount found to be due him. He alleged in his petition that, on Monday afternoon, and while the cattle were in the stockyards at Chicago, he orally sold his interest therein to the defendants, at an agreed price per hundred. Defendants filed separate answers, denying the allegations of plaintiff's petition, but admitting the purchase and shipment of the cattle, and tendering to him the amount claimed by them to be due the plaintiff. The court

found that no part of the purchase price was paid, and that no delivery of the cattle was made to Canney, and that, therefore, the attempted sale by plaintiff falls within the statute of frauds.

The defendant Canney, with whom it is claimed the oral contract of purchase was made, called as a witness in his own behalf, admitted that he had a conversation with plaintiff at the time claimed, during which plaintiff said that he believed he had too many cattle on the market that day; that defendant then, in a spirit of banter or fun, proposed to buy plaintiff's interest in the cattle, and that, after some dickering as to price, defendant told him that he would take them; but that he did not intend at the time to buy an interest in the cattle; and that plaintiff knew he did not. As indicated, no general partnership then existed between plaintiff and Sinnott, or between Sinnott and Canney. All partnership transactions between them involved only occasional specific purchases and sales of stock.

It is conceded by the defendants that, after the cattle in question were purchased by plaintiff and Sinnott, Canney acquired a share in the half interest of Sinnott; but he was

1. FRAUDS, STATUTE OF: in no sense a partner with plaintiff in the transaction. It is further conceded that no money was paid to plaintiff for his interest in the cattle, and that there was no actual delivery thereof to Canney, or to Sinnott & Canney. Appellant, however, contends that the cattle were, at the time of the alleged sale, in the possession of defendants; that full dominion and control of the property was turned over to and assumed by them; that they received and appropriated the proceeds of the sale to their own use; and that, therefore, the statute was complied with. Many decisions from other jurisdictions holding that, where personal property is in possession of the buyer at the time of the sale, it is unnecessary for the owner to resume possession thereof in order that actual delivery may be made, are cited. *Wilson v. Hotchkiss*, 171 Cal. 617 (154 Pac. 1); *Godkin v. Weber*, 154 Mich. 207 (114 N. W. 924); *Smith v. Bryan*, 5 Md. 141;

Reinhart v. Gregg, 8 Wash. 191 (35 Pac. 1075); *Snider v. Thrall*, 56 Wis. 674 (14 N. W. 814). These cases, however, hold that, where the property is in the possession of the buyer, his conduct touching the same must thereafter be inconsistent with his previous possession as bailee or agent of the seller. *Charlotte H. & N. R. Co. v. Burwell*, 56 Fla. 217 (48 So. 213); *Young v. Ingalsbe*, 208 N. Y. 503 (102 N. E. 590); *Wilson v. Hotchkiss*, supra; *Silkman Lbr. Co. v. Hunholz*, 132 Wis. 610 (112 N. W. 1081). Evidence showing acts of dominion and control thereover by the purchaser, inconsistent with the facts upon which his prior possession was based, would be sufficient for that purpose. *Wilson v. Hotchkiss*, supra.

Manifestly, actual delivery of the cattle by plaintiff to Canney, or of his interest therein, could not have been made at the time of the transaction. The parties were in Osceola, and the cattle were in the stockyards at Chicago, consigned to the Iowa Live Stock Commission Company for sale. Mere words between them at the time of the transaction, which are a part thereof, at the time of the alleged sale, could not constitute or effect a delivery of the property. *Silkman Lbr. Co. v. Hunholz*, supra; *Godkin v. Weber*, supra; *Smith & Son v. Bloom*, 159 Iowa 592.

The evidence does not sustain appellant's claim that the cattle were, at the time of the alleged sale, in the possession of the buyer. The evidence is not quite clear as to the extent of the partnership relations between the defendants generally, but they apparently had an understanding that they would share profits and losses in purchases agreed upon, or in sales of stock bought by Canney and approved by Sinnott. Sinnott testified that he knew nothing about the transaction between plaintiff and his codefendant until after the sale of the cattle, and the receipt by him of the proceeds arising therefrom. In this he is not contradicted. The cattle, at the time of the transaction, as stated, were in the stockyards at Chicago, for sale by the agent of the shipper, who was Sinnott & Deitrick. No affirmative act which could, upon any theory, amount to a delivery is

shown in the evidence. It is true that we held, in *Smith & Son v. Bloom*, supra, which involved a controversy over a quantity of lambs, over which plaintiff had no control, picked out by the defendant, weighed and placed in a separate pen, with the knowledge of Bloom, that there was a delivery; but that differs materially from the case at bar. In this case, there was no surrender to defendant of possession, dominion, or control over the cattle.

But it is further contended by counsel for appellant that the defendants received and appropriated the proceeds of the sale of the cattle, thereby accepting them, and that delivery may be inferred therefrom. No relationship between the receipt and deposit of the proceeds of the sale in the bank by Sinnott to his own credit, and the transaction between plaintiff and Canney, was disclosed.

On July 30th, the defendant Sinnott wrote a letter, or card, to the Iowa Live Stock Commission Company, at Chicago, stating that he was shipping one of three carloads of cattle, and that same were billed out in the name of Sinnott & Deitrick, and requesting that the proceeds of the sale be forwarded to the Simmons & Company Bank. Explaining his reasons for writing this letter, Sinnott testified as follows:

"As to how I came to write that, Mr. Deitrick suggested, when we were coming home, at the time we were talking about Mr. Canney going in, that he had never shipped any cattle to this company, and he says, 'You had better write to them and tell them to send the money to Simmons & Company.' Exhibit C which you hand to me is the card which I wrote. It seems to me that we had the returns for the first load when that card was written. I had been shipping other cattle to them before that."

As will be observed, this letter was written before the last shipment of cattle was made. Evidently, the commission company made remittance to the bank in compliance with the request contained in the letter referred to. A letter from the commission company, explaining how the remittance came to be made to Sinnott, was introduced in

evidence by the plaintiff, and attention is directed to the following extract therefrom:

"Our bookkeeper naturally supposed that these cattle belonged to Mr. Sinnott, and, from this letter, we would take it that they were billed Sinnott & Deitrick, in order to get a pass, or for some other reason."

Sinnott & Deitrick did not have an account in the Simmons & Company Bank, although each kept separate accounts therewith. The remittance was payable to Sinnott, and naturally was placed to his credit, when received at the bank. Both Sinnott and plaintiff appear to have been financially responsible and personally friendly, and the method of handling the proceeds of the sale was probably not objectionable to plaintiff. The record, in our opinion, does not disclose facts from which delivery may be inferred.

II. Counsel for appellant further argues that, whether there was a sufficient delivery of the property to take the contract out of the statute of frauds or not, it was fully established by the testimony of the defendant Canney. The following provisions of the Code have a material bearing upon this proposition:

2. FRAUDS,
STATUTE OF:
testimony of
adverse
party.

"Section 4627. The above regulations, relating merely to the proof of contracts, shall not prevent the enforcement of those not denied in the pleadings, except in cases when the contract is sought to be enforced, or damages recovered for the breach thereof, against some person other than him who made it.

"Section 4628. The oral evidence of the maker against whom the unwritten contract is sought to be enforced shall be competent to establish the same."

Prior to the enactment of Section 4628, *supra*, in its present form, we held that, if the plaintiff desired to rely upon the testimony of the adverse party to prove an oral contract, he must so allege in his petition. *Babcock v. Meek*, 45 Iowa 137. Section 3667 of the Code of 1873, which was in force when the decision in the above-cited case was

announced, corresponds to the section quoted above, and was as follows:

"Nothing in the above provisions shall prevent the party himself against whom the unwritten contract is sought to be enforced, from being called as a witness by the opposite party, nor his oral testimony from being evidence."

Plaintiff did not allege in his petition that he relied upon the testimony of the defendant to establish the contract, and counsel contends that, under the present statute, this is unnecessary. We fail to see, however, wherein the change in the language of the statute alters its effect. Section 4625 of the Code of 1897 provides:

"Except when otherwise specially provided, no evidence of the following enumerated contracts is competent, unless it be in writing and signed by the party charged or by his authorized agent:

"1. Those in relation to the sale of personal property, when no part of the property is delivered and no part of the price is paid; * * *"

This statute does not, however, render an oral contract for the sale of personal property, where no part of the purchase price is paid and no part of the property delivered, void. *Berryhill v. Jones*, 35 Iowa 335; *Merchant v. O'Rourke*, 111 Iowa 351; *Nebraska B. S. & L. Co. v. Conway & Sons*, 127 Iowa 237. If the defendant fails, in his answer, to deny the contract, or if he admits the same, it is enforceable, except when the plaintiff seeks to enforce the same, or to recover damages for a breach thereof against some other person than the party making it. Another exception to Section 4625 is provided by Section 4628, which makes the oral evidence of the maker against whom it is sought to enforce the contract competent to establish the same. If plaintiff would avoid the statute of frauds, in an action upon an oral contract for the sale of personal property, he must allege such facts as will effect that purpose; and, if such necessary allegations are omitted, the petition is demurrable. *Babcock v. Meek*, supra; *Burden v. Knight*, 82 Iowa 584; *Marks v. McGookin*, 127 Iowa 716. Further, it

is the settled rule in this state that, if plaintiff relies upon the testimony of the adverse party to establish the contract, the proof thereof is limited to his testimony, and can neither be supplemented nor contradicted by the testimony of other witnesses. *Auter v. Miller*, 18 Iowa 405; *Thorn & Stein v. Moore*, 21 Iowa 283; *Mighell v. Dougherty*, 86 Iowa 480; *Burnside & Co. v. Rawson & Co.*, 37 Iowa 639; *Johnson v. Holland*, 124 Iowa 157; *Marks v. McGookin*, supra; *Olsen v. Peregoy & Moore Co.*, 182 Iowa 889.

Manifestly, Section 4628 was enacted for the benefit of the party seeking the enforcement of an oral contract, and not for the benefit of a party opposing enforcement thereof.

3. FRAUDS. Doubtless, the defendant is a competent wit-
STATUTE OF: ness, even when called in his own behalf, to
defendant as establish the oral contract sought to be en-
witness. forced against him; but the enactment of

Section 4628 was wholly unnecessary, in view of the provisions of Section 4627, for the purpose of authorizing the defendant to testify thereto. If, under said statute, he failed, in his answer, to deny the contract, or specifically admitted the same, it will be enforced, except where a third party is involved. The defendant Canney availed himself of his privilege, and became a witness in his own behalf, and testified fully concerning the transaction in question. The only question is whether his testimony establishes the contract. Defendant admitted that he had a conversation with plaintiff in which the purchase of his interest in the cattle was discussed; but, in explanation thereof, testified that what was said by him was in a spirit of banter and fun; that he at no time intended to purchase the cattle, either for himself or for Canney & Sinnott. He also testified that the conversation was had on the Monday following the Sunday of the "hot winds," when, as is generally known, the temperature reached 110 degrees in the shade, and possibly, in some parts of the state, 112 or 113 degrees. Plaintiff was regretting that he had so many cattle on the market, and defendant, according to his testimony, jokingly said he would buy the cattle; but he testifies that he in fact had no

intention of doing so, and that plaintiff must have known he did not. It is true that a party cannot avoid a contract upon the ground that he was merely jesting, if his conduct and words were such as to warrant a reasonable person in believing he was in earnest. The testimony of the defendant, under all the holdings of this court, upon the question of the oral contract, was conclusive, and the court cannot say that he is not telling the truth about the matter, and that he intended to purchase the cattle. There was no delivery of a part of the property, nor the payment of any part of the purchase price; and Sinnott testified that he had no knowledge of the transaction until informed by plaintiff, when they came to settle, some days later. Testimony tending to contradict defendant's claim that the conversation with plaintiff was merely a joke, and not a serious proposition, was offered by plaintiff in rebuttal; but testimony was inadmissible, either to supplement or contradict that of the defendant as to the contract. The provision of the statute quoted goes no further than to make the oral evidence of the maker competent to establish the alleged unwritten contract. It follows that the judgment and decree of the court below must be and are—*Affirmed*.

WEAVER, C. J., LADD and ARTHUR, JJ., concur.

SAMUEL McCANE, Appellant, v. LOUIS WOKOUN et al.,
Appellees.

FRAUD: Right to Rely. An action for fraud and deceit may not
1 be based on *borrowed* fraud and deceit. In other words, a party has no right to rely on representations unless they were made for the purpose of influencing *his* action. Applied where the owner of land, in obtaining a loan *from a bank*, was alleged to have fraudulently represented to the cashier the condition of the land, and where the cashier *subsequently* bought the land, and sought to avail himself of the former representations *to the bank*.

VENDOR AND PURCHASER: Waiver of Rescission. A purchaser
2 may not rescind when, with full knowledge of every material fact, he accepts attornment from the vendor's tenant, rents the property for a term of years, collects the rent, and exercises, generally, unrestricted acts of ownership over the property.

Appeal from Linn District Court.—MILO P. SMITH, Judge.

OCTOBER 19, 1920.

ACTION in equity to enforce specific performance of the defendants' contract to purchase land owned by the plaintiff. There was a decree in favor of the defendants, and plaintiff appeals.—*Reversed and remanded.*

Voris & Haas, for appellant.

Treichler & Treichler, for appellees.

WEAVER, C. J.—Many of the material facts in the case are not the subject of dispute. The plaintiff was the owner of a farm lying on or near the Wapsipinicon River, in Linn County. The defendant Louis Wokoun was
1. FRAUD: and is the cashier of a bank at Cedar Rapids,
right to rely. Iowa. From or through this bank, in August, 1917, plaintiff obtained a loan of \$8,000, secured by mortgage on the farm. In negotiating the loan, the bank, by its committee, consisting of the cashier, Wokoun, and two other persons, visited and personally examined the farm, and, as they were satisfied with the security, the loan was made. On the occasion of this visit to the farm, the committee was accompanied by the plaintiff, and there was more or less conversation between him and them concerning the farm, its character and value. In September, 1917, after the loan had been perfected, plaintiff offered the farm for sale at auction, and, as the day, September 21st, approached, asked Wokoun to serve as clerk of the sale. To this Wokoun consented, and, as a witness, swears that, while he was driving to the farm with plaintiff, the latter

loan, and to some minor improvements—all of which expenses, he says, he paid “to protect the bank.” In October, 1917, defendant listed the land with one or more agents for sale or trade, at a stated value of \$125 per acre.

As a witness, defendant makes no claim or pretense that he ever had any negotiation with plaintiff for the purchase of the farm, except such as is shown by his bid at the auction sale, and the execution of the contract pursuant thereto. His charge of false representations is based wholly on what he asserts plaintiff said to him, or in his presence, when the loan committee visited the farm, weeks before the subject of a sale of the property had been mentioned by either party, and upon the alleged statement made by the plaintiff, prior to the auction sale, that he had been offered \$150 an acre. The subject of a sale of the land to the defendant does not appear to have ever been discussed between the parties, up to the time defendant made his bid at the auction, nor did plaintiff at any time request or solicit defendant to bid at the auction. Indeed, if we may credit defendant’s own statement in his letter of November 8, 1917, the bid by him was not made with any intention of buying, but was voluntarily offered by him to “help on” the sale; “but unfortunately no other bid was made,” and he thus unexpectedly and unintentionally became the purchaser. Taking his own showing as literally true, it must be said that there is an utter failure of evidence on which the court or jury could base a finding of false representations by the plaintiff. It is an elementary principle of law on this subject that:

“No one has a right to accept and rely upon the representations of others but those to influence whose action they were made.” 2 Cooley on Torts (3d Ed.) 940.

In the same connection, the same author says:

“When statements are made for the express purpose of influencing the action of another, it is to be assumed they are made deliberately, and after due inquiry, and it is no hardship to hold the party making them to their truth. But he is morally accountable to no person whomsoever but the

very person he seeks to influence, and whoever may overhear the statements and go away and act upon them can reasonably set up no claim to having been defrauded, if they prove false. Fraud implies a wrongful actor and one wrongfully acted upon; but, in the case supposed, there is no privity whatever. *Therefore, one may even be the person to whom false representations are made, and yet be entitled to no remedy, if they were made to him as agent for another, and to affect the action of the other, and were not intended to influence his own action.*" 2 Cooley on Torts (3d Ed.) 941.

The instant case falls clearly within the quoted rule, the language of which we here italicize. The statements which the defense attributes to the plaintiff were made to the defendant as agent for the bank in the matter of a loan upon the land, and were doubtless intended to influence the action of the bank. The loan was, in fact, made; and, if the representations were false, and the bank was thereby deceived or misled to its injury, a right of action accrued thereon to the bank alone, and not to the agent who represented it.

Illustrative of this proposition is the case of *Wells v. Cook*, 16 Ohio St. 67. There, the plaintiff, as agent of his brother, purchased from defendant a number of sheep, which were represented by defendant to be sound and free from disease, though they were, in fact, diseased, and defendant knew it. Soon thereafter, the plaintiff, relying upon the truth of said representations, purchased the sheep from his brother, and mingled them with his own flock, to which the disease was communicated. It was there held that an action for the deceit would not lie in plaintiff's favor, and that a petition alleging the facts was demurrable. See, also, *Lembeck v. Gerken*, 88 N. J. L. 329 (96 Atl. 577); *Butterfield v. Barber*, 20 R. I. 99 (37 Atl. 532).

The citations by appellee of *Wilson v. Green*, 25 Vt. 450, and *Merchants' Nat. Bank v. Robison*, 8 Utah 256 (30 Pac. 985), are not in point. The rule there applied is to the effect that one who supplies another with means of perpetrating a fraud in his name against one person, and the fraud is, in fact, perpetrated by the same means, but against other

parties, may be held liable to such parties for the deceit: a proposition which may readily be affirmed, without any departure from the rule applied in *Wells v. Cook*, supra. There is in this case no evidence that, at the time the alleged misrepresentations were made to the loan committee of the bank, plaintiff desired to sell or was offering to sell the farm, or that defendant had any desire to purchase it, or that the idea of making such purchase ever entered his mind, until he announced his bid to the auctioneer who struck it off to him. To permit him now to repudiate his purchase, on the theory that he acted in reliance upon the statements made by plaintiff to the bank's representatives, in negotiating the loan weeks before the sale, and having no connection whatever therewith, would be a startling departure from all recognized rules and principles of the law applicable to charges of fraud and deceit.

It may also be said that, even if there were evidence in the record from which actionable fraud and deceit could properly be found, we are of the opinion that defendant is

2. VENDOR AND
PURCHASER:
waiver of
rescission.

in no position to claim or demand a rescission of the contract. It is true that, within a few days after the deal was made, defendant wired plaintiff, saying "Boundary line not as stated by you. Will nullify the contract." Were this all, it might perhaps be construed as an election by him to rescind. But this was soon followed by another notice, complaining of a deficiency in the acreage of the farm, and saying, "I will want to have the farm surveyed, before any further payment on the contract." This demand for a survey and allowance for an alleged shortage in measurement was repeated on two or more occasions, accompanied with the statement that "the land was purchased at so much per acre, and I do not propose to pay for any more acres than what there will be in the tract." These declarations are inconsistent with the idea that defendant considered the contract rescinded, but are, rather, evidence of his understanding that it was still existing, and that he was entitled to claim the benefit of its provisions. His admitted conduct

in leasing the land, offering it for sale, collecting the rent, and exercising all the usual acts of ownership over the property since the date of the contract, is not to be reconciled with the theory of a rescission by him. His explanation that he did these things "to protect the bank" does not explain. The acts mentioned are only those which his contract of purchase bound him to perform. If that contract had been rescinded, he had no right to the possession, use, rents, or profits of the farm, and, but for his character as a purchaser, his assumption of control over it was a sheer trespass.

The terms of the contract are simple, and the defense of fraud and misrepresentations is not sustained by the evidence. No equitable grounds are shown for refusing the plaintiff a decree for specific performance. There is, however, some evidence fairly tending to show that the actual area of the land is several acres short of the measurement of 163 acres, as stated in the contract, a difference for which, if it exists, defendant should have proper allowance. The decree below will, therefore, be reversed, and case remanded to the district court, to enter a decree for the plaintiff for specific performance of the contract sued upon, subject to proper credit to the defendant for the deficiency, if any, in the acreage of the farm. If the amount of the deficiency, if any, be not agreed upon by the parties, the court is authorized to hear such additional testimony on this issue as may be found necessary for its determination.—*Reversed and remanded.*

LADD, STEVENS, and ARTHUR, JJ., concur.

ELIZABETH MITCHELL, Administratrix, Appellee, v. MYSTIC
COAL COMPANY, Appellant.

MASTER AND SERVANT: Workmen's Compensation Act—Over-
1, 6 coming Presumption. Proof (1) that an injured person was in
the employ of a master who had rejected the Workmen's Com-
pensation Act, and (2) that his injury arose "out of" and "in
the course of" the employment, *ipso facto* brings to the aid of
the injured employee the statutory presumption that the injury
was proximately caused by some negligence of the employer.
Evidence of the care exercised by the master in carrying on
his work must be very comprehensive, before it may be said
per se that the said presumption is overcome. (Sec. 2477-m,
Code Supp., 1913.)

NEW TRIAL: Misconduct of Counsel. Explicit direction by the
2 court to the jury to disregard erroneous conduct by counsel will
ordinarily justify the court in denying a new trial on the
ground of such misconduct.

NEW TRIAL: Presence of Relatives of Deceased. The fact that
3 relatives are present on the trial of an action for damages for
negligently causing the death of deceased, and that sympathetic
appeal is made in connection with such relatives, is not ground
for new trial.

MASTER AND SERVANT: Scope of Employment. The fact that
4 an injured employee may have been, at a time prior to the in-
jury, a foreman or vice-principal, is quite immaterial when, at
the time of the injury, he was acting under the master's orders,
as a common laborer.

TRIAL: Cautionary Instructions—Non-indulgence in Sympathy. In-
5 structions cautioning the jury against being swayed by sym-
pathy are properly refused.

TRIAL: Excessive Verdict. Record reviewed, and *held* that a
7 verdict for \$3,500 for negligently causing the death of a miner
was not excessive.

Appeal from Appanoose District Court.—C. W. VERMILION,
Judge.

OCTOBER 19, 1920.

ACTION at law, to recover damages occasioned by the death of Willard White, while in the service of the defendant coal company. Trial to a jury. Verdict and judgment for the plaintiff, and defendant appeals.—*Affirmed*.

Howell, Elgin & Howell, for appellant.

John Clarkson and H. E. Valentine, for appellee.

WEAVER, C. J.—On April 11, 1918, the defendant company was engaged in operating a coal mine in Appanoose County, Iowa, and, in carrying on the work of said mine, it employed the services of the plaintiff's intestate, Willard White. On the day named, White, in obedience to the appellant's directions, was engaged, with others, in cleaning out dirt and rubbish which had collected in one of the mine entries through which coal was being removed, and, while he was so at work, a large rock from or near the junction of the side wall and the roof of the entry fell upon him, killing him instantly. Prior to this accident, the company had given notice, as provided by law, of its rejection of the terms of the Workmen's Compensation Act.

1. MASTER AND
SERVANT :
Workmen's
Compensa-
tion Act :
overcoming
presumption.

The plaintiff, as administratrix of the estate of the deceased, brings this action at law, to recover the damages occasioned by his death.

The defendant answers by denial of the allegations of the petition, and pleads affirmatively that the death of White was the result of the dangers and perils naturally incident to the work in which he was employed, and not in any degree to neglect or want of due care on its part. The answer also pleads affirmatively that the injury and death of deceased were due to his own negligence.

There was a jury trial, and verdict and judgment in plaintiff's favor for \$3,500. Defendant appeals.

I. Counsel for appellant first deny the sufficiency of the evidence to justify a recovery of damages, asserting that "there is not a scintilla of competent evidence to support the verdict." But the zeal of counsel leads them to overlook or forget that the record shows, without dispute, the employment of deceased in the company's mine, and his "personal injury sustained, arising out of and in the course of his employment." and that our statute expressly provides that, under such circumstances, "it shall be presumed that the injury to the employee was the direct result and growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such cases the burden of proof shall rest upon the employer to rebut the presumption of negligence." Section 2477-m. Code Supplement, 1913.

Under this statute, to sustain her right to a recovery, plaintiff was not required to allege or prove specific acts or omissions of a negligent character by the appellant. See, on this point, *Mitchell v. Swanwood Coal Co.*, 182 Iowa 1001, where the subject is fully discussed. We there said:

"When the servant has established the employment, and that the injury arose out of and in the course of his employment, a prima-facie case of negligence is made against the master."

In the case before us, such prima-facie case was made. The facts on which it rests are undisputed. Whether that showing and the presumption arising therefrom were successfully rebutted by the defense, was a question of fact, for the consideration of the jury.

Appellant sought to meet the case so made, by testimony tending to show due care in daily inspection and in other precautions to make the entry a reasonably safe place to work; but it clearly does not present a case which enables the court to say, as a matter of law, that the burden which the statute casts upon the employer in such cases has been successfully sustained. Counsel on both sides have taken much pains to explain the practical working of coal mines in the Appanoose field, and the methods followed in making

and maintaining entries through which miners pass to and from their work, and in which tracks are laid for the removal of coal. It is unnecessary to extend this opinion for a minute recitation of the facts. It is enough here to say that, as the coal is removed, entries or roadways several feet in width are preserved by building on each side a wall of so-called "gob," or waste matter, extending from the mine floor to the roof or cap rock which overlies the stratum of coal. The removal of the coal is followed by some degree of settling of the roof, which finally comes to rest upon the side walls of gob. To give head room, and to permit the operation of the cars on which the coal is carried away from the face, the height of the entry is increased by removing a stratum of clay which covers the floor, or by taking down the cap rock, or some of it, from the roof.

At the place where White was killed, the cap rock had been cut or arched out, leaving a ledge or projection of such rock extending from the side of the entry a short distance into the upper part of the entry, and resting on the side wall. How far this rock constituting the ledge extended into or beyond the gob wall of the entry was not known, and was not open to visual inspection; but there was testimony from which the jury could find that, if the rock was broken so near the projection into the entry as to create danger of its falling or slipping out, the danger could be discovered by proper sounding, and the peril removed by taking the rock down. Indeed, it would seem hardly to require expert or technical knowledge of mining to suggest to men of ordinary prudence that a ledge of rock not more than a foot in thickness, extending across the gob wall into an open space, and subjected to the tremendous pressure of countless tons of superimposed rock and earth material, would quite certainly break, in due time (if not already broken), and the ledge fall into the entry.

There was testimony also tending to show that the break, in this instance, had taken place at a point only a few inches from the face of the wall, and was not one of recent origin. In short, the circumstances were such that, even admitting

the truth of the company's testimony as to frequent inspections of the place, and of care displayed to make the place reasonably safe, it still remained a question for the jury whether, had that duty been properly attended to, the danger would not have been discovered and the defect remedied before this accident occurred. *Mitchell v. Phillips Mining Co.*, 181 Iowa 600.

The verdict for plaintiff cannot, therefore, be set aside as being without support in the evidence.

II. Appellant next insists that a new trial should have been granted because of the misconduct of appellee's counsel in his argument to the jury. We regret to say that the

trial was quite evidently marked with an excess of zeal and degree of heat on part of the respective counsel which have no proper place in a court of justice. The court appears, however, to have made commendable effort to suppress these exhibitions, and to caution the jury against being influenced by anything except relevant facts, considered with reference to the rules of law laid down in the instructions.

Altogether, we are impressed with the view that the trial court did not err in refusing a new trial on this ground. It is not to be denied that appellee's counsel did indulge in improper statements and insinuations, but he extenuates his offense by asserting that appellant's counsel himself did not play the role of the inoffensive lamb, but assumed an attitude "furious, violent, impetuous, forcible, mighty; as a vehement wind, a vehement torrent, a vehement fire and heat," and by such conduct provoked and invited the retorts and declaration of which he complains. That there were bushwhacking attacks and counter attacks by counsel which deserve condemnation and rebuke must be conceded; but they were by no means confined to one side of the controversy, and, in view of the fairly successful efforts of the court to hold an even rein on the contestants, and to protect the jury from being misled, we are not jus-

tified in ordering a new trial. Moreover, we must assume that the jury was made up of men of fair average intelligence, and that the froth and foam of these wordy battles, however entertaining to the audience in the back seats, made no serious impression upon the minds of the triers of fact, performing their sworn duty in passing upon the evidence.

III. It appears that the wife and child of the deceased were present in court at the trial, and that counsel for the administratrix, in addressing the jury, referred to the

3. NEW TRIAL: presence of relatives of deceased. widow and orphan more or less frequently, and said they were the persons who would receive the benefit of a recovery of damages.

This also is relied upon as an abuse of counsel's privilege, and an unfair appeal to the sympathies and prejudices of the jury. To sustain this assignment of error would be an undue restriction of the oratorical privileges of the advocate. *Dowdell v. Wilcox*, 64 Iowa 721; *Wissler v. City of Atlantic*, 123 Iowa 11, 16; *Brusseau v. Lower Brick Co.*, 133 Iowa 245, 248; *Geiger v. Payne*, 102 Iowa 581, 593; *George Weeks & Co. v. Swafford Bros.*, 75 Iowa 491, 496; *State v. Burns*, 119 Iowa 663, 670; *State v. Drake*, 128 Iowa 539, 541. The control of arguments of counsel rests largely in the discretion of the trial court, and we do not interfere, where that discretion is not abused.

IV. The court instructed the jury that the appellant was not an insurer of the safety of its employees, but was charged with the duty of exercising reasonable and ordinary

4. MASTER AND SERVANT: scope of employment. care to furnish deceased a safe place to work, unless the place was rendered unsafe in the prosecution of the work which deceased, with others, was then doing. Counsel say this

was erroneous, because deceased was not simply a "pick miner," but a "day man, inspector, remover of loose rock, and assistant pit boss." It is true deceased was, for the time being, a "day man:" that is, an employee who was paid day wages, and not a miner, paid a price per ton for coal produced. But it is not shown that, at the time of his injury, he was a pit boss or assistant boss, or was other than

an ordinary servant or employee, doing a variety of work, according as he might be ordered or directed by his foreman or boss. He had spent much time as a mule driver in the entries. On the day of his death, he was sent, with others, to shovel out and remove the dirt or mud which had gathered along the side of the car track, and thus facilitate the drainage of the entry. There is no evidence that he was under any duty or obligation to care for the safety of the entry, other than the ordinary duty of the day man to use ordinary care to keep his eyes open, and, if he discovered loose rock or other defect or danger, to take necessary measures to correct it. There is nothing whatever to show or to sustain a finding that he was in any sense a vice-principal or representative of the employer, or was charged with the performance of the magisterial duty to maintain the entries in reasonably safe condition for the employees having proper occasion to use them. There was, therefore, no error in giving either the eighth or the ninth paragraph of the court's charge to the jury. Whatever may have been his duty when engaged in other lines of employment, it is obvious that, when he was ordered to work as an ordinary laborer, he was entitled to the same protection which was due to his fellow employees in such service.

V. Of the instructions requested by the defendant, it is sufficient to say that, in so far as they state correct propositions of law having any application to the case, they are fairly covered by or embodied in the charge

5. TRIAL:
cautionary
instructions:
nonindul-
gence in sym-
pathy.

given by the court on its own motion. The refusal of plaintiff's request that the court should warn the jury against "indulging in sympathy for the widow or child," and, as a correlative to such admonition, should charge the jury "to refrain from entertaining prejudice against the defendant simply because he was and is a coal operator," was not erroneous. So far as appears from anything in the record, the court could rightly assume that the jurors were fair-minded men, needing no kindergarten instructions to insure

an honest effort on their part to find a verdict upon the evidence, and the evidence alone.

VI. The eighteenth request for instruction is that the jury has "no right to find that defendant was guilty of negligence in any respect in regard to the maintenance of the entry, unless there is evidence to support such finding." The request was properly refused. The force and effect of the proposition is to repeal the statute which makes the occurrence of an injury to the employee

6. MASTER AND
SERVANT:
Workmen's
Compensa-
tion Act:
overcoming
presumption.

which arises out of and in the course of his employment, presumptive evidence that the employer was negligent and that such negligence was the proximate cause of the injury, and which places the burden on the employer to rebut such presumption. Hence, to sustain a recovery of damages, the jury need not find affirmatively that defendant was guilty of some specific negligent act or omission, but it is enough if, in view of all the evidence, the jury finds that defendant has failed to negative or rebut the statutory presumption.

VII. Other errors assigned upon instructions given and requests for instructions refused, and upon rulings in matters of evidence, are entirely too numerous to justify us in extending this opinion for their discussion in detail. The record is one of unusual volume, and prepared with slight reference to our rules; but we have examined it at length with care, and find no reversible error. So far as the exceptions taken raise questions pertinent to the issues tried, they are governed and controlled by the conclusions we have announced in the foregoing paragraphs of this opinion. Of other points made, it may be said that they reflect the erroneous view which pervades much of appellant's argument: that plaintiff, in addition to proof that the injury to deceased arose out of and in the course of his employment, must also prove that defendant was guilty of negligence with respect to some specific act or omission inconsistent with due care for the safety of its employees, a proposition which, we have repeatedly pointed out, is without merit in

this class of cases, since the enactment of the statute, Section 2477-m, Code Supplement, 1913, which places the burden of negating or rebutting the presumption of liability on the employer.

VIII. Appellant's final contention is "that, in any event, the damages assessed are grossly excessive."

At the date of his death, White was about 36 years old.

His expectancy of life was 30.32 years. He had been married about 14 years, and was survived by his widow and a minor child.

7. TRIAL :
excessive
verdict.

He was a man of sober and industrious habits. His earnings were about \$5.00 per day. He had expended \$800 to \$1,000 for furniture, and paid considerable sums for medical and surgical services rendered his family, and, at the time of his death, had \$350 in bank and in hand. He was an experienced miner, and, so far as appears, was in good health, with reasonable prospect of living out his expectancy. The jury assessed the damages to his estate at \$3,500.

Assuming, as we must, upon the record, that the plaintiff was entitled to recover damages in some reasonable amount, the award made by the jury does not appear to be unreasonable or extravagant; or, to say the least, is not so manifestly excessive as to indicate that the jury was influenced or swayed by passion or prejudice. That a young, married man, of good and industrious habits, with an earning capacity of \$1,500 per year, and having a life expectancy of 30 years or more, may reasonably be expected to accumulate an estate of the present worth of \$3,500, is an estimate which hardly justifies counsel's fiery denunciation as an "unmitigated outrage." We find in it nothing which justifies us in interfering with the verdict.

In closing this discussion, it may be said that it is true that the statute to which reference has been made, places the defendant at considerable disadvantage, as compared with the position it would occupy if all the common-law rules applicable to negligence cases of this class were still available to the employer. But, having deliberately, and of

its own choice, refused to accede to the terms of the Workmen's Compensation Act, and having elected to submit to the alternative liability imposed upon employers taking that course, it has no ground of just complaint if, when suit is brought, it finds difficulty in avoiding the statutory restrictions which limit its defense.

We find no good reason for setting aside the verdict, or ordering a new trial. The judgment below is—*Affirmed*.

LADD, STEVENS, and ARTHUR, JJ., concur.

STATE OF IOWA, Appellee, v. ARCHIE MORRISON, Appellant.

RAPE: Nonresistance as Bearing on Consent. A single threat to
1 kill, *unaccompanied by any demonstration of brutal force or of dangerous weapons*, will not excuse a total failure of a female to make outcry or resistance, by word or act, when she is a woman of mature years, a widow, fully conscious, and in possession of ordinary physical powers.

RAPE: Definition. Definition of rape reviewed, and held sufficient,
2 under the record presented, though subject very properly to amplification.

Appeal from Lee District Court.—JOHN E. CRAIG, Judge.

OCTOBER 19, 1920.

THE defendant was indicted, tried, and convicted of the crime of rape, and appeals. The material facts are stated in the opinion.—*Reversed*.

E. C. Weber, for appellant.

H. M. Havner, Attorney General, and *J. M. C. Hamilton*, County Attorney, for appellee.

ARTHUR, J.—The errors relied on question the sufficiency of the evidence to sustain the verdict, and the action of the court in giving and refusing certain instructions and rulings on evidence.

1. RAPE: non-resistance as bearing on consent.

It appears from the testimony of Abbie Gehle that she is a widow, 48 years old, and lives with her son-in-law, Harry Stein, on the Augusta Road, north of Fort Madison; that, on the evening of the 6th of November, 1918, she was driving a horse and buggy along the road north of the Willard farm, near the state penitentiary farm, and some man climbed into the buggy on the left side (she was sitting on the right side): that she did not see who he was; that it was getting dark, being a little after six o'clock; that it was light enough so that she could have seen, but she did not see him; that she made no outcry, when the man got into the buggy; that he told her to keep quiet, or he would kill her, and she kept quiet; that he jammed her hat down over her eyes; that she made no outcry, because, she said, she was in fear of her life; that he crawled over her and pulled her out on the right side of the buggy and dragged her over to the fence and under the fence and into a cornfield, and there had sexual intercourse with her; that, on the way from the buggy to the fence, her hat and glasses dropped off; that, during all the time he was pulling her out of the buggy and dragging her across the road and under the fence and into the cornfield, three or four rows, she made no outcry, because, she says, she was taken so by surprise, and was too badly scared, that she was in fear of her life; that all the time he kept over her face a fur collarette that she was wearing, and it prevented her from seeing; that she said nothing to him at any time except when her glasses fell off, when she said "Be careful," that she could not see without them, and did not want to lose them; that she knew what was happening; that, from the time he took her out of the

buggy, there was no conversation, and she did nothing; that he did not tell her what he wanted; that she was not unconscious at any time, and knew what was happening all the time. She said she imagined what his purpose was, and made no outcry, and did nothing to prevent him; that she made no resistance whatever; that she did nothing to prevent him from having intercourse with her, because she was too badly scared—she was afraid for her life.

The evidence shows that there is a cornfield lying east of the road,—east of the fence on the east side of the road,—and the intercourse claimed by the prosecutrix took place over this fence in the cornfield. After the occurrence, defendant told prosecutrix not to go out into the road until she got to the schoolhouse, which was further north on the road, and he also told her that he would cut her throat if she said anything about what had occurred. When defendant first climbed into the buggy, he jammed her hat down over her eyes, and afterwards, when her hat fell off, perhaps, he pulled her collarette up over her eyes and kept it over her eyes, so that she never got a look at him. When in the buggy, he told her to keep quiet and make no outcry, or he would kill her; and she says she was in fear for her life. He made no other threat until after the intercourse was over, when he told her that he would cut her throat if she said anything about what had occurred. She made no resistance at any time, by word or act. She says she did nothing to prevent his taking her from the buggy across the road, through the fence, into the cornfield, and having sexual intercourse with her, and made no outcry, because she was too badly scared, and in fear for her life.

In instructing the jury, the court gave the statutory definition, and, in addition, the following definition of rape:

“Rape is the act of sexual intercourse, accomplished with a female not the wife of the perpetrator, when she resists, but her resistance is overcome by force or violence, or when she is prevented from resisting by *threats* of immediate and great bodily harm, accompanied by the apparent power of execution.”

We think the above instruction fairly laid down the rule applicable to this case, and applicable to the facts in this case. It might well have been amplified, and the jury told with more particularity that force consisting of threats and acts on the part of the defendant, such as would overcome the will of the woman by fear, must be such as to reasonably create apprehension of death, or immediate and great bodily harm. But the failure to so instruct was not error. The instructions fairly submitted the case to the jury. We find no error in refusing to give instructions asked by the defendant.

2. RAPE :
definition.

We do not discuss the assignments lodged against such refusals, in view of our holding in this case, neither will we discuss assignments directed to rulings on evidence. They were not well taken, and, under our holding, it would serve no good purpose to discuss them. They raised only questions that have been passed on by this court many times.

In the case of *Mills v. United States*, 164 U. S. 644, at 649, Mr. Justice Peckham states the rule:

"That, if the woman at the time was conscious, had the possession of her natural, mental, and physical powers, was not overcome by numbers or terrified by threats, or in such place and position that resistance would have been useless, it must also be made to appear that she did resist to the extent of her ability at the time and under the circumstances."

Also, at page 648:

"Bishop, in his treatise on Criminal Law, says that the proposition as to the element of consent, deducible from the authorities, is that, although the crime is completed where the connection takes place without the consent of the female, yet in the ordinary case, where the woman is awake, of mature years, of sound mind, and not in fear, a failure to oppose the carnal act is consent; and though she object verbally, if she make no outcry and no resistance, she by her conduct consents, and the act is not rape in the man. 2 Bishop on Criminal Law, Section 1122."

Perhaps the leading case on the subject is *People v. Dohr-*

ing, 59 N. Y. 374 (17 Am. Rep. 349). It is there said, *inter alia*:

"Certainly, if a female, apprehending the purpose of a man to be that of having carnal knowledge of her person, and remaining conscious, does not use all her own powers of resistance and defense, and all her powers of calling others to her aid, and does yield before being overcome by greater force, or by fear, or being surrounded by hostile members, a jury may infer that * * * it was not against her will. Of course, the phrase 'the utmost resistance' is a relative one; and the resistance may be more violent and prolonged by one woman than another, or in one set of attending physical circumstances than in another. In one case, a woman may be surprised at the onset, and her mouth stopped so that she cannot cry out, or her arms pinioned so that she cannot use them, or her body so pressed about and upon that she cannot struggle. But whatever the circumstances may be, there must be the greatest effort of which she is capable therein, to foil the pursuer and preserve the sanctity of her person."

In *Smith v. State*, 80 Am. Dec. 355, in note at page 365, the subject is well treated. There it is said:

"Where the woman is paralyzed from fear and terrified into submission, this submission and failure to make resistance or outcry will not constitute consent, and the offense is rape, notwithstanding."

It is further said:

"Thus, where a father by his ferocity established a 'reign of terror' in his family, and had carnal intercourse with his daughter, who remained passive because of fear, but gave no consent, the offense was rape. It is not necessary to show that there was force enough used to create a reasonable apprehension of death. But it should be established that the defendant intended to accomplish his purpose, in spite of all resistance."

We find no Iowa cases where the facts are similar to the case at bar. Bearing somewhat upon the question, see *State v. Ward*, 73 Iowa 532; *State v. Harlan*, 98 Iowa 458.

We find no cases where a mere threat, even a threat to kill, unaccompanied by a demonstration of brutal force or dangerous weapon, is held to be a sufficient putting in fear to excuse nonresistance. In the *Mills* case, supra, the defendant had a gun, and represented himself as a notorious desperado. Following this, the *Mills* case was reversed, not on account of the insufficiency of the evidence, but because of an erroneous instruction given by the trial court.

In *Doyle v. State*, 39 Fla. 155 (22 So. 272), it was held that, in a prosecution for rape, where the evidence tends to show that the commission of the offense was accomplished by an exhibition of weapons and threats on the part of the defendant, calculated to produce in the mind of the woman a reasonable fear of death or great bodily harm in case of refusal or resistance on her part, it is not error to refuse to charge the jury that they must acquit the accused, unless satisfied beyond a reasonable doubt that the woman did not, during any part of the act, yield her consent. Consent of the woman from fear of personal violence is void, and, though a man lays no hands on the woman, yet if, by an array of physical force, he so overpowers her that she dares not resist, his carnal intercourse with her is rape.

Unlike the case at bar, in this case the accused had solicited the woman to have sexual intercourse with him, and she refused him, and he begged her, and offered her money to submit, and she still refused, and the defendant then cursed her and drew a knife, and threatened to kill her if she did not submit, saying that he would gratify his desire anyway, and that he would kill her if she did not submit; and under that situation, she did submit without further resistance.

In *Cole v. State*, 57 Tex. Cr. Rep. 51 (136 Am. St. 973), the accused, while making his threats, held a pistol in his hand, while he had carnal knowledge of the girl. The evidence was held sufficient to sustain a conviction on the charge of threats.

Many cases are found where no resistance was made by the woman, but in such cases, strong physical force was ex-

hibited at the onset, or a gun or a knife exhibited, and by such means, the victim terrified.

In the case at bar, it does not appear that the defendant used the prosecutrix roughly at the onset or at any time; he made only the one threat—that he would kill her if she made outcry—before the intercourse, and that threat was made while they were both in the buggy. He never told her how he was going to kill her; he never exhibited or intimated that he had a gun or knife, or any sort of a weapon. She says she was scared, but she does not say just how her fright affected her. She did not plead with the man to desist. She said nothing, except when her glasses fell off. Then she said, "Be careful." On the witness stand, she said she spoke that way about the glasses because she did not want to lose them, for she could not see without them.

It seems to us that the evidence is too frail to sustain the verdict. The motion to direct a verdict for the defendant at the close of the testimony should have been sustained. The case is—*Reversed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

STATE OF IOWA, Appellee, v. FERN REYNOLDS, Appellant.

HOMICIDE: Verdict on Conjecture. Evidence held wholly insufficient to sustain a verdict that defendant had aided, abetted, or encouraged the murder of her infant child.

CRIMINAL LAW: Presumed Coercion of Wife. Whether a wife will be shielded from responsibility for murder by the presumption that she acts, while in the presence of her husband, under his coercion, *quaere*.

Appeal from Lee District Court.—RALPH OTTO, Judge.

OCTOBER 19, 1920.

THE accused was indicted for murder in the first degree, and convicted of manslaughter. She appeals.—*Reversed and remanded.*

R. D. Robinson, R. N. Johnson, and E. C. Weber, for appellant.

H. M. Havner, Attorney General, F. C. Davidson, Assistant Attorney General, and Shelby Cullison, for appellee.

LADD, J.—The accused was married to Orville Reynolds, January 1, 1918, and to them was born a female child, February 17th following. It died shortly before midnight of March 9th of the same year. Both she and her husband are charged with having caused its death, and therein to have committed murder in the first degree. The husband pleaded guilty, and was sentenced accordingly. Thereafter, the wife was put on trial, and convicted of manslaughter. The main issue for our determination is whether the evidence was sufficient to carry the issues as to her guilt to the jury. Both testified that she was in no manner connected with the killing. Each appears to have been about 22 years of age. They had been engaged for several years prior to their marriage. She had graduated from the high school at Galesburg, Illinois, and had taught, during the two years following. The match was opposed by his relatives. Immediately after the marriage, they began housekeeping in rooms leased to them in Fort Madison by Mrs. Moyer, and he entered the employment of an ice company. The child was born at a hospital, where she remained 12 or 13 days after the birth, and then returned to the rooms with her baby, whom she had named Florence Irene. The child seemed to have been in ordinary health, save that it had a mark, as though burned, down one side of its face and on the chin; its lip was blistered; and there was a blister in the top of its mouth, for about a week prior to its death. The accused explained this to Mrs. Moyer and her daughter by

1. HOMICIDE:
verdict on
conjecture.

saying: "I don't know, I must have had the milk too hot." The story of accused was that she and her husband retired shortly after 8 o'clock on Saturday evening, March 9th, with the child between them; that the witness awoke shortly after 10 o'clock in the evening, and fed the child from a bottle, and then went to sleep, and, when she awoke again, discovered that the child was cold; that she directed her husband's attention to this, but did not remember what he said; that she "got up, lit the light, and looked and found that she was dead. I don't remember just what I did then, after I found the child was dead. I told him that I wanted him to take her to an undertaker, and he told me he would do so. He then took the child away." She testified further that she had not seen any carbolic acid about the house, and did not know how it appeared; that she was preparing to visit her and his folks in Galesburg, Illinois; that her mother had been with her at the hospital, and later on her return to the rooms, the last visit being from Monday till Thursday before the child's death. On cross-examination she told of taking the body to the kitchen, after discovering the child's death, and of having washed and dressed it; and that, after so doing, she told her husband to take it to the undertaker; that he carried the body away in his arms; that she did not know until the following day that her husband had taken the body into Illinois. The husband swore to having bought carbolic acid in the name of Orville Walker; that he left it in the kitchen (one of their rooms), without hiding it; that he was awake when the baby was fed; that, shortly before midnight, he took the child in his arms, and gave it the carbolic acid from the bottle he had purchased, having placed said bottle under the bed before retiring; that he had purchased this for the purpose of using in taking the child's life; that his wife, at the time, had her face towards the wall, and gave no indication of being awake, but awoke 4 or 5 hours afterwards, and discovered that the baby was dead; that he did not remember saying that it was smothered; that he placed the body in a box, and carried it from the building before daylight over the bridge, and left it in Illinois near

the river, and on the following morning, brought it back, at the instance of the chief of police; that he returned to their rooms, immediately after carrying the body away, but that neither of them went to bed; that they had supper, Sunday evening, with the Englishes, in pursuance of a previous engagement; that he hated the baby, and did not want to take it where he was known; and that he never talked to his wife about taking it back to Galesburg, Illinois, though they had planned to visit there, sometime during the following week. Mrs. Moyer, of whom the rooms were rented, testified that she saw the baby daily, after it came from the hospital; that the defendant and her husband came to her room, about 8 o'clock Sunday morning, March 10th, when the accused exclaimed, "Mrs. Moyer, we had to give our little girlie up;" and, to Mrs. Moyer's remark that she did not understand what she meant, added, "Oh, Mrs. Moyer, we had to give our little girlie up;" and again, upon Mrs. Moyer's saying that she did not understand, declared, "We smothered our little girlie last night;" and, when Mrs. Moyer suggested going upstairs, she answered, "Oh, I made him take her away, I couldn't bear to have her in the house;" and explained the reason for not calling her, by saying, "Mrs. Moyer, you have always been so good to me, and I thought it was too much trouble;" and that she informed Mrs. Moyer that the body was "at the undertaker's parlors, and they could not have a funeral, because she could not bear to go." Mrs. Moyer testified further that, on Sunday morning, when the accused and her husband came down, the latter told her that "he woke up during the night, and found the baby dead. She was standing near him at the time. They said they didn't know what time it happened. She said she washed and dressed the baby. After this, Orville Reynolds said, he had taken the baby to the undertaker's parlors. She did not seem to be in deep grief," and, during the breakfast and dinner, they did not talk, except as they were spoken to. Mrs. Moyer's testimony was corroborated by that of her daughter, Mrs. English, who had known the two in Illinois, testified that the accused and her husband

took supper with her on Sunday evening, in pursuance of a previous invitation, and related that, when they came, she expressed disappointment that the baby was not brought, to which the accused responded: "The baby went away last night. * * * We had to put her away." To the inquiry, "Is the baby dead?" she answered "Yes;" and to the further inquiry of the witness as to "what happened," she said: "I don't know, unless it got too warm. Orville threw his arm over it." The witness described the conduct of accused as indicative of unusual grief.

Other evidence was adduced, tending to show that the accused was of good character, and that the death of the child was caused by the administration of poison, or by strangulation.

Such is the evidence upon which the finding of guilt rests. We are of opinion that it was insufficient to warrant the conclusion that the accused committed the crime charged. Though she may have said that "we smothered," this appears to have had reference to the cause of the child's death, and not to have been intended as saying that this was purposely done. If guilty at all, this must have been in abetting, advising, aiding, or encouraging; for nothing in the record indicates any physical violence on her part. Even if it were conceded that the obligation to protect her child did warrant the conclusion that, if present, and making no effort to do so, she must have been found to encourage what her husband did, this was obviated by the showing that (1) she was not consciously present, and (2) that, though consciously present, there was no evidence that she did not meet the obligation mentioned. She testified that she was asleep during the period when her husband must have murdered the child, and this was corroborated by the latter. This was uncontradicted, and even though rejected by the jury, a different statement of facts was not shown from which the inference is to be drawn that she was present in the room where the offense was committed, or that, if present, she did not meet the obligation which both nature and the law imposed upon her. Neither he nor anyone else testi-

fied that the crime was committed in the presence of the accused, and she was not required, if she observed him moving the child, to suspect wrongdoing on his part. If, then, it could be said that these witnesses testified falsely as to what happened, it was not open for the jury to imagine or suppose a state of facts, without evidence justifying a conviction. For all that appears, he might have taken the child into the kitchen to perpetrate the crime, and away from the wife. But it will not do, when the evidence establishes a state of facts negating guilt, to substitute another, without evidence justifying conviction. Were there any proof from which failure to discharge the duty of shielding her child from harm might be inferred, we should have an entirely different question. If the killing did not happen as they testify, how did it happen? Did he kill it in another room, away from his wife, and without her knowledge, or was she present, and a witness to the transaction? The record makes no answer. Conviction for crime cannot rest on conjecture alone, but must be supported by proof justifying the deduction of guilt.

What we have said does not proceed on the theory that the accused is presumed, in the absence of evidence to the contrary, to have acted under the coercion of her husband.

2. CRIMINAL
LAW: pre-
sumed co-
ercion of
wife.

The wife was not exempted from the responsibility for murder on this ground at the common law; and the ruling in *State v. Kelly*, 74 Iowa 589, is contrary to the great weight and current of authority. See *Bibb v. State*, 94 Ala. 31 (33 Am. St. 88), and valuable note; *Morton v. State*, 141 Tenn. 357 (4 A. L. R. 264), and note in which all the cases are collected; 21 Cyc. 1355. In view of the numerous statutes emancipating women, and the recent amendment to the Constitution of the United States, conferring the right of suffrage, the rulings on exemption of married women on the ground of presumed coercion by their husbands should be reviewed and restated. As the question is not necessarily raised in this record, we defer this until the issue is fairly raised. Since we find the evi-

dence insufficient to support the conviction, it is unnecessary to consider other questions argued.

The judgment is reversed and the cause remanded.—
Reversed and remanded.

WEAVER, C. J., STEVENS and ARTHUR, JJ., concur.

STATE OF IOWA, Appellee, v. H. A. WITTY, Appellant, et al.,
Appellee.

INTOXICATING LIQUORS: Other Sales as Evidence. On the trial

1 of an indictment for keeping intoxicating liquors for unlawful sale, evidence of defendant's connection with *other* sales of liquors, about the time of the transaction on trial, is admissible, as bearing on the intent and purpose of the defendant.

INTOXICATING LIQUORS: Presumption from Undue Quantity.

2 The finding of 13 gallons of whisky in a private residence may well justify the jury (under the record) in finding that the same was kept for unlawful sale.

INTOXICATING LIQUORS: Jury Question as to Unlawful Intent.

3 Evidence held to sustain a verdict of guilt of keeping intoxicating liquors for unlawful sale, even though no actual sale was proven.

INTOXICATING LIQUORS: Unusual Quantity. Record reviewed,

4 and held insufficient to justify the court in holding that defendant had, as a matter of law, overcome the presumption arising from finding 13 gallons of whisky in his private residence.

Appeal from Clarke District Court.—P. C. WINTER, Judge.

OCTOBER 19, 1920.

DEFENDANT H. A. Witty and his brother, Oliver Witty, were indicted, accused of the crime of nuisance, in that they kept intoxicating liquor in the house where they dwelt, and used such dwelling house for the purpose of

there selling intoxicating liquor, and were tried. Oliver Witty was acquitted, by direction of the court. Defendant H. A. Witty was convicted, and fine of \$300 imposed. Defendant H. A. Witty appeals.—*Affirmed.*

O. M. Slaymaker, for appellant.

H. M. Havner, Attorney General, and *J. B. Dyer*, County Attorney, for appellee.

ARTHUR, J.—A conversation occurred in the road in front of Morgan's house on the Sunday before July 4, 1919, in which the defendant H. A. Witty, and James Morgan, and a man whom defendant was with, talked, about which the defendant H. A. Witty and James Morgan have different versions of just what was said. While different conclusions and inferences may be drawn from the other testimony, there is very little dispute in the facts.

Defendants, H. A. Witty and Oliver Witty, are brothers. H. A. Witty was a bachelor, 36 years old at the time of the trial, and lived on a rented farm, 4½ miles from the town of Murray, in Clarke County. Oliver Witty and his wife lived with him, in the same house, and worked for him. H. A. Witty has been engaged in farming for the last 14 years, and before that he was a coal miner. On September 11, 1919, the Witty house was searched by the deputy sheriff, and there were found and seized 12 gallons and 3 quarts, lacking one-half pint, of whisky. The whisky was in 116 bottles: 53 half pints, 51 pints, and 12 quarts. About half of the whisky was found upstairs in a small bedroom, and the other half in the cellar. The whisky belonged to H. A. Witty. He had bought the liquor in St. Joe, the latter part of June. No empty bottles were about the premises.

James Morgan, witness for the State, testified that, on the Sunday before the 4th of July, H. A. Witty and some other man in an automobile stopped in the road in front

1. INTOXICATING
LIQUORS:
other sales
as evidence.

of his house, and one of them called for him to come down, and he went down to the road where they were, and H. A. Witty asked him if he wanted to buy some whisky, and said to Morgan that he expected he could buy a couple of pints of liquor; and Morgan bought two pints of whisky from the man who was with Witty in the automobile.

H. A. Witty, as a witness for himself, gives a slightly different version of the conversation in the road. First, he explains how he happened to be with this man in the automobile,—says that he was traveling along the road on an errand, and this man drove along in an automobile, and asked him to get in and ride; that the man was a party he knew in Des Moines; that he guesses his name is Jones, but is not sure; that Jones told him he had a couple of pints of whisky to sell; that Jones offered him a drink, but he refused; that they stopped in the road in front of Morgan's house; that he told the man that he did not know whether Morgan would want to buy some whisky or not. He says:

"I told Jones to call Morgan out, and if he wanted to buy it from him, he would buy it. Morgan's place is four or five miles from mine."

He also testified that he had been engaged in farming for the last 14 years; that before that he was a coal miner; that, when he quit coal mining and went to farming, some Des Moines doctor, whose name he had forgotten, told him to use liquor for trouble he had with his lungs and stomach; that he used whisky purely as a medicine; that he was brought up to use liquor; always kept liquor, and used from a half pint to a pint a week; that his brother Oliver used about the same; that Oliver's wife took a drink now and then, but she drank wine. He said:

"I bought the liquor the latter part of June, probably 10 days before the 4th of July. I went to St. Joe myself, and I brought back 100 pints of whisky and 5 quarts of wine; and as to how much I used before the 11th day of September, the day that Mr. Tillotson was there, I had a few pints before Mr. Tillotson came out there, and before

I went to St. Joe, I sent to Minneapolis after my whisky. I would buy it once every 2 or 3 months,—maybe once every 6 weeks,—and I used it purely as a medicine. I am not very stout. I suppose the particular ailment I am using this whisky for is my stomach,—I don't know; and as to my still acting under the advice of the Des Moines doctor, I am not really acting under the advice of anybody now; and as to how I came to know that Jones had the whisky, that he had a couple of pints to sell, he told me he had. As to my thinking Morgan would want it, I didn't know whether Jim would want it or not. I didn't ask him whether he wanted to buy it. I didn't tell Jones to ask him; I told Jones to call that fellow out, and if he wanted to buy it from him, he would buy it."

He says that he never kept any liquor for sale, and never sold any.

Oliver Witty testified that he and his wife worked for his brother, H. A. Witty, and had nothing to do with renting the premises; that his brother was sickly when he left the mines, and the doctors told him to use some liquor; that was 14 years ago; that liquor was always used in their father's home; that his wife liked a drink once in a while; that he never sold any liquor, and never knew his brother to sell any; that his brother does not buy liquor for him—he buys his own liquor; that he has bought whisky, five gallons at a time; that, if he wanted liquor, he bought it for himself; that they both bought liquor, and, when one was out, he used the other's liquor; that the liquor seized was the largest quantity bought at any one time; that, before, they had only bought 5 or 6 gallons at a time.

Mrs. Oliver Witty testified that she used liquor, that:

"I have my hot toddy every morning, and I would this morning, if I had it. I have not had any since they took it away. I expect I will die with the flu this winter."

She testified that the sheriff took every bit but four bottles of wine, which he left for her; that no liquor was given away or sold on the place; that the reason they got this amount at the time it was gotten was "that the state

was going to go dry, and we knowed we couldn't get any;" that the whisky was kept, part of it upstairs, and part of it down in the cellar, because they didn't want to run down cellar every time they wanted a drink.

Arl Jeffries, J. R. Corneilson, Albert Duggatt, and W. L. Blood, witnesses for defendant, testified that they were neighbors, and were at the Witty premises frequently, and had never seen any liquor sold there, or anything to indicate that there was liquor sold there.

At the close of the evidence, a verdict of acquittal was directed in favor of the defendant Oliver Witty. A motion by defendant to withdraw testimony of James Morgan from the jury was overruled. A motion by defendant to direct a verdict in favor of H. A. Witty was overruled. The case was submitted to the jury as to H. A. Witty.

Five assignments of error are directed to rulings and instructions as to the testimony of James Morgan, who testified to a conversation with defendant and the occurrence in the road in front of Morgan's house on the Sunday before the fourth of July.

We find no error. The Morgan testimony was competent, as bearing on intent,—as a circumstance tending to show defendant's attitude with respect to the sale of liquor. To say the least, the conversation, either as related by Morgan or Witty, shows that the defendant was instrumental in making the sale of two pints of whisky to Morgan, although it was not the defendant's whisky that was sold to Morgan, and it is not claimed that he made the sale. The court cautioned the jury not to consider the testimony, so far as the sale was concerned, but the fact that the conversation was had, and the conversation, were admitted in evidence. It was not defendant's whisky that Morgan bought, and defendant did not sell it. The other man sold it, and got the money for it. However, defendant's own testimony shows that he discovered Morgan, the purchaser. Jones did not know Morgan. Morgan says that, when he came down to the road, Witty asked him if he wanted to buy some whisky. Only a few days before this Morgan

conversation, defendant had brought from St. Joe, he says, 100 pints of whisky. The testimony of Morgan was competent, as bearing on defendant's intention with reference to his disposition of the liquor that he had recently purchased, to be considered with other facts and circumstances shown in evidence. It was competent, although the conversation occurred some 4 or 5 miles from the home of Witty.

Counsel for defendant insists that nearly 13 gallons of whisky, found in the private dwelling house of the defendant, is not an unusual quantity; therefore, no presumption

attaches to its intended use. Considerably smaller quantities of liquor than found with defendant have been held to be unusual quantities to be found in a private dwelling house. *McMillan v. Anderson*, 183 Iowa 873; *State v. Butler*, 186 Iowa 1247. What might be considered an unusual quantity for one man to have in his private dwelling would not be considered an unusual quantity for some other man to have. What constitutes an unusual quantity of intoxicating liquor, in any case, is a question of fact for the jury. If it is conceded that a quantity of liquor kept in a dwelling house is there for private use, then it does not matter about the quantity, nor the presumption that might otherwise arise from the quantity; for the intention is conceded to be not unlawful. Witty had not bought so large an invoice of whisky in former purchases; he had been in the habit of buying only 5 or 6 gallons at a time before; and his explanation for buying so large an amount in the last days of June, 1919, was that the eighteenth amendment would go into effect on July 1st.

It is argued that 13 gallons of whisky is not an unusual amount for a man to supply himself with, and have in his private dwelling, with, perhaps, a long dry spell ahead of him. If that is sound logic, then Witty and all other men, and women, too, would have been legally justified, in the last days of June, 1919, in consulting a mortality table, and ascertaining their expectancies of life, and laying in a stock sufficient to last through their lives. If this course had

2. INTOXICATING LIQUORS : presumption from undue quantity.

been pursued by everyone, the beneficent results of prohibition would not be realized for at least a generation yet. As July 1, 1919, drew near, there was a great temptation to men whose morals with respect to handling liquor were lax, to lay in a stock and sell it at an exorbitant price.

It is strenuously insisted by counsel that the evidence was not sufficient to warrant the submission of the case to the jury, and that it was error to overrule motion to direct a verdict for defendant; and it is in-

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LIQUORS:
jury question
as to unlaw-
ful intent.

sisted that, even if the testimony, considered with the statutory presumption, is sufficient to warrant the finding of an unusual quantity, in such event the testimony offered by defendant in explanation and avoidance is sufficient to overcome the statutory presumption, and, no actual sale having been proven, that it was the duty of the court, on such a record, not to submit the case, but to find, as a matter of law, that the showing of avoidance was sufficient to overcome the presumption, and to direct a verdict for the defendant. We think the testimony offered by the State was sufficient to warrant the submission of the case to the jury, and that it was not error to refuse to direct a verdict. *State v. Butler*, 186 Iowa 1247.

After examining the testimony offered by defendant, we conclude that defendant's explanation of buying and having in his house nearly 13 gallons of whisky, in 116 con-

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LIQUORS:
unusual
quantity.

tainers, was not sufficient to warrant the court in holding, as a matter of law, that the statutory presumption of unusual quantity was overcome. We think that, at the close of all the testimony, the case for the State was stronger than at the close of the State's testimony, owing to the weaknesses in the defendant's attempted explanation and avoidance. Defendant's avoidance seems to be based on his keeping the whisky for his own use for medical purposes. He received his medical advice to use liquor for stomach and lung trouble about 14 years before, from some Des Moines doctor whose name and residence he does not

now recall. But, in his testimony later, defendant says:

"As to my still acting under the advice of a Des Moines doctor, I am not really acting under the advice of anybody now."

Other assignments of error are directed to instructions involving questions that we have not discussed, but which we have examined carefully, and in which we find no error.

It was not error to submit the case to the jury, and the case was properly submitted to the jury.

There is no reason to disturb the verdict and judgment.
—*Affirmed.*

WEAVER, C. J., LADD and STEVENS, JJ., concur.

MAUD SWAN, Appellant, v. F. R. DALBEY, Appellee.

LIMITATION OF ACTIONS: Amplifying Amendment. An allegation that plaintiff's fall and resulting injury were due to the sickening effect of poisonous gases, negligently allowed to escape from a defective stove, may, *after the statute of limitation has fully run*, be amended by alleging that such fall and injury were also caused by an *explosion* of the said stove.

PLEADING: Variance. An allegation that an employee's fall and resulting injury were caused (1) by the sickening effect of poisonous gases escaping from a defective stove, and (2) by the explosion of such stove, with proof of only *one* of said causes, presents no fatal variance.

NEGLIGENCE: Contributory Negligence of Servant. It is reversible error (Sec. 3593-a, Code Suppl. Supp., 1915,) to instruct that a *servant* must affirmatively show freedom from contributory negligence, *even though the servant has alleged such freedom*, and even though the record, negatively speaking, does not reveal any act of contributory negligence.

Appeal from Clarke District Court.—HOMER A. FULLER,
Judge.

OCTOBER 19, 1920.

ACTION at law to recover damages for personal injury. Verdict and judgment for defendant, and plaintiff appeals. —*Reversed*.

W. S. Hedrick and Temple & Temple, for appellant.

O. M. Slaymaker, for appellee.

WEAVER, C. J.—The plaintiff was employed by the defendant, to assist in cleaning a room in a building owned by the latter. To warm the room and to heat the water for the work, defendant furnished a gasoline stove. This stove, the plaintiff charges, was in a worn, dilapidated, and defective condition; and, while she was standing on a counter, engaged in the work for which she was engaged, she was overcome by the noxious gases escaping from the defective stove, and caused to fall to the floor, receiving a severe injury, all of which she alleges was occasioned by the defendant's negligence with respect to the condition and use of such stove. On these allegations the defendant took issue, and the cause was tried to a jury, which returned a verdict for the defendant. At the close of the plaintiff's testimony, defendant moved for a directed verdict in his favor. The motion was overruled, and the defendant proceeded to offer testimony in his own behalf. At the close of all the evidence, the motion to direct was renewed, and again overruled.

In its charge to the jury, the trial court, among other things, instructed that, before she would be entitled to a verdict, plaintiff was required to "prove by a preponderance of the evidence * * * that she herself did not, by any negligence on her part, contribute to the happening of the accident which caused the injury claimed." This instruction was emphasized by being four or more times repeated in the course of the charge. Exception was taken to these instructions, and the error therein was made the

ground of a motion for new trial. The motion was denied, and judgment was entered on the verdict against plaintiff for costs.

That the instructions referred to were erroneous, is manifest. Code Supplemental Supplement, 1915, Section 3593-a. To avoid a reversal because of the error, the appellee urges the following propositions:

I. That the error was without prejudice to appellant, because her claim was barred by the statute of limitations. This argument is predicated on the fact that, in her original petition, plaintiff's complaint showed

1. LIMITATION
OF ACTIONS:
amplifying
amendment.

that her injury occurred on March 28, 1916, and alleged that, because of the defective condition of the stove and the noxious gases and vapors therefrom, she became sick and unconscious, and fell. Later, and more than two years after the date of the accident, plaintiff amended her petition, again alleging that, by reason of the defective stove, the room was filled with gas from the gasoline, whereby she was smothered and overcome, and that an explosion occurred with such violence as to throw her to the floor. On the theory that the amended petition set up a new cause of action, defendant pleaded in defense the statute of limitations; and such statute is now insisted upon as sufficient reason for holding the erroneous instruction concerning contributory negligence to have been without prejudice.

In our judgment, there is no merit in the point thus made, for the sufficient reason that the amended petition does not set up a new or different cause of action. It pleads the same alleged wrong described in the first petition, and does no more than to amplify and make more specific the charge made in the prior pleading. See *Gordon v. Chicago, R. I. & P. R. Co.*, 129 Iowa 747, 750; *Kuhns v. Wisconsin, I. & N. R. Co.*, 76 Iowa 67; *Van Patten v. Waugh*, 122 Iowa 302; *Thayer v. Smoky Hollow Coal Co.*, 129 Iowa 550; *Blake v. City of Bedford*, 170 Iowa 128, 136; *Hankins v. Young*, 174 Iowa 383, 388; and *Hobbs v. Illinois Cent. R. Co.*, 182 Iowa 316, 320. The plea of the statute of limitations is,

therefore, not available to the defendant.

II. It is further contended for appellee that the evidence does not show that an explosion occurred, or how plaintiff was injured; and, moreover, that her testimony is unreasonable and incredible; and that it

2. PLEADING:
variance. "is physically impossible for her story to be true," and because thereof she suffered no prejudice by allowing the verdict to stand.

It was not essential to a recovery by her that plaintiff should prove that there was an explosion. Her petition, both in its original form and as amended, charged defendant with neglect, in providing a defective and unsafe stove, and that, by reason thereof, the room became filled or charged with gas from the gasoline, from which she became sick, and was overcome and choked. It is true that, in the amendment, she further charges that an explosion occurred, and she was thrown to the floor; but, to entitle her to recover, it was not necessary for her to prove all the incidents and details described in her pleading. If her testimony had any fair tendency to prove the negligence charged, and that, by reason thereof, the air in the room where she worked was permeated with noxious gases, the breathing of which made or caused her to become sick or faint, and to fall, then she was entitled to have her claim for damages go to the jury, under appropriate instructions by the court, whether she did or did not prove the additional allegation that there was an explosion. The court cannot say, as a matter of law, that her testimony is unbelievable, or that the truth of her story is "physically impossible." Her credibility is a question for the jury.

III. Next, it is said for the appellee that the error into which the court fell in its instructions was invited by the plaintiff, and that she cannot now complain of it. This

conclusion is sought to be drawn from the fact that the petition, after charging the defendant with the alleged negligence, and injury resulting therefrom to herself, follows it with an allegation that she "did not, by any negli-

3. NEGLIGENCE:
contributory
negligence of
servant.

gence on her part, contribute to said injury." In our judgment, the record before us presents nothing calling for application of the rule which precludes a party to an action from taking advantage of an error which he himself invites or causes. The allegation in the petition that plaintiff did nothing to contribute to her own injury was redundant and unnecessary, and she was not bound to prove it, in order to make a case.

She asked no instruction such as was given. It was the duty of the court, without request, to give the jury proper instructions upon all issues joined. An omission to instruct upon a pertinent proposition of law may sometimes be disregarded, as being, under the particular circumstances, nonprejudicial; but a positively incorrect instruction is very rarely of harmless character. *Capital City B. & P. Co. v. City of Des Moines*, 136 Iowa 243; *State v. Pennell*, 56 Iowa 29, 31. The error here complained of was not invited by the plaintiff.

IV. Finally, it is said that there is no evidence tending to show contributory negligence on the part of the plaintiff, and that, for that reason, the instruction casting the burden upon her was without prejudice; and we are cited to some precedents which are thought to so hold. None of the cases mentioned is quite in point here. If the instructions as given were correct, and the burden was upon plaintiff to show herself free from contributory negligence, then she could not safely rest upon the theory that no negligence on her part has been shown, but, in order to recover, she was required to make affirmative proof of her due care for her own safety. The erroneous charge that she was bound to negative contributory negligence was impressed upon the minds of the jurors in several different paragraphs of the court's charge, and we think it not within the province of the court to assume that the error was without prejudice. The judgment below is reversed, and cause remanded for new trial.—*Reversed and remanded.*

LADD, STEVENS, and ARTHUR, JJ., concur.

CHARLES WHITE, Appellee, v. HOME MUTUAL INSURANCE ASSOCIATION OF IOWA, Appellant.

INSURANCE: Non-Necessity for Reformation. Reformation of a
1 policy, in order to correct a mistaken description of personal property, is not necessary, when the property may be and is definitely and unquestionably identified by extrinsic evidence. Especially is this true when the description is inherently ambiguous.

INSURANCE: Fraud in Obtaining Policy. An insurer may not
2 avoid a policy for misrepresentation as to the manner in which the insured acquired the policy, unless the record reveals some dishonest motive, or the fact that the insurer has been misled.

INSURANCE: Representation as to Location of Property. A
3 representation that a motor vehicle was usually kept in a "private garage" is not violated by keeping the vehicle in a shed or "lean-to" on the insured's barn, even though the shed is also used for housing other vehicles, and even though a portion of the shed is fenced off for stock.

INSURANCE: Estoppel in re Location of Property. An insurer
4 who accepts a premium, with full knowledge of the nature of the place where an insured automobile is to be kept, may not avoid liability on the plea that the insured described the place as a "garage," when it was not strictly such.

INSURANCE: Negligence of Insured. The fact that a fire was
5 caused by the mere negligence of the insured is no defense to an action on the policy.

Appeal from Lucas District Court.—FRANCIS M. HUNTER,
Judge.

OCTOBER 19, 1920.

ACTION on a policy of insurance for loss of an automobile resulted in a decree as prayed. The defendant appeals.—
Affirmed.

Holly & Holly, for appellant.

William Collinson and J. D. Threlkeld, for appellee.

LADD, J.—The defendant, a mutual insurance company, issued its policy January 9, 1917, covering an automobile described as:

“Made by Velie Co., Year 1914, No. of cylinders 4, Car No. 17217, Model, Horsepower25. How equipped,—Fully. Car is usually kept in a private garage on Lot, Block in Addition to or on quarter section. Township 71, Range 21, in Benson Township, Lucas County, Iowa. Kind of work for which car is used, family car. Is the car new or secondhand, 2 years old. Amount paid for car, including equipment, \$800. Year of purchase, 1916. Month, October. Was the consideration cash or trade? Both. If trade, describe fully what was given in exchange. Ford car and cash consideration.”

The automobile was, in fact, kept in a lean-to to the insured's barn, and was burned with the barn on the February 10th following the issuance of the policy. Proofs of loss were furnished, but the company refused payment of the loss, on the ground that the car destroyed was not that of insured. Suit was begun, praying that the policy be reformed by correcting the number thereof, and that judgment be entered for the indemnity stipulated.

I. The evidence disclosed that, when the application was signed by the insured, the number of the automobile was not inserted therein, as he did not remember it. He and the agent arranged that this should be done by the latter later on; and, on the morning following, the insured notified the agent, on information furnished by his son, that the number was 17217; and this number was written in the application by the agent. It was discovered after the loss, though before the petition was filed, that this number was not that of the license plate furnished by the secre-

tary of state, and plaintiff amended his petition by alleging the facts, and praying that the contract be reformed by correcting the number so as to read 19253. Reformation was decreed, as prayed, and it is said not to have been warranted by the record. Were this to be conceded, it does not follow that recovery should have been denied: for reformation of the instrument was unnecessary. The number of the automobile was inserted merely for the purpose of identification. The insurance was intended to be and was of the automobile; not of the number plate. It was the car insured quite as certainly, if fully identified, without resort to the number. There was such identification; for the evidence, without conflict, showed that the automobile burned met the description contained in the policy in all other respects, was the only automobile owned by the insured, and was the one intended to be covered by the policy. When the insured property can be so identified, there is no occasion for correcting the description contained in the policy covering personal property. Many courts of respectable authority hold that reformation of the description of realty, in event of mistake therein, is unnecessary where the buildings insured are identified by extrinsic evidence. *State Ins. Co. v. Schreck*, 27 Neb. 527 (20 Am. St. 696, 6 L. R. A. 524); *Kansas Farmers' Fire Ins. Co. v. Saindon*, 52 Kan. 486 (39 Am. St. 356). Moreover, the description by number was ambiguous; for it was shown to have a serial number, given it at the factory, and that of the license plate, and no indication was made as to which was intended in the application or policy. In these circumstances, extrinsic evidence was rightly resorted to, to show what was intended (*Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa 308), and, as the automobile burned was shown to have been covered by the policy, there was no error at this point.

II. The company interposed the defenses: (1) That it was induced to issue the policy by fraudulent representations; (2) that the automobile was not kept in a garage, as represented; (3) that the value of the car did not exceed

\$100, though represented to be worth \$800; and (4) a general denial.

The petition alleged fraud, in that the application for insurance represented that the car insured was obtained by exchanging a Ford automobile and money therefor; where-

2. **INSURANCE:**
fraud in
obtaining
policy.

as, in fact, the Ford car, with cash, was first exchanged for a Crow Elkhart automobile, and the latter, with boot money, traded for the one insured. Possibly, the son of the insured, who did the trading, found it necessary, in order to substitute the Velie automobile for the Ford car, to first exchange for the Crow Elkhart car, and then for that in question. The answer may have been made on this theory. Whether so or not, the record contains nothing tending to show a dishonest motive, or that the insurer was misled by the inaccuracy of the answer. The court rightly denied the charge of fraud.

III. The application recited that the automobile was "usually kept in a private garage." The evidence disclosed that he kept it in a shed or lean-to on his barn, and it is

3. **INSURANCE:**
representa-
tion as to
location of
property.

argued that this was not a garage. The definition of this word, found in Webster's dictionary, is "a place for housing automobiles." The Century dictionary says it means "a station at which motor cars can be sheltered, stored, repaired, cleaned, and made ready for use; also, a place for private storage for a motor car, a stable for motor cars." In the addenda to the Standard dictionary, it is defined as "a building, as a stable or shed, for the storage of automobiles and other horseless vehicles." As remarked in *Diocese of Trenton v. Toman*, 74 N. J. Eq. 702:

"These garages occupy, with relation to automobiles, the same place that stables do with regard to horses."

But the word "garage" is not to be regarded as synonymous with "stable," nor is a clause in a contract prohibiting the erection of a "stable" to be held breached by the construction of a garage thereon. *Riverbank Imp. Co. v. Ban-*

croft, 209 Mass. 217 (34 L. R. A. [N. S.] 730, Ann. Cas. 1912B 450); Babbitt on Automobiles (1911 Ed.), Section 628; *Smith v. O'Brien*, 46 Misc. Rep. 325 (94 N. Y. Supp. 673). The word "garage" was recently appropriated from the French language, there meaning, "keeping under cover," or "a place for keeping," and, as employed in English, is accurately defined by Webster's dictionary, substantially like the definition in the Century dictionary, as "a place where a motor vehicle is housed and cared for." To be such, the place need not be apart from other buildings, though that may be the more common and appropriate way. If the "place" be in a "lean-to," attached to another building, as a barn or corncrib, constructed for the purpose, or having been erected as set apart for the housing of the automobile, it is, none the less, a "garage," within the meaning of that word in either language. In French, the word has reference to the place of keeping wagons and other vehicles of transportation, as well as automobiles; but in English, it appears to have been restricted to motor vehicles.

The automobile in question was kept in the front end of a lean-to 16 feet wide and 26 feet long, attached to plaintiff's barn. By its side was kept a buggy, and there was a fence or partition back of it, to separate the vehicles from the stock. As to the automobile, this was a

4. INSURANCE:
estoppel
in re loca-
tion of
property.

"private garage," within the meaning of that expression found in the application. Moreover, the insurer was advised as to the kind of place in which the automobile was being kept. Plaintiff testified that he told the agent who filled out the blanks in the application that the automobile was kept in "a shed that joined onto the barn," and the agent's memory was that the applicant "said the car was usually kept in a shed, I think he termed it, near the barn." Apparently, the agent was not certain of the precise words used; and, as the plaintiff's version harmonizes with the facts, and is the more probable, we are inclined to the conclusion that the insured told the agent that the car was

kept in a shed that joined onto the barn. If so, the company, having accepted the premium and issued the policy with knowledge of the place where the automobile was kept, must be deemed to have waived any misstatement with reference to its locality. See *Key v. Des Moines Ins. Co.*, 77 Iowa 174, and other like cases, too numerous for citation.

The defenses interposed are without merit. The evidence left no doubt as to the identity of the automobile insured, nor was it such as to warrant any other conclusion

than that the loss was through no fault on the part of the insured. The proof failed to show excessive valuation, or any bad faith

5. INSURANCE:
negligence
of insured.

on the part of the insured. If he were neg-

ligent, that would not constitute a defense. *Nash v. American Ins. Co.*, 188 Iowa 127. The inspector of defendant seems to have been oversusceptible to suspicions, and inclined to "see things." We are satisfied that he erred in concluding that the automobile was equipped with six, instead of four, cylinders; that the serial number was on the right side of the engine, instead of the left side; that the number was 94402, instead of 94A02, found on the left side of the engine; and that a number had been chiseled off either side; and in saying that the insured had told him he obtained the automobile from a person in Illinois, instead, as was conclusively proven, from one Mercer, living at or near Chariton. It is likely that these mistakes led to the interposition of defenses unsupported by the evidence.

The decree of the district court is—*Affirmed*.

WEAVER, C. J., STEVENS and ARTHUR, JJ., concur.

STATE OF IOWA, Appellee, v. FRED N. WILSON, Appellant.

CRIMINAL LAW: Setting Verdict Aside. A verdict on conflicting
1 evidence must stand, unless it clearly appears that such verdict is contrary to the weight of the evidence. So held on the issue of agency in an embezzlement charge.

EMBEZZLEMENT: Tender as Barring Prosecution. One charged
2 with embezzlement may not bar prosecution by making a tender after indictment.

EMBEZZLEMENT: Evidence of Other Offenses. On the trial of an
3 indictment for embezzlement, evidence of other acts of embezzlement by the accused may properly be received for the sole purpose of throwing light on the motive and intent of the accused in the transaction on trial.

Appeal from Lucas District Court.—C. W. VERMILION, Judge.

OCTOBER 20, 1920.

DEFENDANT was indicted for larceny by embezzlement. It was charged that defendant, as agent for Frank Youtsey and Anna B. Youtsey, embezzled \$2,525.35. Defendant was tried and convicted, and appeals.—*Affirmed.*

Hickman & Wells, for appellant.

H. M. Havner, Attorney General, F. C. Davidson, Assistant Attorney General, C. F. Wennerstrum, County Attorney, and D. W. Bates, for appellee.

ARTHUR, J.—Defendant was engaged in the real estate and loan business at Chariton, Iowa, during the years 1917 and 1918, and he was correspondent for the Union Central Life Insurance Company of Cincinnati, Ohio, soliciting farm loans in Lucas County through the firm of George M. Van Evera & Company, of Des Moines, state agents for

1. CRIMINAL
LAW: setting verdict
aside.

said insurance company. At the solicitation of defendant, Anna B. Youtsey and Frank Youtsey, her husband, since deceased, applied for loans from said insurance company through George M. Van Evera & Company, state agents; and one loan was obtained for \$10,500, one for \$3,500, and another for \$2,500. Three mortgages were executed, to secure these three loans, upon three farms in Lucas County, belonging to Anna B. Youtsey. The last loan of \$2,500 is the one out of which the charge of embezzlement grew. There was some delay in completing the abstract of title to the land included in the \$2,500 loan, and, when the money was paid over, on April 10, 1918, it included the interest up to that date, and was in the amount of \$2,525.35. This money was paid to defendant by a draft dated April 10, 1918, made payable to him, and was received and deposited by him to his account at the State Savings Bank of Chariton, on the 11th day of April, 1918, less the sum of \$910, which Wilson took in cash with him from the bank. Claim is made by the defendant that he took this \$910 in cash out of the proceeds of the draft in compliance with the request of Anna B. Youtsey that he keep the same out and hand it over to her, and he claims that he did pay it over to her, and that she signed a receipt for the same. This is a disputed matter. Anna B. Youtsey says, as a witness, that he did not pay this \$910 to her, and that she did not sign a receipt for same.

It is a fact undisputed that defendant received the money on the \$2,500 loan: that is, \$2,500 plus the accumulated interest, making \$2,525.35. Defendant claims that Anna B. Youtsey owed him one per cent commission, or \$165; that she owed him \$160 commission for selling some land for her; that she owed him \$72.75 for expense on her abstract of title of the land mortgage; and that, after deducting from the \$2,525.35 which he received, the \$910 which he paid her, commission of \$165, and \$160 commission for selling the land, and \$72.75 expense on abstract, there was left in his hands, due Anna B. Youtsey, a balance of \$1,217.60.

Defendant claims that, on October 23, 1919, after indictment and before trial, he tendered and offered to pay to Anna B. Youtsey the sum of \$1,217.60, with interest thereon from the time he received it at 6 per cent, in the total sum of \$1,330.95, but that she refused to receive that amount, and demanded the payment of the entire \$2,525.35. It appears that the defendant did make a verbal offer to pay over to Anna B. Youtsey \$1,217.60, with interest thereon at 6 per cent while he had it, that being the balance, as he claims, of her money in his hands, after deducting from the amount he received \$910, which he claims he paid her, his commissions, and expense in perfecting her abstract. There is no evidence that defendant made an actual tender of that amount of money, or any other amount. His offer was a verbal offer only, and, at the time he made the offer, he said that he had the money on deposit, and held certificates of deposit therefor, issued by the Iowa Loan & Trust Company of Des Moines, and that certain other certificates had been issued to him by a bank at Indianola. That defendant had the money he claimed to have on deposit in these banks, is disputed. An officer of the Iowa Loan & Trust Company, also the cashier of the Indianola Banking Company, and the cashier of the First National Bank of Indianola, all testified that no draft had ever been issued to Fred N. Wilson, nor had any certificate of deposit been issued to him, as claimed by him in his testimony.

The principal questions involved in this case are whether or not Fred N. Wilson was the agent of the Youtseys, and whether the claimed tender made by defendant to Anna B. Youtsey of \$1,217.60, and interest thereon, was sufficient to bar a prosecution for embezzlement. The errors relied upon for reversal relate to these two matters; that is, that the evidence is insufficient to sustain the verdict, because it fails to show that defendant was, in fact, the agent of Anna B. Youtsey in applying for and receiving the \$2,500 loan; and that the tender which defendant claims he made to Anna B. Youtsey was sufficient to bar this prosecution. The question of whether defendant was the agent of Anna

B. Youtsey is one of fact, and was submitted to and passed upon by the jury. This court will not interfere with such finding, unless clearly contrary to the weight of the evidence. *State v. Pingel*, 128 Iowa 515; *State v. Tomlinson*, 11 Iowa 401; *State v. Wise*, 83 Iowa 596; *State v. Sullivan*, 156 Iowa 603, 607; *State v. Elliott*, 15 Iowa 72.

We have examined carefully the testimony of the defendant bearing upon the question of whether the defendant was the agent of Anna B. Youtsey or not. It is an undisputed fact that defendant sought to secure loans, aggregating \$16,500, for Anna B. Youtsey and her husband. Wilson, the defendant, was to receive one per cent commission. Defendant was also correspondent for the Union Central Life Insurance Company. All his transactions were directly with George M. Van Evera & Company, of Des Moines, who were state agents for the insurance company. The first loan secured was for \$10,500; the second loan was for \$3,500; and the third for \$2,500. The \$10,500 loan was obtained, and the transaction fully closed. The \$3,500 loan was obtained, and the Youtseys received the money on it. At the time of the trial, Anna B. Youtsey had received all the money on account of the loans negotiated, except the last loan, for \$2,500. She did not receive any part of that loan, unless it is the \$910 which defendant claims he paid her in currency, but which Anna B. Youtsey claims she did not receive. Defendant had in his possession application for the \$2,500 loan, and he also had in his possession the notes for the \$2,500 loan, and the mortgage to secure the payment therefor. The application for the loan, the notes for \$2,500, and the mortgage, purport to have been signed by Anna B. Youtsey and her husband. Defendant also had in his possession an order, addressed to George M. Van Evera & Company, directing them to turn over to defendant the proceeds of the \$2,500 loan, and this order purports to have been signed by Anna B. Youtsey and her husband. At the time of the trial, Frank Youtsey, the husband, was dead. Anna B. Youtsey, as a witness, denied having signed the application for the loan, and also denied

having signed the order to turn over to defendant the proceeds of the loan. Whether defendant, Fred N. Wilson, was the agent of the Youtseys or not, was a question of fact for the jury, and was dependent upon whether the name of Anna B. Youtsey, appearing on the application and on the order, is the genuine signature of Anna B. Youtsey or not. If the application and the order in question were signed by Anna B. Youtsey, then Fred N. Wilson, defendant, was the appointed agent. Hence, the proof of agency depends upon the genuineness of these signatures.

H. H. Van Evera, as an expert, testified that the signatures are the genuine signatures of Anna B. Youtsey. Against the testimony of H. H. Van Evera is the testimony of Anna B. Youtsey, that the signatures appearing on the application and order are not hers. The application and order were in evidence before the jury. A conceded signature of Anna B. Youtsey's was also in evidence before the jury, so that comparison could be made by the jury, as provided in Section 4620 of the Code:

"Evidence respecting handwriting may be given by experts, by comparison, or by comparison by the jury, with writings of the same person which are proved to be genuine."

On motion for a new trial, the court refused to disturb the finding of the jury.

In *State v. Elliott*, 15 Iowa 72, 79, this court said:

"And while we recognize the duty of the court to interfere with an unjust verdict, it should, nevertheless, be well satisfied, when the testimony is conflicting, of its insufficiency to convince the judgment, reason, and conscience of the triers, before setting aside the conclusion arrived at, as it must be presumed, after the requisite patient thought and attention. And especially is this so when the court below has refused to disturb such verdict."

In view of the conflict in the testimony in regard to the signatures, this court will not disturb the finding made by the jury.

It may further be remarked that the defendant himself,

on the witness stand, made no attempt to say that he was not the agent of Anna B. Youtsey. In fact, we think he at least tacitly admitted that he was, when he claimed that he had tendered her the amount of money that was due her.

We next come to consider the matter of tender which the defendant claims he made to Anna B. Youtsey, and whether such claimed tender was sufficient to bar prosecution.

2. EMBEZZLEMENT: tender as barring prosecution.

Section 4843 of the Code provides:

"In a prosecution under the preceding section [the embezzlement section], it shall be no defense that such officer, agent, clerk, servant, collector, attorney at law or other person was entitled to a commission or compensation out of such money or property as compensation or commission for collecting or receiving the same for or on behalf of the owner thereof. It shall be lawful for such agent, clerk, servant, attorney at law, collector or other person to retain his reasonable compensation or collection fee for collecting or receiving the same, but no attorney at law may retain any money or property as compensation, or as money and property on which he has an attorney's lien, after the filing of a bond as provided for in regard to such liens."

It does not appear from the record that the defendant made an actual, lawful tender of the \$2,525.35, or any part of it, to Anna B. Youtsey. But perhaps she waived his making lawful tender by refusing to accept his oral offer to pay to her that amount, less what he claims she owed him in the way of commissions, and the \$910 which he claimed he had paid to her. However that may be, the trial court gave to the jury as favorable instruction as the defendant was entitled to, covering that matter:

"If you find from the evidence, beyond a reasonable doubt, that the defendant, as agent for Frank Youtsey and Anna B. Youtsey, received the money in question, or some thereof, and that he unlawfully and fraudulently converted said money, or some thereof, to his own use, without the consent of the owners, then it would be no defense that,

after the return of the indictment herein, he tendered or offered to pay said amount of money, or some part thereof, to said Anna B. Youtsey, if he did.

"But if you do not find from the evidence, beyond a reasonable doubt, that the defendant unlawfully and fraudulently converted said money, or some thereof, to his own use, or if you find that defendant was, at all times prior to indictment, ready, able, and willing to settle with owners of said money, and to pay to the owner or owners thereof an amount equal to the balance of the amount so received by the defendant as such agent, if any, after deducting the aggregate of claims the defendant had, or in good faith claimed to have, against the owners thereof, or one of them, for commissions or money paid out for or to said owners, or one of them, he would not be guilty of embezzlement, and you should acquit him."

Testimony was admitted, over objection of defendant, of other acts of embezzlement or fraudulent conversion, as bearing on defendant's motive in converting the money in

this case. This is assigned as error. By proper instruction, this testimony was strictly limited to show motive, and it was not error to receive it. *State v. Boggs*, 166 Iowa 452.

3. EMBEZZLEMENT: evidence of other offenses.

The judgment is—*Affirmed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

ALICE M. COLEMAN, Administratrix, Appellant, v. IOWA RAILWAY LIGHT & POWER COMPANY, Appellee.

PLEADING: Variance—Surplus Allegation in re Negligence. No fatal variance is presented by alleging that a public utility company, in response to a request from deceased for electrical current, (1) erected the poles and strung the wires in the public highway to deceased's residence, (2) installed a transformer in connection with said poles and wires, (3) owned said poles.

wires, and transformer, and (4) so negligently maintained said electrical appliances as to cause the death of deceased, and by proving the first, second, and fourth allegations and, in lieu of the third allegation, proving that the deceased defrayed the cost of all said appliances; the record failing to show that deceased was charged with any duty to maintain said poles, wires, or transformer.

Appeal from Linn District Court.—MILO P. SMITH, Judge.

JULY 6, 1920.

REHEARING DENIED OCTOBER 23, 1920.

ACTION to recover damages for death. Directed verdict for the defendant. Plaintiff appeals. Opinion states the facts.—*Reversed.*

Samuel A. Anderson, J. E. Holmes, and Voris & Haas, for appellant.

John A. Reed, William Smyth, and Barnes, Chamberlain & Hanzlik, for appellee.

GAYNOR, J.—This action is brought by the administratrix of the estate of one Charles Coleman. In the action, the plaintiff seeks to recover damages on account of his death, which, she asserts, was caused by the negligent and wrongful acts of the defendant. She charges that the defendant is a corporation, with its principal place of business in Cedar Rapids, Iowa; that, at the time of the accident which resulted in the death of decedent, and for a long time prior thereto, it was engaged in the business of furnishing electricity for light and power to various homes and places of business in the state; that, to effectuate the purpose, it had constructed and was keeping and maintaining poles along the public highways of the state, and kept and maintained electric wires strung upon these poles; that these wires so strung were designed to convey electricity to those who desired it for consumption. The plaintiff re-

cites that a string of poles *belonging to the defendant*, and being a part of the poles above referred to, were set about 150 feet apart in the highway; that one of the poles was placed in front of the residence of deceased, and another about 150 feet to the south; that the defendant, at and prior to said injury, kept, had, and maintained, strung along said poles and extending therefrom for a long distance, two electric wires, known as "high tension" wires, and fastened and hung to and between said poles at a distance of about one foot apart, and parallel with each other; that, during all the time, and particularly at the time of the accident, a current of electricity was carried and permitted by the defendant to pass along and through these two high tension wires, carrying a current of about 2,200 voltage or volts; that it also kept and maintained upon said poles two "service" wires, hung parallel with the high tension wires, hung one on either side of the high tension wires, one towards the deceased's home, one about one foot from the high tension wire, the other on the opposite side of the two high tension wires, about the same distance therefrom; that, on the top of the pole opposite plaintiff's home, an instrument was installed by the defendant company known as a "transformer," built and constructed and designed to permit the taking from the passing current on the high tension wires a certain fixed voltage of electricity into the residence of deceased, for the use of deceased and his family; that connection was so made to and with the transformer as to cause and permit only 110 volts to pass through and along over the service wires into the residence, and into the cellar or basement, there to be connected with appliances so designed as to permit and enable deceased and his family to make use of the electricity; that the deceased had purchased and was using for this purpose, an extension or drop cord, known as an electric cord, equipped with plugs, one of which was designed to be inserted into a receptacle in the basement of the home, and the other end was connected with a washing machine, so that electricity passing through said service wire would be transferred

into and through said washing machine, and afford power for the operation of the same; that this cord was properly strung and maintained.

The plaintiff further states that, on or about the 27th day of May, 1918, and about half past 1 o'clock in the afternoon, deceased was in the act of carrying said extension or drop cord in the basement; that, in so walking from the basement, he permitted the wire to trail out behind him, holding the wire as it trailed; that, while he was so doing, a tremendous electric shock passed from the said wire into his body, causing his death. The plaintiff charges that the two high tension wires and the two service wires were hung between said poles so loosely that, at the central point between the poles upon which the wires were hung, they sagged or hung down at least three feet below the point of attachment on the pole, and were so strung and kept and maintained there that there was at all times present imminent danger that one or both of said wires would be blown or moved by the wind so as to cause one or both of said service wires to come in contact and entangled with and wrapped around the high tension wires, and thus to permit the heavy voltage on the high tension wires to pass along and through both of said service wires into the appliances in deceased's residence; that they not only permitted these wires to be and remain sagged, but so placed and maintained them that they would and did come in contact with certain trees and the limbs of certain trees standing out at that point; that, on account of the blowing and swaying of the limbs of the trees, there was at all times danger and likelihood that the high tension wires and the service wires would be brought together and entangled by the movement of the limbs and by the force of the wind; that it was practicable and feasible for said high tension wires to be so strung, fastened, and located between the poles that they could not and would not come in contact with each other, and would not wrap around each other or entangle; that defendant knew that it was essential and necessary for the reasonable safety and protection of de-

ceased and his family, while engaged in using electricity, that said wires be so strung, kept, and maintained as to prevent their coming in contact with each other, or being wrapped around each other or entangled, and knew that it was extremely dangerous to the deceased and his family to have said wires kept, strung, and maintained so as to permit them to come in contact one with the other, or become entangled and wrapped around each other; that, notwithstanding this, the defendant carelessly, negligently, and wrongfully caused and permitted said wires to be so loosely strung, kept, and maintained as to permit one of said service wires and one of said high tension wires to come in contact with the other, and to become entangled and wrapped around each other, and carelessly and wrongfully failed to have, keep, or maintain said wires in a reasonably safe and proper condition for use, and carelessly, negligently, and wrongfully so strung, located, kept, and maintained said service wires and high tension wires as to permit them to come in contact with the limbs of trees, and failed to warn plaintiff of the dangers incident to the condition there created and maintained; that, on account of the high voltage carried on said high tension wires, reasonable care for the protection of its customers, including the deceased, required that the insulation should be of such thickness and quality and character as to prevent transferring electricity from the high tension wires to the service wires, in case the same, for any reason, became entangled or wrapped around each other, or for any reason came in contact with each other; that the insulation of the high tension wires was insufficient in quantity or thickness or quality to render the same, under such circumstances, reasonably safe or proper for use.

It is the contention of the plaintiff that the death of the deceased was traceable directly to the negligent manner in which the wires were strung, kept, and maintained by the defendant; that, by reason of the manner in which they were strung, kept, and maintained, the service wires came in contact with the high tension wires, thereby throwing

into the service wires the high voltage carried on the high tension wires, and through the service wires into the residence of the plaintiff and into the home of the deceased, causing his death.

The defense was a general denial.

The cause was tried to a jury; and, at the conclusion of the evidence, the court directed a verdict for the defendant; and from this, plaintiff appeals.

The only question submitted to us for determination is whether or not, under the issues tendered by the plaintiff and the evidence offered by her in support of these issues, she made a case for the jury.

At the conclusion of the evidence, the defendant made the following motion for a directed verdict, and rested its right to a directed verdict upon the claims therein made:

(1) That the testimony shows without conflict that the defendant was not the owner of the line through which plaintiff's decedent received the injuries that caused his death.

(2) That, upon the issues tendered, there is no competent evidence to support a verdict in plaintiff's favor, if one should be returned by the jury.

(3) The evidence shows without conflict that the plaintiff's decedent was the owner of the electric line over which the charge of electricity passed that caused the death, and that the defendant was in no way responsible for the negligence, if any, charged in the petition.

The argument here proceeds upon the same ground as that upon which, we take it, the motion was sustained. The motion was sustained generally. We are not informed by this record as to the particular ground upon which the court concluded that the plaintiff had made no case for the jury.

To properly dispose of this contention, it is necessary that we examine the pleadings, to ascertain what the real claim is on which plaintiff bases her right to recover. What is the negligence charged? What is the theory developed by her pleading upon which she bases the defendant's lia-

bility? What facts are alleged showing to the court the negligence upon which liability is predicated? What is it charged that the defendant did, or omitted to do, which, under the law, creates liability? What is the proof offered which tends to sustain the claim of the petition that the defendant did, or omitted to do, something charged against it as actionable negligence?

It seems to be the contention of the defendant that, inasmuch as plaintiff alleged that the defendant was the owner of these wires and poles over which the electricity was conducted into her home, she cannot recover unless she affirmatively proves that these poles and wires were the property of the defendant at the time of the doing, or omitting to do, the things charged as negligence. It will be noted from a recitation of plaintiff's claim that she says that the poles belonged to the defendant; that upon these poles the defendant kept and maintained and strung the electric wires over which it is claimed the electricity was carried, both through the high tension and the service wires. It is claimed that, because the evidence fails to show that these poles belonged to the defendant, because the evidence affirmatively shows that these poles were paid for by the deceased, and that the extension wires that carried the electricity into his home were paid for by the deceased, the plaintiff has failed to establish the gravamen of her complaint. It is assumed that, because of this allegation, her right to recover must depend upon proof of this allegation. It is assumed that the showing is such, touching the ownership of the poles and the service wires connecting the current with the plaintiff's home, that there was no duty on the defendant to construct or maintain the line, and no duty to inspect the line to ascertain whether the current which it was sending into plaintiff's home could be sent with safety to its occupants. It is true that this record shows that the poles were paid for by the deceased. It is true that the record shows that the extension wires that carried the electricity into plaintiff's home were paid for by the deceased. It is true that the transformer referred

to by the plaintiff, though furnished by the defendant, was paid for by the deceased. We may assume this to be a fact; but does this sum up and end the controversy? It appears that the defendant is engaged in furnishing electricity to its consumers throughout the state; that to this end it erected a line of poles along the public highways, and especially a line of poles extending from this city to what is known in the record as the "Country Club," a distance of about a mile and a quarter. It appears that the deceased desired to connect with defendant's plant, for the purpose of securing light and power; that he made written application to the defendant therefor, in substantially these words:

"Feb. 12, 1917.

"The undersigned, C. Coleman, hereby requests the Iowa Railway & Light Company to supply electric lighting services to his premises. The consumer agrees to accept and pay for such service monthly from date service begins at the regular schedule rates charged by the company."

It also appears that it was under this application that the services were rendered. It appears that, at that time, poles had been erected along the public highway between the defendant's plant and the Country Club, and that it was serving the Country Club with electricity; that the Country Club paid the expense of these poles and wires, but that the defendant put them up; that various connections were made to various houses between the defendant's plant and the Country Club; that the defendant built the line of electric poles and wires running from this plaintiff's home to the Country Club; that the electricity was manufactured, furnished, and sent out by the defendant, and it collected from the various consumers, including the Colemans, for the services so rendered; that the road and the line of poles to the Country Club extended north from defendant's plant; that the road that passed deceased's home ran east and west in front of the house; that this east and west road extends to the Country Club; that, upon the application of the plaintiff, hereinbefore set out, the company put up the two poles and strung the two high tension wires to the pole

in front of the Coleman house, and it put them there for the purpose of serving the Coleman place alone; that the company furnished the poles and put them up, but charged the cost to Coleman. The company bought the poles, erected the poles, strung the wires on, but charged this to Coleman. All that Coleman paid for was the material.

The defendant's local manager testified:

"The company bought the poles and brought them out, but charged them to Coleman. The company took the wires out there. Coleman paid for the material. The company built the line in front of the house. Because of the expense, it was charged up to Coleman, and he paid the defendant for it. There were two high tension wires, carrying 2,200 voltage. When we put up these poles for Coleman, we put up a transformer, through which 110 volts were conveyed to the Coleman house. The transformer was adjusted so as to serve Coleman with 110 volts. When Coleman made application for service, our men did the work. There were not any primary wires leading to Coleman's house, at the time he asked for electricity. They had to be put up, and they were put up. We had to put up poles. We had to put up primary wires. We didn't have to put up connecting wires, extending from the poles to the house. He might have had someone else do that. I don't know who did it. In order to run wires from the poles to the house, connection would have to be made with the transformer. Our men put up the transformer."

He was asked this question:

"Did Coleman make any arrangements with the defendant company to do anything for him in putting in the line between his house and the Country Club high tension line, except to furnish him material and to furnish him work or labor to put up the line? A. That is all. He paid the company for doing the work at that time a little over \$50."

He further testified:

"When Coleman asked me to furnish electricity in his house, by putting in the application hereinbefore referred to, I put his application on file. That means for our fore-

man to do the work. That means to get the service out there. I supposed that my men proceeded under the application so filed to do whatever was necessary to accomplish the purpose called for by the application. When the application comes in, the foreman takes the application, and is supposed to do the work that is necessary to make the connection. I would not know the details. I know the result. I know what all was done. When this application of Coleman's was put on file, my foreman started to work to bring about the result sought. He would have to get the wires up; he had to put up the transformer; and my foreman did the work. I turned it over to him. The material that was used in building the line between Coleman's house and the Country Club was billed to Coleman from this office."

It is conceded that the poles and lines in front of the home of the deceased, over which the electricity was taken and carried into the home, were in the public highway.

Negligence, to be actionable, involves the failure to discharge some duty to the complaining party, whether that duty be legal or contractual. It is the doing or omitting to do something concerning which he owed a duty, which a reasonably prudent and cautious man would not do or omit to do, under like circumstances. Where a duty to do or not to do exists, and that duty is neglected, and injury results, actionable negligence arises. When one predicates liability on a charge that the party complained of did or omitted to do a particular thing which it was his duty not to do or not to omit to do, and says that the omission results in injury, he cannot recover, unless he affirmatively shows the duty charged and its omission. Or, in other words, he cannot predicate liability upon failure to discharge one duty, and recover on proof of a failure to discharge some other duty, though the other duty may be as binding as the one charged. The proof must correspond to the allegation made, and be confined to the point in issue. This is the basis of the thought upon which the court proceeded, in holding that plaintiff had not made a case. The theory of

the court was evidently that, inasmuch as the plaintiff had alleged that the defendant was the owner of the poles and wires, the duty to erect them and maintain them in a safe condition was only an incident of that ownership, and the defendant could not be liable until it was made affirmatively to appear that the condition existed out of which the duty arose; that the fact alleged was the basis of the duty violated, and, the fact not being true, the duty did not arise, and, there being no duty, it followed logically that there could be no negligence predicated on failure to discharge it. It is true that the plaintiff alleged ownership, but that is not all that the plaintiff alleged. She alleged that deceased requested the defendant to furnish the electricity; that the defendant knew at that time that the means by which electricity could be supplied had not been furnished; that it undertook to furnish the means for transporting the electricity to the deceased's home; that it erected the poles and strung the wires; that it did this negligently; that it was its duty not to do this in that way. All this is charged in the petition. It did undertake to furnish electricity over the poles and wires as it erected them. Its duty, then, was to see that the poles and wires were erected in a reasonably safe way for the doing of the act which it undertook to do. When it undertook to erect these poles and string these wires, and over them to furnish plaintiff the use of this dangerous agency, it assumed a duty to the plaintiff to see that the appliances erected, by which and over which it undertook to furnish him this agency, were in such condition as to make it reasonably safe for him to receive the dangerous agency in his home, and to see that it was furnished to him in such a way as not to unreasonably imperil his safety in receiving the thing. While the general rule contended for by the defendant is true, that the plaintiff cannot present her case upon one theory, try it upon that theory, and recover upon another theory, it is also true, under our theory of pleading and our practice, that plaintiff is not required to prove every fact alleged by her in her petition, in order to be en-

titled to recover. If the allegations of the pleading are such that it discloses a fair duty neglected, resulting in injury, and the injury is traceable to that failure to discharge that duty, a case is made, notwithstanding the fact that other facts may be alleged out of which other duties might arise, and upon which negligence might be predicated. As said in *Russell v. Holder*, 116 Iowa 188:

“Plaintiff was only bound to prove so much of the matter alleged as was necessary to make out his cause of action.”

See, also, *Luttermann v. Romey*, 143 Iowa 233; *Watson v. Mississippi River Power Co.*, 174 Iowa 23. If the plaintiff in her petition has alleged—and we think she did—facts showing a legal duty existing on the part of the defendant company towards her deceased, in the manner of erecting and constructing these poles and wires over which it was intended to furnish her husband with electricity, and that they were negligent in the manner in which they arranged the wires, and this negligence was the proximate cause of his death, she has made out a prima-facie case. *Kanz v. J. Neils Lbr. Co.*, (Minn.) 131 N. W. 643.

We cannot construe this petition to make it appear that the sole contention of the plaintiff was that the defendant was the owner of these poles and wires; that out of this, and this alone, arose the duty to see that they were kept and maintained in reasonably safe condition; and that this failure was the proximate cause of the injury. The allegations of her petition are that the wires were strung loosely by the defendant; strung so loosely that the elements, operating upon them, caused the service wires to come in contact with the high tension wires, and thereby carry a heavy voltage of electricity into the home of the deceased. She further claimed that the defendant carelessly caused and permitted the wires to be so loosely strung, kept, and maintained that they were liable to become entangled with the limbs of the trees through which they passed, and thereby cause danger; and that this did cause the injury complained of. The argument of the defendant proceeds upon the the-

ory that these poles and wires belonged to the deceased; that they were there at his instance and request; that they were there for his use; that he had supervision and control of them; that it was his duty to see that they were not loosely strung, and were kept and maintained so as not to become entangled with the high tension wires; that it was the duty of the deceased to maintain the structure in proper condition.

Even though it be said that the wires and poles belonged to deceased, the defendant undertook to erect them, and to place them in position to give service. When it assumed that work, there was involved in it a duty to see that reasonable care was exercised to place them in such juxtaposition, one with the other, that the evils that all the evidence shows might reasonably be expected to result from the coming in contact, might be avoided, and that the consumer might not be unnecessarily and negligently exposed to the hazard of the thing which the defendant undertook to do. There is nothing in this record that shows that the plaintiff owed any duty to superintend the construction of these wires, or to see that they were kept in reasonably safe condition. That duty all rested on the defendant. It rested because it assumed to perform that duty, and to give the deceased the service for which he had petitioned, and for which he paid.

We do not enter into a consideration of the merits of this case. We think the record presents a fair question for the jury, and we think the court erred in directing a verdict for the defendant. Its action in so doing is, therefore,—*Reversed.*

WEAVER, C. J., LADD and STEVENS, JJ., concur.

C. W. NELSON, Appellee, v. S. R. ROBINSON et al., Appellants.

**LANDLORD AND TENANT: Option to Purchase—Special Assess-
1 ments.** A lessee in a long-time lease, who acquires an option to purchase, and thereby to terminate the lease, must, on exercising the option, assume the payment of special assessments for improvements which were *not* within the contemplation of the parties when the lease and option contract were entered into.

DEEDS: Assumption of Unpaid Special Assessments. One who has
2 given the tenant the option to purchase the leased premises at a specified time during the term of the lease, is under no obligation, on the exercise of the option, to pay special assessments for improvements which were *not* within the contemplation of the parties when the option was granted.

**MUNICIPAL CORPORATIONS: Special Assessments—Presumption
3 in re Enhancement of Value.** Principle recognized that a special assessment is presumed to enhance the value of the property to the extent of the legal assessment.

**SPECIFIC PERFORMANCE: Noncontemplated Special Assess-
4 ments.** A written contract giving a tenant the right to purchase the leased premises at a specified time during the term will not be so specifically enforced as to require the owner of the property to pay special assessments for improvements which were *not* within the contemplation of the parties when the right to purchase was granted.

Appeal from Marshall District Court.—JAMES W. WILLETT,
Judge.

JULY 6, 1920.

REHEARING DENIED OCTOBER 23, 1920.

ACTION in equity, brought to specifically enforce the following provisions made in a lease between plaintiff and defendant:

"It is further agreed that the lessee shall have the option and privilege of purchasing said property at the price of \$8,000, July 1, 1918, at which time, should he exercise the option to purchase, the lease shall terminate."

It appears that, since the lease was executed, the property has been improved by the city, by the putting in of paving, sidewalks, and sewers. The court decreed plaintiff entitled to the property, free and clear of liens created by special assessments made for these improvements, upon the payment of the price stipulated in the contract. Opinion states the facts.—*Reversed*.

Rayburn & Lyman, for appellants.

E. N. Farber, for appellee.

GAYNOR, J.—This is an action for a decree of specific performance of a written contract to convey land. The facts upon which the right to a specific performance is based, are substantially as follows:

1. LANDLORD
AND TEN-
ANT: option
to purchase:
special as-
sessments.

On and prior to the 22d day of May, 1908, one Carney, of Cook County, Illinois, was the owner of Lots 7, 8, 9, 11, and 12 in Block 8 in Anson's First Addition to the town of Marshalltown, Iowa. On that day, he entered into a written contract with one J. H. Mineah, in which he agreed to sell and convey to him the lots aforesaid, at the agreed price of \$6,000. In this contract was the following stipulation:

"It is further understood and agreed that the party of the second part [Mineah] shall pay all taxes and assessments now due or *which may hereafter be assessed against the property*, with the further statement that the premises are free and clear from all liens, incumbrances except the taxes for 1907."

This contract was assigned in writing to the defendant Robinson on the 22d day of March, 1912, for a consideration of \$5,500. This was the condition of defendant's title at

the time the contract sought to be enforced in this action was entered into. The contract here sought to be enforced was the usual form of lease. In it Robinson leased to plaintiff the premises in question for a term of 10 years, to wit, from the 1st day of July, 1913, until noon of the 1st day of July, 1923, at a monthly rental of \$75 per month, to be paid in advance. This lease contained this provision:

"Lessee [being the plaintiff] shall have the option and privilege of purchasing said lots at the price of \$8,000 on the 1st day of July, 1918, at which time should he exercise the option to purchase the lease shall terminate."

The plaintiff entered into the possession of the premises, and made valuable improvements upon the same, and paid all the rents required of him to be paid under said lease until the 1st day of July, 1918. On that day, he notified the defendant in writing that he had elected to accept and exercise the option and privilege given him in the lease, and offered and tendered to the defendant the \$8,000 stipulated therein. This was refused by the defendant, and this action is brought to require him to specifically perform, and convey the land to the plaintiff for the said sum of \$8,000.

After the making of said lease, and on the 23d day of September, 1915, Carney conveyed to the defendant the property in question by warranty deed, the consideration named being \$6,000. This was made in fulfillment of the contract hereinbefore referred to, entered into between Carney and Mineah, and assigned to the defendant. In this deed it was provided "that the same is sold subject to all taxes and assessments which may be a lien against the property," all of which the purchaser, Robinson, assumed, and agreed to pay. It appears that, between the making of said lease and acceptance of the option, street pavements were put in, sewers constructed, and sidewalks built by the city of Marshalltown on streets adjoining these lots, and the lots were duly assessed for benefits on account thereof made, as follows: October 26, 1916, for the sewer, approximately \$565, part of which has been paid by Robinson since that date; for paving on Railroad Street adjoin-

ing the lots, approximately \$860; for paving on First Street adjoining said lots, against Lots 7, 8, and 9, each \$194.69, part of which has been paid; for sidewalks in front of Lots 9 and 12, on Lot 9, \$103.07, and on Lot 12, \$151.12.

On the trial of the case, it was practically conceded that plaintiff was entitled to a specific performance of his contract, and was entitled to have conveyed to him the title

to the lots in controversy. The only ques-

2. DEEDS: as-
sumption of
unpaid
special
assessments.

tion now around which the controversy centers is the duty of the plaintiff to accept title subject to *existing liens* for special assessments so made. On the trial, the

defendant tendered the plaintiff a good and sufficient warranty deed, subject only to the *unpaid special assessments*. This deed was refused by the plaintiff. The only question, therefore, which this case calls upon us to determine is whether or not this deed is a sufficient compliance with the covenants of the defendant under his lease, and whether it should not have ended the controversy between the parties. If the tender is all that plaintiff is entitled to, under the facts in this case, then the defendant has tendered performance of all the obligations he assumed in the lease, and the case should terminate here. The evidence tends to show—and we think does show—that the actual value of the property, at the time the lease was entered into, was about \$5,500; that the property was practically unimproved; that, since then, the plaintiff has put valuable improvements upon the land; that he placed these improvements upon the property in reliance upon the optional agreement given in the lease; that, at the time the lease was entered into, the reasonable rental value of the property did not exceed \$25 a month; that the plaintiff agreed to and accepted the lease because of this optional provision that he might purchase it at a stipulated time at a stipulated price. This lease extended over 10 years. Marshalltown was a city of about 15,000, surrounded by a fertile and productive country. No doubt the parties had in mind, at the time, that, at the expiration of the lease, whether it

terminated upon acceptance of the option or whether it terminated at the expiration of the 10 years provided in the lease, the rental value would be far in excess of the then rental value. No doubt the agreement to pay \$8,000 was made in anticipation of the development and building up of the city, and especially of that portion of the city, and the rise in value of the lease on account thereof. The plaintiff stipulated with the defendant to pay him from \$2,000 to \$2,500 more, on the 1st day of July, 1918, than the property was actually worth at the time the lease was entered into. At the time the lease was entered into, many of the streets of Marshalltown had been paved, and paving had been laid on Center Street, adjoining the property in controversy on the west. There is a reason for believing that the parties did not contemplate, at the time, that the improvements in controversy would be made during the life of the option. The necessity for this paving seems to have come out of conditions that came into existence after the lease was made. The same may be said of the storm sewer and of the sidewalks. The laying of this paving, the building of these sidewalks, and the construction of the sewer, were not matters over which the parties to this contract had any control. Neither can be held to have anticipated that these improvements would be made within the time limited for acceptance of the option. The necessity for these improvements and the time when they should be made, rested in the sound discretion of the city, to be exercised according to the public needs, as the years developed them. The improvements in controversy here were directed by the city council, and assessments were made according to special benefits assumed to have been conferred upon this property by their action. The improvements, so far as the parties to this suit were concerned, were compulsory; and we cannot say from this record, or from anything that this record discloses, that these improvements were anticipated, at the time the agreement to convey was entered into. Of course, in a general way, we must recognize the fact that the citizens of these grow-

ing cities in Iowa, owning property within their limits, do expect and anticipate that public improvements of the nature here under consideration will be made, in the interest of the public, by the public authorities of the city at some time. But the character of the property and its location, the character and size of the town at the time, the previous improvements and their character, must always be considered in determining whether or not parties contracting for the sale of property abutting upon the streets anticipated and had in mind specific improvements of that character, involving the property subject to the

3. MUNICIPAL
CORPORATIONS:
special
assess-
ments:
presumption
in re en-
hancement
of value.

contract. The theory of assessments for special benefits is that the property itself is benefited to the extent of the improvement, but not to exceed 25 per cent of the actual value of the property to be affected.

At the time this contract was entered into, the property was unimproved. It was, no doubt, desirable property for the purposes to which plaintiff desired to devote it. It was located near railway tracks. If these improvements had not been made by the city, the plaintiff would be entitled to a decree of specific performance, upon the payment of the \$8,000 stipulated in the lease, even though, from natural causes, the property became more valuable. By the action of the city in placing these improvements, we must assume that the property had been benefited, to some extent. The improvements must be paid for, or the property confiscated to the payment. The proportionate cost of the paving, according to benefits conferred, must be borne by someone, and primarily is charged to the land, but is actually borne by the owners of the land. The work for which these special assessments were made was a permanent improvement to this land, which now the plaintiff seeks to take under his contract at a price stipulated before the improvements were made; and we must assume that the improvements have added largely to the value of the land. The equities of the parties are before the court for adjustment; and though, or-

dinarily, courts of equity follow the contract, and will specifically enforce the same, yet if, by reason of matters over which neither party has control, it becomes unjust or inequitable to enforce the same, they may refuse to do so. We do not mean to say by this that courts of equity will refuse to enforce a contract because, in their judgment, the contract is improvident, or because one party or the other had made a bad bargain. This is not sufficient to justify refusal to specifically perform. Courts of equity will not undertake to make contracts for parties or to revise them. Equity recognizes, as the law does, that parties are entitled to the benefits of their contracts and their bargains. But bad bargains will be often interfered with by courts when there is proof of fraud or deceit, or the taking of undue advantage of another because of infirmities. The refusal to enforce a contract specifically is not based, then, upon the mere ground that the bargain is improvident or unfair, but upon the fact that other influences have worked their way into the making of the contract, which show that one or the other has been circumvented into the making of the contract, and which render it inequitable now to compel him to abide by the terms, and perform as stipulated. Here we have no evidence of any unfairness; the parties dealt at arms' length; the property was there, and known to each party; each was a man of large business experience; and each was competent to take care of himself. However this may be, this fact is true: that there were only five years to expire between the making of the lease and the right to exercise the option. We cannot say, as a matter of fact or of law, that both parties anticipated and foresaw that, within that time, these valuable improvements would be made by the city, without the consent of either party to the contract, which improvements would enhance the value of the property as a commercial entity.

We do not deem it of any importance in the disposition of this case that Robinson made no objection to the improvements. It is not shown that there was any ground

for objection. Nor do we deem it in any way a controlling fact that he accepted the benefit of the seven-year provision for the payment of the assessment. At that time, the then owner of the land was called upon to act. The land was primarily liable for the payment of the assessment. The seven-year waiver added nothing to the burden, but afforded protection against immediate confiscation.

It is recognized that equity, when called upon to specifically enforce a contract, looks keenly to see whether or not, under all the circumstances disclosed in the record,

4. SPECIFIC
PERFORM-
ANCE: non-
contem-
plated
special as-
sessments.

it would be just and equitable to require the parties to specifically perform. True that, in most cases which have come to the courts in which specific performance is prayed and the prayer denied, there apparently existed in the contract some inequal-

ity in the very terms of the contract itself, or it was made to appear that the one seeking to avoid the performance had been circumvented in some way, so that it was apparently unjust and unfair to require the contract to be specifically performed according to its terms. A discretion, then, is lodged in the court of equity to refuse specific performance, and leave the parties to their remedy at law for damages as for a breach. It has been held that this same discretion exists when the enforcement of the contract has become inequitable, through subsequent events or collateral circumstances. These are but expressions of a general rule applied by courts of equity, in an effort to work out substantial justice between the parties. In some cases, courts of equity have refused specific performance of a legal and valid contract, because, as it was said, it would be attended with great loss and hardship to one of the parties. In other cases, specific performance was refused because of gross inequality and improvidence in the contract itself. In other cases, it was held that a court of equity may refuse specific performance "notwithstanding contractual obligation, if there be circumstances rendering it inequitable to require specific performance of it;"

and it was said that it was not with abstract and rigid law that equity dealt, but with principles of justice and right, which the consciences of men must approve. In *Mansfield v. Sherman*, 81 Me. 365 (17 Atl. 300), the court said:

“However strong, clear, and emphatic the language of the contract, however plain the right at law, if a specific performance would, for any reason, cause a result harsh, inequitable, or contrary to good conscience, the court should refuse such a decree, and leave the parties to their remedy at law.”

We have nothing in this record that would justify us in saying that, when the parties entered into this lease, with this optional stipulation in it, on which the plaintiff rests his claim to the land, either party understood or foresaw that, within the five-year limitation for acceptance, these improvements, or any improvements of a character such as those involved here, would be made, to the great advantage and improvement of the property which was the subject of the contract. We do not think that it was in contemplation of the parties that, so far as public improvements of this character are concerned, these improvements would be made during that period of time, and before the expiration of the option, and we do not believe that the parties, in contracting, one to buy and the other to sell, at the stipulated sum, on the date when the option should be exercised, had in contemplation that the property itself would be permanently improved or enhanced in value.

We do not feel that we can add anything to what has been heretofore said by this court on this same question in *King v. Raab*, 123 Iowa 632, and *Cornelius v. Kromminga*, 179 Iowa 712; nor do we find anything in the facts of this case that distinguishes it from the basic facts in those cases, or that would justify us in applying any other rule than that applied there to the rights of the parties litigant. In *Cornelius v. Kromminga*, supra, this court said, referring to a state of facts very much like the ones here:

"Nothing is taken from the defendant [the purchaser]; the value of his property is not only undiminished, but it is presumably increased to the full amount of the assessment against it; and we think there is no sound principle of law or equity which will permit him to shift the natural and proper cost of this increment upon the plaintiff [the seller]."

See, also, *Larson v. Smith*, 174 Iowa 619.

We think, therefore, that the decree of the court was rightly for the plaintiff, but that the title given in fulfillment of the option should be subject to all the liens made for improvements *undischarged and existing* at the time the acceptance was made. The deed made by the defendant in tender is a waiver of any claim made for assessments heretofore paid by the defendant. The plaintiff, therefore, should take the land subject to all the *unpaid special assessments* made for paving, sidewalks, and sewers, as disclosed in this record. The case is, therefore, reversed, and decree ordered in accordance with our holding here. Plaintiff may have a decree in this court, if he so elect.—*Reversed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

J. L. RHEA, Appellee, v. ADDER MACHINE COMPANY,
Appellant.

PRINCIPAL AND AGENT: Commission on Sales—Exempting Clause. A principal who, reasonably knowing that he would be unable to fill orders, contracts to pay his agent (who was without such knowledge) a commission on all orders obtained, will not be relieved of his obligation by an exempting clause in the contract that no commissions will be claimed "*by reason of delay in filling orders*."

Appeal from Des Moines Municipal Court.—W. G. BONNER,
Judge.

JULY 6, 1920.

REHEARING DENIED OCTOBER 23, 1920.

SUIT for commission on sales of adding machines resulted in judgment as prayed. The defendant appeals.—*Affirmed.*

Read & Read, for appellant.

G. H. Winans, for appellee.

LADD, J.—On April 2, 1917, the parties hereto entered into a contract by the terms of which plaintiff became the exclusive sales agent of the defendant, "to dispose of by lease and sale under the company's regular contracts with customers, Wales Visible Adding and Listing Machines, as now are or may be manufactured by the company," within designated counties. In pursuance thereof, plaintiff obtained an order from the Commercial Savings Bank of Farragut, Iowa, for a Model 30 machine, on June 29, 1917; an order from the Farmers & Merchants State Bank of Corydon, July 25, 1917; and another order from Hammill College, Council Bluffs, three days later. These orders were promptly accepted, and commissions credited to plaintiff, but defendant did not fill them. The first was canceled by the purchaser on March 25, 1918, the second about January 1, 1918, and the third in the fall of 1917. Such cancellations were acquiesced in by defendant, for that it was unable to deliver machines such as were sold. Suit is for recovery of these commissions. The defendant contends that it is relieved of liability by exemptions therefrom, contained in the contract. It is stipulated therein that, upon receipt of an order which is accepted, the full amount allowed as commission was to be entered on the company's books as a credit. Paragraph 45 thereof stipulates that:

"In case the purchaser fails to pay any note or any part

of the purchase price of a machine and your commission on the machine has been paid to you or credited to your account, the commission on the amount unpaid is to be charged back against your account."

Paragraph 46:

"Such credits or commissions as outlined above, when entered in your account on the books of the company, shall constitute full compensation and remuneration for your services and expenses."

A previous paragraph, 23, stipulated that:

"It is mutually agreed that no damages or commissions are to be claimed by reason of delays in filling orders, or should accidents, fire or strikes occur, or other causes beyond our control arise."

The agent also agreed to "abide by all the decisions, rules, and regulations of the company, which are hereby made a part of this contract."

Paragraph 57 of the Decision Book contains the following:

"Where in the interest of business at large it is considered by the company advisable not to enforce collection on account, the company shall accept cancellation of the order and relieve the purchaser of any responsibility he has assumed. In such cases the same commission adjustment shall be made as though the cancellation had been accepted with the consent of the sales manager."

The sole question is whether these stipulations relieved the defendant from liability for commissions. Manifestly, none of these conditions were available, save, possibly, Paragraph 23, relating to damages or commissions "claimed by reason of delays in filling orders." The trouble, however, was deeper than the mere matter of delays. The company was without machines such as it employed plaintiff to obtain orders for, and, moreover, it had not perfected its device for their manufacture. Its inability to furnish the machines appears from its letter of September 18, 1917, addressed to the Hammill College and

Business Institute of Council Bluffs, Iowa, in which it says:

"Referring to your kind order placed with us for one of our Model 30 Duplex Subtracting Machines, we beg to inform you that shipment was being prepared when our development department suggested a few minor changes in the mechanical construction of this machine. Upon investigation of these changes, it was found that, although being simple in nature, would be very valuable to the service and life of the machine. To install these slight changes, it was found necessary to make new tools, which, as you may be aware, cannot be accomplished in a few hours. This company deemed it advisable, in the interests of both customer and itself, to make these changes effective without delay, feeling that the customer would by far suffer the inconvenience of waiting a little while longer for the delivery of a machine without these improvements."

It also promised delivery "as quickly as the changes are made." We understand that like letters were mailed to other parties purchasing machines. This was sent out, notwithstanding the fact that, as early as April 16, 1917, a letter addressed "to men on the firing line" urged the agents to do their best in obtaining orders for Model 30 machines. As early as September 1, 1917, in a letter to plaintiff, the defendant advised that "we have no means of knowing just when Model 30 machines will be delivered to those sales orders now pending delivery," and requested that no further orders be taken, and proceeded:

"The development department have made a wonderful improvement in the construction of Class 30 machines and these improvements will be installed in all Class 30 machines now pending delivery."

It is plain from these letters that the company had not perfected the Model 30 machine, and there is no evidence in the record tending to show that the machine was ever completed, or ever ready for delivery. In entering into the contract, plaintiff had the right to assume that the company then had or could manufacture within a

reasonable time what it employed him to sell. Nothing to be found in that instrument required him to risk its ability to furnish sometime the goods he was employed to sell. The defendant's lapse, as between principal and agent, was not merely in delay, but in its inability to furnish for purchasers the machines which it had employed plaintiff to sell, and which he did sell. Exemption from the company's liability for this breach is not covered by any of the clauses quoted; and we are of opinion that the court did not err in so ruling, nor in finding that the contract became impossible of performance by defendant, owing to its failure to perfect the machines for the purchase of which the orders were procured. The company must have been aware that it was not in a situation to furnish Model 30 when the contract was made, though it intended to manufacture machines of that model, and may do so yet. Having undertaken something that might be difficult of performance, it is not in a situation to complain. *Wernli v. Collins*, 87 Iowa 548. Moreover, such a contingency might reasonably have been anticipated, and have been provided against, and the absence of any such provision warrants the inference that the obligation of defendant was intended to be absolute. *Mahaska County St. Bank v. Brown*, 159 Iowa 577. The plaintiff was not shown to have had knowledge of these facts, and, for all that appears, entered into the agreement in reliance on defendant's ability to perform. In these circumstances, the company was not relieved from liability for damages consequent on its subsequent inability to carry out its undertaking. See 13 Corpus Juris 635 *et seq.*—*Affirmed.*

WEAVER, C. J., GAYNOR and STEVENS, J.J., concur.

WILLIAM E. G. SAUNDERS et al., Appellees, v. A. S. STULTS
et al., Appellees; WAHKONSA INVESTMENT COMPANY
et al., Appellants.

RECEIVERS: Right Acquired by Bidder. A bidder at a receiver's sale acquires no enforceable right until his bid has been accepted by the court..

*Appeal from Winnebago District Court.—M. F. EDWARDS,
Judge.*

MAY 11, 1920.

REHEARING DENIED OCTOBER 23, 1920.

APPEAL from the action of the district court in refusing to confirm a sale made by its receiver. Opinion states the facts.—*Affirmed.*

Kelleher, Hanson & Mitchell, for appellants.

E. A. & W. H. Morling, Gordon & Osmundson, Senneff, Bliss, Witwer & Senneff, and *Cosson & Clarke*, for appellees.

GAYNOR, J.—Prior to the happening of the matters involved in this controversy, the defendants Stults had contracted to purchase 790 acres of land. Finding themselves unable to finance the purchase, they induced the plaintiffs, Saunders and the two Sopers, to do so. A contract was entered into between these parties, by the terms of which the land was to be sold, and the sum realized divided between them, in proportion to the interests of each, as fixed in the contract. It appears that a sale could not be effected within the time limited by the contract, and a disagree-

ment arose between them as to the price at which the land should be sold. Thereupon, these plaintiffs brought this action to terminate the joint adventure, and to have a receiver appointed. After a hearing, the court found for the plaintiffs, and appointed a receiver in the person of one James B. Anderson. Anderson qualified, and gave bond, and entered upon his duties as receiver. The decree was rendered in October, 1918, and directed this receiver to sell, convey, and convert into money all real estate and all personal property covered by the joint enterprise, and to do this as speedily as might be without sacrificing the property. As to the real estate, the receiver was directed to sell the same upon such terms "as are customary in the locality in relation to real estate when sold in like quantities at private or public sale." Thereafter, the receiver endeavored to interest buyers in the property, from time to time. The receiver fixed the price at \$135, and undertook to secure a purchaser at that price. He made diligent effort to secure a purchaser. There is no complaint of this. On or about May 26, 1919, the Wahkonsa Investment Company and Furlong & Brennan, after inspecting the land, submitted a bid of \$130. On May 31, 1919, the receiver accepted the bid of these parties, and entered into a formal written contract with them, in which he agreed to sell and convey to them the land aforesaid at the price of \$130, and in the contract they bound themselves to buy at that price, and to pay \$10,000 down. The terms upon which the Wahkonsa people were to purchase the property were as follows: To pay for said land the sum of \$102,700, \$10,000 in hand, and \$30,000 in cash on March 1, 1920; to assume mortgages on the land, amounting to \$35,475; and to give a second mortgage on the land of \$27,225, the second mortgage to bear interest at the rate of 6 per cent per annum, payable annually from March 1, 1920. Shortly after this contract was made, the receiver prepared a report of this sale for submission to the court. The report, however, was not filed. Thereafter, and before any report was made to the court of the sale aforesaid, the First & Second

Mortgage Corporation of Iowa presented a bid to the receiver of \$145 per acre, with payments to be made on terms far more favorable to the parties interested than was provided in the Wahkonsa contract.

On the 21st day of July, 1919, the receiver filed a report, in which he advised the court of the sale of the land to the Wahkonsa people, and also advised the court of the offer made by the mortgage corporation, and requested such action by the court on his report as might be just and proper. The Wahkonsa people moved for a confirmation of the sale to them. Objections were filed to its confirmation on various grounds, among which were that the sale price was far less than the actual value of the land, and that the manner and times of payment were inequitable. After hearing was had upon this motion and the objections thereto, and after evidence was introduced, the court refused confirmation of the sale to the Wahkonsa people, and directed the receiver to accept the bid of the First & Second Mortgage Company on the terms set out in its offer, and directed the receiver to enter into a written contract with this party for the purchase and sale of the land. The Wahkonsa Investment Company and Furlong & Brennan appealed from this action of the court, claiming that the sale to them was a binding sale; that they acquired an interest in the land under the sale; that the court should have confirmed the sale; and that it erred in ordering the contract set aside, and in recognizing the sale to other parties on bids made after the sale to them, and also erred in directing the receiver to accept the bid of the First & Second Mortgage Corporation.

This is all that is necessary to present the only question that is here for our consideration.

The contention of appellant is:

(1) That a bidder to whom property has been knocked down at a judicial sale, acquires legal rights which are to be as much protected and enforced as are the rights of other purchasers, and that the court erred in not confirming the contract of sale made with appellants.

(2) That a successful bidder has a right to insist that his purchase be not set aside by the court, and that he has a right to a confirmation of the same; that there are no facts shown impeaching the sale, and no reason why the court should not have confirmed the same.

(3) That inadequacy of price which is not gross is not sufficient for refusing to confirm the sale; that the fact that more was offered for the land after the receiver had entered into the contract with these appellants, did not justify the court in setting aside that contract and refusing to confirm the same.

The appellants' contention overlooks material facts: that is, that the receiver was simply the officer or agent of the court; that this sale was not a completed sale; that it was not in the power of the receiver to make a completed sale which would bind the court to its confirmation; and that those who buy at a receiver's sale, such as we have in this case, take with knowledge of the fact that the contract of sale is not binding on the receiver until the same is presented to the court and approved by the court; that a sale such as we have here is a sale without the right of redemption.

In *Terry v. Coles' Err.*, 80 Va. 695, the Supreme Court of Virginia, quoting from Rorer on Judicial Sales, 30, 55, 56, said:

"Confirmation is the judicial sanction of the court. Until then, the bargain is incomplete. Until confirmed by the court, the sale confers no rights. Until then, it is a sale only in a popular, and not in a judicial or legal sense. The chancellor has a broad discretion in the approval or disapproval of such sale. The accepted bidder acquires, by the acceptance of his bid, no independent right, as is the case of a purchaser at a sale under execution, to have his purchase completed, but is merely a preferred proposer, until confirmation by the court of the sale, as agreed to by its ministerial agent. In the exercise of this discretion, a proper regard is had to the interest of the parties and the stability of judicial sales. By sanctioning a sale, the courts

make it their own. There is a difference between such sale and ordinary auction sales, and sales by private agreement. In case of sales before a master, the purchaser is not considered as entitled to the benefit of his contract till the master's report of the purchaser's bidding is absolutely confirmed."

See, also, *Davis v. Stewart*, 4 Tex. 223, 226; *Henderson v. Herrod*, 23 Miss. 434, 454; *Taylor v. Gilpin*, 3 Metc. (Ky.) 544, 546; *Ohio Life Ins. & Trust Co. v. Goodin*, 10 Ohio St. 557, 563; *Todd v. Gallego Mills Mfg. Co.*, 84 Va. 586.

In Barton's Chancery Practice, 1070, it is said:

"In Virginia, * * * a bid by a purchaser to a commissioner is a bid to the court, and, if accepted, he is bound by it; but the court, and not the commissioner, is the seller, and the confirmation by the court and its direction to convey are essential to the validity of any sale that the commissioner may make."

At page 1094, it is said:

"His bid at the commissioner's sale is a mere offer, and although, after confirmation, his title relates back to the day of sale, yet he has until confirmation to examine into the title, and to inquire if there be any defects in the proceeding."

In *Langyher v. Patterson & Bash*, 77 Va. 473, the Supreme Court of Virginia used this language:

"Confirmation is the judicial sanction of the court; and by confirmation the court makes it a sale of its own; and the purchaser is entitled to the full benefit of his contract, which is no longer executory, but executed, and which will be enforced against him and for him."

In *Brock v. Rice*, 27 Gratt. (Va.) 812, Judge Staples, speaking for the court, said:

"In considering this case, it is important to bear in mind rules of law governing judicial sales. All the authorities agree there is a wide distinction between an application to set aside a sale after it is approved by the court, and an application to withhold a confirmation. A decree of confirmation is a judgment of the court, which deter-

mines the rights of the parties. Such a decree possesses the same force and effect of any other adjudication by a court of competent jurisdiction. But before confirmation, the whole proceeding is *in fieri*, and under the control of the court. Until then, the accepted bidder is not regarded as a purchaser. His contract is incomplete, and he acquires by his bid no independent right to have it perfected."

Further:

"It is very certain that with us the commissioner conducting a sale is regarded merely as the agent or servant of the court, and his proceedings are necessarily subject to its revision and control. Whether the court will confirm the sale must, in great measure, depend upon the circumstances of each particular case. It is difficult to lay down any rule applicable to all cases; nor is it possible to specify all the grounds which will justify the court in withholding its approval."

In *Davis v. Stewart*, 4 Texas 223, at 226, that court said:

"It will be seen that much discretion is left to the judge. If he should believe that the sale was not fair, or that it was not made in conformity with law, it would be his duty to set it aside, and order it to be sold again. He is not required to place upon the record the reasons by which he is governed, either in confirming or rejecting a sale.
* * * The purchaser could not be injured; when he bid for the land he was aware that he was purchasing subject to the confirmation or rejection of the sale by the probate judge."

Taylor v. Gilpin, *supra*, confirms the rule stated above, and says:

"The application to the chancellor was not to disturb the sale which he had approved, but it was to reject a bid or proposal which had been offered. This court has, time and time again, held that a purchaser of property under a decretal sale does not acquire any independent right by his purchase until after the same has been approved by the chancellor. He is simply an accepted or preferred bidder; and whether his bid or proposal will be approved

depends upon the sound, equitable discretion of the court having control of the cause."

In *State of Tennessee v. Quintard*, 80 Fed. 829, it was said:

"The cases, both Federal and state, fully establish the rule that Quintard's bid for the property at the special master's sale was only an offer to take the property at that price, and that the acceptance or rejection of that offer was within the sound legal discretion of the court, to be exercised with due regard to the special circumstances of the case. The acceptance of his offer could only have been manifested by an order confirming the sale, and, until that was done, he acquired no title, and there was in his position at the time this petition was filed no element of an innocent purchaser."

In *Todd v. Mills*, 84 Va. 586, it is said:

"But before the court had an opportunity to act, before the sale was reported to the court, another person offered a substantial advance of \$12,000, which was satisfactorily secured. There was then before the court no question as to the inadequacy of price to be determined. One hundred and thirty-two thousand dollars was offered for the same property, under the same circumstances, and, so far as the court was concerned, at the same time, for property which the purchaser claimed the right to buy and have conveyed to him at \$120,000. * * * All the cases agree that the court must sell at the best price obtainable; and when a substantial upset bid, well secured and safe, for 10 per cent advance, is put in before confirmation, it is as much a valid bid as if made at the auction."

The decided weight of authority supports the holdings of the courts above cited. However that may be, we are not without authority in our own state in harmony with these rules. In *Central Tr. Co. v. Gate City Elec. St. R. Co.*, 96 Iowa 646, this court recognized the doctrine announced above. It is true that, in that case, the decree required the receiver to report the sale for confirmation, but this added nothing to his legal duty, or to the right of the court

to pass upon and determine whether the sale was one that should or should not be confirmed. In the instant case, the sale to the Wahkonsa Investment Company was for approximately \$12,000 less than the bid of the First & Second Mortgage Corporation, and required the carrying back of a mortgage on the land of over \$27,000; whereas the bid of the First & Second Mortgage Corporation was a cash bid, and it further appears in the record—though it was not in the decree—that the proposed purchasers, the Wahkonsa people, were informed by the receiver that whatever bid they made and whatever contract was entered into were subject to the approval and confirmation of the court; and this was in the contract which the Wahkonsa people are now insisting was binding without the confirmation of the court.

The holding of the court from which the appeal was taken is in harmony with these decisions. We find no ground for interfering with its judgment, and its action is, therefore,—*Affirmed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

GEORGE WATERS, Administrator, Appellant, v. CHICAGO,
MILWAUKEE & ST. PAUL RAILWAY COMPANY et al.,
Appellees.

RAILROADS: Crossing Accident—Conclusive Contributory Negli-
1 **gence.** One who, in full possession of good health, sight, and hearing, on a clear day, and without distracting circumstances, drives upon a well known railway crossing, and is killed by a negligently operated engine, is *conclusively* guilty of contributory negligence, even though the surviving occupant of the vehicle testifies that they did look for an approaching train at all times after passing a point 75 feet from the crossing, when the record reveals the fact that, for said entire distance, the view of the track for at least 50 rods was unobstructed.

NEGLIGENCE: “Last Chance” Rule—Nonapplicability. Principle
2 recognized that the doctrine of the “last clear chance” has ap-

plication only in those cases where the injured person is *actually* discovered in a position of peril at a time when reasonable care might save him from injury.

Appeal from Clayton District Court.—A. N. HOBSON, Judge.

JULY 17, 1920.

REHEARING DENIED OCTOBER 23, 1920.

ACTION in the name of the administrator of the estate of Edward Waters for damages. While attempting to cross defendant's track at a highway crossing, the automobile in which deceased was riding, was struck by one of its engines, killing him instantly, severely injuring his wife, and completely demolishing his automobile. The court, at the conclusion of all the testimony, upon motion of counsel for defendant, directed the jury to return a verdict in its favor. There was a judgment on the verdict for costs, and plaintiff appeals.—*Affirmed.*

Burling & Burling and William S. Hart, for appellant.

Hughes, Sutherland & O'Brien and D. D. Murphy & Son, for appellees.

STEVENS, J.—I. Defendant operates a line of railway westward from Postville, Iowa, which is paralleled by a public highway, referred to in the evidence as "The Military Road." This highway lies south of defendant's track for the entire distance between Postville and the Kahle crossing, except for a distance of 80 rods. The last mile or mile and a half is on the south side. Shortly after noon on July 28, 1916, Edward Waters and wife, who were riding in an Overland automobile, were struck at the Kahle crossing by one of defendant's engines going west. Mr. Waters was killed instantly, and

1. RAILROADS :
crossing
accident :
conclusive
contributory
negligence.

Mrs. Waters severely injured. The automobile, which was thrown a distance of 100 feet, was completely demolished.

The negligence charged in plaintiff's petition is that the engine was being operated at a high and dangerous rate of speed; that no signal or alarm of its approach was sounded; and that the servants in charge thereof were negligent in not reducing the speed or stopping the engine before reaching the point of collision. There were two lines of telephone poles on the north side of the highway, and a line of telegraph poles inside defendant's right of way fence. For practically the entire distance traveled by Mr. and Mrs. Waters, they were in plain view of the railroad track; but it is claimed that, at the corner where they turned north from the Military Road to cross the track at the point where the accident occurred, their view to the east, and of the approaching engine, was obstructed by a dense growth of tall weeds, telephone poles, and a sign-board 6 to 8 feet above the ground, on one of the telephone poles. Photographs introduced in evidence by both parties indicate the presence of weeds or grass at the point in question, and other testimony tends to show that some of them were 6 feet high. The right of way fence is composed of wires fastened to posts; but, from the corner where the highway turns north to the track, there is a board nailed near the top of the posts, below which are at least three strings of wire. One witness testified that the board is a common fence board, and another, that he thought it a 2 by 4. For practically all of the distance, the railroad track is elevated above the public highway; and, at the point of the accident, the elevation above the highway is from 1½ to 2 feet. The day on which the accident occurred was warm, with very little wind. Mr. Waters was 50 years of age, in good health, with good eyesight, and a sound sense of hearing. This was also true of Mrs. Waters. A crew of one of defendant's trains was returning on an engine from Postville, where they had gone for water, leaving the train at Centralia, the first station west. The occupants of the engine, who were the engineer, fireman, and con-

ductor, all testified that the bell was rung and whistle sounded at each of the crossings west of Postville, and that the speed of the engine did not exceed 20 or 25 miles per hour. Other witnesses who observed its movement testified that their attention was particularly attracted to its rapid speed, and that they observed that no warning was given at the crossings west of Postville. Mrs. Waters testified that she and her husband were listening, and did not hear the bell or whistle. The only evidence as to the speed of the engine, except that of the trainmen, is that of the witnesses, some of whom observed it from a distance, and who testified that it was running very fast, and what may be inferred from the effect of the collision. The automobile was thrown about 100 feet, Mr. Waters about 85 feet, and Mrs. Waters about 70 feet. All were found on the right of way. One witness, who was 60 rods west and 100 rods north of the crossing, testified that the engine stopped at a culvert which, subsequent measurements showed, was 447 feet west of the crossing. The engineer testified that the engine could be stopped at 50 miles per hour in about 450 feet. Defendant's witnesses do not designate the exact place at which the engine was brought to a standstill, but they estimate it at about the distance required to stop an engine traveling at 25 miles per hour. There is ample evidence, therefore, from which the jury might have found that the speed of the engine was somewhere between 25 and 50 miles per hour, and that the customary warnings of the approach of the engine were not given at the crossing. It is, however, contended by counsel for appellee that the occupants of the automobile are conclusively shown to have been guilty of contributory negligence. This is the principal question for our decision.

Many authorities are cited by counsel upon both sides: but the rules are familiar, and we do not deem an extended review necessary, in disposing of same. As stated, numerous photographs, taken shortly after the accident on behalf of both plaintiff and defendant, apparently show the situation and condition with more or less certainty,

although some of the photographs manifestly exaggerate the relative importance of certain points involved in the evidence. All of the photographs of the right of way fence show that the view is wholly unobstructed from the first post east of the corner to the crossing, except so far as affected by the board nailed at or near the top of the posts. In most of the photographs, the posts and top wire of the right of way fence are clearly visible from the corner east for several rods. At one point, looking nearly due east from the first post east of the corner outside of the right of way, the view of an approaching train from the position in which the camera was held is practically obstructed. An automobile traveling at 18 miles per hour would be but an instant in passing this point, after which, until the crossing was reached, the view to the east down the track was clear and unobstructed, for a distance of approximately 60 rods. The exact distance from the corner post to the crossing is not shown, but we gather from the record that it is approximately 50 feet. Other photographs indicate that the view of an approaching train, at the corner where the highway turns to go toward the crossing, would be interfered with little, if any, by the weeds, poles, and signboard.

Mrs. Waters, who was sitting on the left side of the seat, was driving the automobile. The distance from the point in the Military Highway from which the travel turns to go north to the Kahle crossing is about 75 feet, and the testimony tends to show that the right track is somewhat lower at the corner than the left track. No one saw the accident, but two or three witnesses testified that they observed the approach of the engine from the east for a distance of 60 or 70 rods; and one witness, that he saw the dust in the highway from the automobile, and remarked to his little son, who was with him, that it looked as if the engine and automobile were racing. He located them at this time near the crossing. Mrs. Waters testified that the automobile was moving about 18 or 20 miles per hour, and that she did not hear or see the engine at any time

until they were on the crossing, when it "seemed to come right up in front of me out of the ground." A photograph, plaintiff's Exhibit 5, which was taken with the camera sitting right in the wagon track, pointing apparently slightly northeast, shows that the track could be seen practically all of the way from the second fence post east to the corner. Defendant's Exhibits Nos. 4 and 11 plainly reveal the board on the top of the post and two wires, the entire distance from the corner post, and a third wire, a part of the distance. The right of way had been recently mowed, but it is claimed that the weeds had not been all cut at the corner where they could not be reached by the mower. Mrs. Waters testified that, just as they turned the corner to go north, her husband stood up in the automobile, and looked out from under the cover toward the east, and said, "Everything is all right; go ahead." She further testified that they both continued to look toward the east and west, until they were struck by the engine. Both were familiar with the Military Highway, which continues on west on the south side of the track, and knew that a passenger train from the west was about due. Their attention was not distracted in any way, and, according to her testimony, they were driving at a moderate rate of speed. As stated, the track was clearly visible to the east up to the crossing, at every point of observation after passing the corner, for a distance of at least 50 rods; and a person having ordinary eyesight, looking in that direction, in the exercise of any reasonable degree of care, could not have failed to see the approaching engine. The physical facts make this practically impossible. It is true, as contended by counsel for appellant, that an engine detached from a train would not be as quickly discerned as a train; but, at most, the speed of the engine was but little more than twice that of the automobile; and, when the automobile turned the corner, the engine must have been within at least 150 feet of the crossing; and, had they looked in that direction, they must have seen it. At the time Mr. Waters stood up in the automobile and looked to the east, the engine could

not have been more than 200 or 250 feet east of the crossing. The case is not one where the traveler upon the highway listened for the crossing signal, and looked at a place where an approaching train could be seen, although, had he again looked, he might possibly have avoided the accident; but, in this case, the driver of the automobile testified, as stated, that her husband took unusual precautions at the corner to see if a train was approaching, and that they both continued to look both east and west, after they passed the obstruction at the corner, until they reached the crossing, but did not see the engine, which must have been in plain view. We are compelled, under the evidence, to reach the conclusion that decedent was guilty of such contributory negligence as to preclude recovery. *Anderson v. Dickinson*, 187 Iowa 572; *Beemer v. Chicago, R. I. & P. R. Co.*, 181 Iowa 642, and cases therein cited.

II. The conductor testified that he noticed an automobile in the road, a short distance ahead of the engine, but did not observe it thereafter, until it was struck. He located the point at which he saw the automobile as west of the Snow fence. The Snow fence was east of the Meier crossing, which was 80 rods east of the Kahle crossing.

2. NEGLIGENCE: "last chance" rule: non-applicability.

When the conductor saw an automobile, if the one in question, it must have been nearer the scene of the accident than indicated by his answer; otherwise, the engine would have cleared the crossing before the automobile reached that point. Basing their case upon this testimony, counsel for appellant contends that plaintiff was entitled to go to the jury upon the doctrine of the "last clear chance." The witness further testified that he paid no attention to the automobile, after his attention was called to it in the highway. No evidence whatever was introduced from which the jury could infer that the automobile was seen by the men in charge of the engine at any time after it left the Military Road, which continues on west of the Kahle crossing on the south side of the track. We find nothing in the record to justify the application of

this doctrine to this case. It is, as conceded by counsel, not sufficient for the evidence to show only that the servants of defendant should have seen the peril of deceased and the other occupant of the car in time to have prevented the injury. *King v. Chicago, R. I. & P. R. Co.*, 185 Iowa 1227; *Papich v. Chicago, M. & St. P. R. Co.*, 183 Iowa 601.

It is our conclusion, from all of the evidence, that the court did not commit error in sustaining defendant's motion to direct a verdict in its favor. Regrettable as the accident is, we see no way by which the conclusion could reasonably be reached by a jury that, if deceased and Mrs. Waters looked to the east, as testified by her, they did not see the approaching engine in plenty of time, after appreciating their peril, to stop the automobile at a place of safety.—*Judgment affirmed.*

LADD, EVANS, and GAYNOR, JJ., concur.

J. C. BRAIG, Appellant, v. C. J. FRYE et al., Appellees.

VENDOR AND PURCHASER: Option (?) or Purchase (?) Option

1 contract for the purchase of lands reviewed, and held that the payment made thereunder constituted a part of the purchase price of the *land*, and not a part of the purchase price of the *option*.

MORTGAGES: Assumption of Payment. The assumption of pay-

2 ment of a mortgage on purchased land may not be avoided on the plea that, subsequent to the assumption, the discovery was made by the promisor that the mortgage covered lands additional to that purchased.

VENDOR AND PURCHASER: Option Contract. Contract re-

3 viewed, and held to be a mere option to buy, even though the price paid therefor was apparently grossly excessive.

VENDOR AND PURCHASER: Forfeiture of Contract. An option

4 contract for the purchase of realty becomes a contract of purchase whenever part of the purchase price is paid, and may then be forfeited only under the provisions of Sec. 4299 *et seq.*, Code Supp., 1913.

Appeal from Palo Alto District Court.—N. J. LEE, Judge.

OCTOBER 26, 1920.

UPON the sustaining of a demurrer to his petition, plaintiff elected to stand on the ruling, and the petition was dismissed. The plaintiff appeals.—*Reversed*.

Lyon & Willging, for appellant.

E. A. & W. H. Morling, for appellees.

LADD, J.—The parties hereto entered into a contract, December 27, 1915, by the terms of which plaintiff undertook to convey to the defendants two quarter sections of land in Hughes County, South Dakota, subject to two mortgages, one for \$2,000 and the other for \$500, and two quarter sections in Sully County, of the same state, subject to a mortgage of \$3,500, grantee to assume these mortgages, and such conveyances to be made immediately upon the execution of the contract. The contract provided that: "In consideration thereof, this instrument shall and is made to witness that the second party [plaintiff] has been granted by first parties [defendants] the option and privilege of purchasing" 260 acres of land in Palo Alto County, Iowa, as described, "on or before November 1, 1916, on the following conditions, terms, and provisions, to wit: Second party shall pay first parties at the Emmetsburg National Bank at Emmetsburg, Iowa, four thousand dollars (\$4,000) as follows: \$1,000 on or before March 1, 1916, and \$3,000 on or before November 1, 1916. It being expressly understood that the exercise of said option shall not be complete until the full payment of said \$4,000."

Here follow conditions relating to the extension of the time of payment of the \$1,000, not necessary to be set out. It is then provided that, "when said \$4,000 shall have been fully paid, if paid by the time stated, this agreement shall

witness that the second party has purchased the premises in Palo Alto County, Iowa, above described, of the first parties," at \$155 per acre, in the manner following: By assuming an existing mortgage of \$14,000, and executing a promissory note for \$4,000, and another for \$5,600, secured by a mortgage on the 260 acres of land, subject to that referred to.

"When the foregoing provisions have been complied with by the second party, first parties agree to credit second party, upon said purchase price, twelve thousand seven hundred dollars (\$12,700) for the equity in said South Dakota land above described, and the \$4,000 which were paid to first parties for said option."

The contract then provides that the first parties shall let and collect the rents of the 260 acres of land, and account therefor to the party of the second part, and assign the lease and all unpaid rents.

"It is expressly understood that time is of the essence hereof, and failure or neglect on the part of second party to faithfully and literally carry out and perform the terms and provisions hereof promptly at the times herein fixed, shall entitle first parties at their option, to declare this contract and agreement forfeited, and to cancel and annul the same as provided by the Code of Iowa; and in case of cancellation all payments made either in money or property shall be retained by first parties as liquidated damages. It being expressly understood that the title to the said land in South Dakota shall have vested absolutely in first parties in fee simple, for their sole use and benefit, in any event, together with the \$1,000 payment, if paid, or the note and mortgage to be given in lieu thereof, if the same shall have been executed, as those items are the purchase price of the option and privilege of purchasing the Iowa land, hereby granted to second party. And it is further understood that this agreement does not become a contract of purchase until said \$4,000 shall have been fully paid."

Then follows the undertaking of defendants to convey

the land, and furnish abstracts on payment, as aforesaid.

"It is expressly understood that the conveyance of the said land in South Dakota as herein stated is a condition precedent to the validity of this agreement, and if second party fails or neglects to convey the said land in South Dakota, and to deliver abstracts of title, promptly as herein stated, first parties may at their option declare this agreement null and void, but that upon the execution and delivery thereof to first parties, this contract and agreement shall be accepted by the parties hereto in lieu of the contract entered into August 5, 1915, and as a substitute therefor, and the agreement shall thereby become null and void."

The petition alleged that the South Dakota land was conveyed, and that plaintiff paid the \$1,000 as agreed, on or before March 1, 1916; that subsequently plaintiff had an opportunity to dispose of the land in Palo Alto County, so informed defendants, and requested an abstract of title, but, upon examining that furnished, discovered that other lands were included in the incumbrance described in the contract as covering said land, and that it was impossible to obtain a release thereof, and for this reason the abstract was rejected, and plaintiff lost said deal. It is further alleged that, shortly before the commencement of this suit, an adjustment of differences was requested, but defendants informed plaintiff that "they would do nothing." No notice of forfeiture was ever given plaintiff, and the contract has not been canceled. Defendants retain possession of the money paid them, and have not reconveyed the lands in South Dakota, and will retain all this property, unless plaintiff is granted relief. Plaintiff also alleged that it would be unconscionable for defendant so to do "without a proper, fair, and equitable return to this plaintiff," and that "he is ready and willing to carry out the terms of said contract in a manner in which this court may find reasonable, just, and equitable in the premises." This was followed by an appropriate prayer.

The ruling on the demurrer was that the facts stated did not entitle plaintiff to any relief.

The allegations that a release of the mortgage by plaintiff could not be obtained, and that it covered other land, furnished no excuse for nonperformance. Defendants had

not undertaken to procure such release, and
2. MORTGAGES : that the mortgage may have covered other
assumption lands would not have relieved plaintiff from
of payment. assuming its payment in consummating the

deal. The controlling question for our determination is whether the contract was and continued to be a mere option, or became one of purchase. That originally it was a mere option, is not fairly debatable. True, plaintiff un-

dertook to and did convey a section of land
3. VENDOR AND in South Dakota, burdened with mortgages
PURCHASER : aggregating \$6,000, but, in consideration
option con- thereof, the contract is made "to witness
tract.

that the second party has been granted by the first parties the option and privilege of" purchasing 260 acres of land in Palo Alto County. The price for a mere option seems somewhat extravagant, the stipulated value of the section, subject to the mortgages, being \$12,700; but that was a matter for the parties to determine, and by such conveyance, plaintiff did not become a purchaser of the Palo Alto County land, but merely acquired the option to become such purchaser, by pursuing the course defined in the contract. *Myers v. Stone & Son*, 128 Iowa 10. See cases collected in note to *Rampton v. Dobson*, 3 A. L. R. 569. Thereby he obtained the "option and privilege of purchasing" the 260 acres, but upon certain prescribed terms, i. e., paying \$4,000; \$1,000 on or before March 1, 1916, and \$3,000 on or before November 1st of the same year, "it being understood that the exercise of said option shall not be complete until the full payment of the \$4,000." The plaintiff paid this \$1,000,—at least we must so assume, as the allegations of the petition are to be taken as true,—and, even though it may not have been a complete exercise of the option, whatever that may mean, it was a payment on the purchase price. The only option and privilege given was that of "purchasing" the land. Since plaintiff had the option to buy, the

exercise of that option was in buying, and by paying the consideration agreed upon. By "complete exercise" of the option seems to have been meant the full payment in cash, and that plaintiff might acquire the title only by doing something more, namely, by assuming the payment of a \$14,000 mortgage thereon, and by executing two notes, amounting to \$9,600. Thereupon, a credit of \$12,700 was to be allowed for the South Dakota land. Surely, if the payment of \$1,000 was a partial exercise of the option, it was none the less a payment on the purchase price, a part of the consideration, aside from the price offered for the option. But it is recited that credit is also to be entered for the payment of \$4,000, "which were paid to the first parties for said option." But this recital is not accurate; for the option was acquired upon the conveyance of the South Dakota land, and the payments of \$1,000 and \$3,000 *in exercising* the option. Further on, it is again recited that "those items [conveyance of land and payment of \$1,000] are the purchase price of the option and privilege of purchasing the Iowa land." But this is not the correct interpretation of what had preceded, and, as the language is merely detailing what had preceded, without purporting to construe, we are of opinion that the stipulation therein that the conveyance of the South Dakota land and delivery of abstracts of title thereto "shall and is hereby made to witness that the second party has been granted by first parties the option and privilege of purchasing," conferred such option to buy, and on the conditions specified: that is, by paying \$1,000 on April 1st, and \$3,000 on November 1st following. Of course, conveyance of the Iowa land might not be claimed until the entire \$4,000 was paid, and, moreover, it must have been paid on the dates named; for time was of the essence of the contract. The instrument further recites, in the same connection, that "it is understood that this agreement does not become a contract of purchase until said \$4,000 has been paid." The language of the instrument excludes the \$1,000 or the \$3,000 from being any part of the consideration given for the option. Where was

it to be applied? What did the agreement contemplate after this payment? The contract had previously specified that plaintiff had the privilege of purchasing, upon the payment of \$4,000: \$1,000 on or before November 1st. This was required to be paid in money. No more was exacted of plaintiff than that he (1) assume payment of an existing mortgage, and (2) execute the notes of \$4,000 and \$5,600, and the mortgage to secure their payment. Thereupon, defendants undertook to execute the conveyances of the Iowa land, and furnish abstract of title thereto. What else was the \$1,000, other than one of the payments exacted? We are of opinion that its payment clearly evidences the vendee's election to exercise the option he acquired by conveying the South Dakota land. Payment of the \$3,000 was essential to the complete exercise of the option,—that is, to the purchase of the land; and it must be in this sense that \$4,000 is required to be paid before the agreement can be said to have become a "contract of purchase." The instru-

4. **VENDOR AND
PURCHASER:**
forfeiture
of contract.

ment is somewhat ambiguous in the respects pointed out, but there is no escape from the conclusion that the payment of the \$1,000 evidenced the election to take the land, and constituted a part of the purchase price, and that the contract may be forfeited only in the manner prescribed by Sections 4299 and 4300 of the Code Supplement, 1913. Section 4301 of the Code exacts that these sections "shall be operative in all cases where the intention of the parties, as gathered from the contract and surrounding circumstances, is to sell or to agree to sell an interest in real estate, any contract or agreement of the parties to the contrary notwithstanding." This contract became one of sale upon payment of part of the purchase price, notwithstanding some ambiguities injected therein. The demurrer should have been overruled.—*Reversed.*

WEAVER, C. J., STEVENS and ARTHUR, J.J., concur.

HOMER L. BROWN, Appellant, v. CITY OF CRESTON et al.,
Appellees.

MUNICIPAL CORPORATIONS: Applicability of 300-Foot Paving Limitation. The statutory provision, Sec. 792-g, Code Supp., 1915, limiting paving assessment to property situated a maximum of 300 feet from the street improved, has no application to paving constructed under Secs. 840-h to 840-r, inclusive, Suppl. Supp., 1915, which provide for paving outlying highways in cities—highways which “constitute main-traveled ways into and out of such cities.”

Appeal from Union District Court.—H. K. EVANS, Judge.

OCTOBER 14, 1919.

OPINION ON REHEARING OCTOBER 26, 1920.

ACTION in equity, to enjoin the collection of certain taxes levied upon the property of plaintiff to defray the cost of highway paving on North Cherry Street, in the city of Creston, Iowa. Plaintiff appeals from the judgment of the court, dismissing his petition.—*Affirmed.*

James G. Bull, for appellant.

L. J. Camp, for appellee.

PER CURIAM.—I. This case is before us on rehearing. Upon the original submission, there was no appearance for appellees, and appellant's abstract and brief and argument practically ignored the rules of practice in this court. The former decision disposed of the case under the general paving statutes, in harmony with our prior decisions. It now appears clearly from the record before us that the

proceedings of the city council to which appellant objects were under Chapter 48, Acts of the Thirty-sixth General Assembly, now Sections 840-h to 840-r, inclusive, Supplemental Supplement to the Code, 1915.

But two questions are argued: It is claimed by appellant that the city clerk fraudulently altered the record of the council, and that the contractor perpetrated fraud in constructing the pavement, and that appellant's property is situated more than 300 feet from the improvement, and is, therefore, under the restrictions of Section 792-g of the Supplemental Supplement, 1915, not subject to taxation for any part of the cost of the improvement.

It is argued on behalf of appellees that appellant had full knowledge of all the facts constituting the fraud charged, and filed objections based thereon, to the resolution of necessity or to the levying of the assessment complained of, and that his only remedy was by appeal to the district court (citing *Clifton Land Co. v. City of Des Moines*, 144 Iowa 625, *Ellyson v. City of Des Moines*, 179 Iowa 882, and other cases, to support this contention). We have read the record; and, while there was some evidence that the paving was somewhat defective, it wholly fails to sustain the charge of fraud. The alterations of the record by the clerk were not made after the proceedings of the council were had, but prior thereto, and were for the purpose of making prepared forms conform to the proposed resolution of the council. We have not, therefore, considered the question whether, under the facts disclosed by the record, plaintiff's only remedy was by appeal, as claimed by appellee.

II. The proceedings complained of, as stated, were under Chapter 48, Acts of the Thirty-sixth General Assembly. This is admitted by appellant. It is also admitted by appellees that the property of plaintiff lies more than 300 feet from the improvement. Section 792-g was enacted as a part of Chapter 76 by the thirty-fifth general assembly, and amended by Chapter 192, Acts of the Thirty-sixth General Assembly, and is as follows:

"Whenever, after January 1, 1914, any city or town council, including the councils of cities acting under special charter, levies any special assessment for street improvement as provided by Section 792 of the Code and amendments thereto and supplementary thereof, the same shall be made in accordance with the provisions of Section 792-a of the Supplement to the Code, 1907, and shall be limited to the amount to be assessed against private property, against all lots and parcels of land according to area so as to include one half of the privately owned property between the street improved and the next street whether such privately owned property abut upon said street or not but in no case shall privately owned property situated more than 300 feet from the street so improved be so assessed. In case of improvement upon an alley, such assessment shall be confined according to area to privately owned property within the block or blocks improved and if not platted into blocks for not more than 150 feet from such improved alley. All property except streets, alleys, public highways, public driveways and property owned by the United States government shall be deemed privately owned property within the meaning of this section."

The statute, as amended, does not, however, touch the question before us. Chapter 48, Acts of the Thirty-sixth General Assembly, is entitled as follows:

"An act authorizing cities (other than special charter cities) having a population of two thousand or more to construct, repair, improve and reconstruct paved roadways along streets, avenues and highways constituting main traveled ways into and out of such cities, to establish paving districts, the lots and tracts of land within which may be assessed to pay all or a portion of the cost of such improvement and providing for the levying of a general municipal tax to defray any balance thereof."

The sections of the statute necessary to a proper understanding of the purpose and scope of Chapter 48, Acts of the Thirty-sixth General Assembly, are Sections 840-i, 840-j,

and 840-o, Supplemental Supplement to the Code, 1915, and are as follows:

"Sec. 840-i. Such cities shall have power to establish paving districts to embrace such portions of said cities as, in the judgment of the city councils thereof, will receive special benefits from the construction, repair, improvement, or reconstruction of such paved roadways, to change the boundaries of same from time to time as may become in the judgment of such councils, just and equitable and to assess so much of the cost of such paved roadways against all lots or tracts of land contained in the paving district within which such improvements are made, as shall equal and be in proportion to the special benefits conferred by said improvements and not in excess thereof. In no case shall such assessments exceed 25 per centum of the actual value of said lots or tracts at the time of levy thereof.

"Sec. 840-j. Whenever the council of any such city shall deem it advisable or necessary for the benefit of the city as a whole, to construct, repair, improve or reconstruct any paved roadway as authorized by this act, it shall, in a proposed resolution, declare such advisability or necessity, stating the streets, avenues or highways along which such improvement is to be made, the terminal points thereof, one or more kinds of material proposed to be used and the width of such paved roadway; establishing a paving district the lots or tracts of land embraced in which shall be assessed to pay the cost of said improvement as in Chapter 7, Title V, of the Code, and acts amendatory thereto provided; estimating the total cost of such improvement; and stating the proportion of such estimated total cost which will be assessed against each lot or tract of land in said district, which proportion shall be determined and fixed in accordance with the terms of this act, and with the benefits, value, area, distance from said roadway and accessibility thereto."

"Sec. 840-o. Such city shall have power after the completion of any improvement contemplated in this act, to levy upon all taxable property excepting moneys and credits

in said city contained, an annual tax for the purpose of paying that portion of the cost of such improvement not borne by the special assessments levied against the lots and tracts of land embraced in the paving district established therefor, but the aggregate of all such levies shall not exceed 10 mills, nor shall such levies in the aggregate, exceed 1 mill for any one year."

The purpose of the enactment of Chapter 48 is apparent. The provisions thereof are additional to all other provisions for paving streets and alleys, and Section 792-g has no application to improvements thereunder. The council must, in its resolution of necessity, estimate the total cost of the improvement, and state "the proportion of such estimated total cost which will be assessed against each lot or tract of land in said district, which proportion shall be determined and fixed in accordance with the terms of this act, and with the benefits, value, area, distance from said roadway and accessibility thereto."

If the total cost of the improvement exceeds the amount which may lawfully be levied against the property benefited, then the council shall proceed under the provisions of Section 840-o, and levy an annual tax upon all of the property within such municipality, except moneys and credits, not exceeding 10 mills for any one year. The provisions of the foregoing enactments were manifestly designed by the legislature to confer other and further authority on the city council to pave certain portions of its streets. As it is conceded by appellant that the proceedings involved upon this appeal were under the above provisions of the statute, further discussion is unnecessary. The court below properly denied the prayers of plaintiff's petition for an injunction, and its judgment and decree are—*Affirmed*.

FRANK DELBRIDGE, Appellee, v. CORA DELBRIDGE, Appellant.

DIVORCE: Unauthorized Annulment. The district court has no jurisdiction to set aside a decree of divorce for fraud in its procurement, at a term subsequent to the entry of the decree, and on the hearing of an application confined solely to a prayer for modification of the alimony provision; and especially is this true where, in the meantime, both parties have remarried.

Appeal from Woodbury District Court.—J. W. ANDERSON,
Judge.

OCTOBER 26, 1920.

THE opinion sufficiently states the case.—*Reversed.*

Charles Lockie, for appellant.

Kass Bros., for appellee.

WEAVER, C. J.—The parties were formerly husband and wife. In the year 1911, the wife brought suit for divorce, and a decree in her favor was granted, as prayed, on January 11, 1912. By the terms of the decree, the wife was given the house and lot which they had occupied as a home, subject to a mortgage to secure payment by her of \$275 as a provision for the benefit of their young son, whose custody was given to the husband. The wife was granted the custody of two daughters, and, as alimony, the sum of \$6.00 per week. This weekly allowance was paid by the husband until April, 1912, when one of the daughters became of age; and thereupon he reduced his payment to \$3.00 per week, claiming that the alimony allowed was intended to be at the rate of \$3.00 for each daughter, and was to cease as they

should arrive at their majority. Three years later, in November, 1915, the husband, who was defendant in the divorce proceeding, appeared again in that cause, with a petition alleging that the condition of the parties had so changed since the divorce was granted as to render it unjust to require him to pay the alimony, and asking that the allowance made in the wife's favor be set aside. On trial of this issue to the court, an order or decree was entered, substantially as prayed, not only canceling the petitioner's obligation to pay further alimony, but also, in effect, relieving him from obligation to pay the installments then past due and unpaid under the terms of the original decree. To review this modification, the wife removed the proceeding to this court by certiorari, and the order complained of was annulled. That decision was handed down on March 12, 1917, and five days later, the present action was begun by the husband (who will hereinafter be spoken of as plaintiff), to enjoin the enforcement of the original divorce decree, "in so far as the same relates to the payment of alimony" by him. This relief was asked on the ground that, before the divorce was granted, plaintiff had an agreement with his then wife that, in the event of a divorce, the alimony should be limited to a payment of \$3.00 per week for the support of each of the two daughters during their minority; but that the wife, in taking her decree, fraudulently deceived the court as to the terms of the agreement, and caused the decree to be entered for an allowance of \$6.00 per week, without any limitation of time. On these allegations, plaintiff asked to be relieved from the payment of further alimony, and that the judgment allowing the same be canceled and set aside.

To this petition, the defendant (plaintiff in the divorce proceedings) appeared, and denied all allegations of fraud on her part. She also pleaded the statute of limitations, and alleged that plaintiff was estopped by his own laches. There was a hearing and trial to the court, at the close of which the court entered a decree to the effect that the original decree of divorce "be set aside and annulled in its

entirety." The defendant appeals. Since the appeal was taken, the appellee has bombarded this court with numerous motions and amended motions for its dismissal. The only grounds assigned therefor having any appearance of merit is that the evidence was not certified and filed within the statutory time; but, since we have come to the conclusion that the decree appealed from was rendered without jurisdiction, in so far as it purports to set aside the divorce, it is wholly unnecessary to consider whether the evidence is properly before us, or whether it was preserved at all. The divorce case was tried and decree entered in January, 1912. The decree was not excepted to, and no appeal was taken therefrom. Three years later, plaintiff sought to be relieved from the allowance of alimony, and the proceeding to obtain such relief was decided against him by this court. In 1917, more than five years after the divorce, he returned to the attack. Meanwhile, it should be said, both parties had remarried, and children of these later marriages have been born to one or both of them.

In this proceeding, he did not ask or seek to have the divorce decree disturbed, except "in so far as it relates to the payment of alimony." It was this claim or demand to which the defendant appeared, and this was the sole issue which the parties presented for the court's consideration. It appears, however, from the language of the court's order that, in the testimony produced upon this question, the court discovered evidence indicating to its mind that the divorce had been, to some extent at least, a matter of agreement between the parties; and, acting upon its own motion, it set aside, not merely the allowance of alimony, but the original decree in its entirety. In doing this, we think the court exceeded its authority. See *Maxey v. Polk County Dist. Court*, 182 Iowa 366; *Bronson v. Schulten*, 104 U. S. 410 (26 L. Ed. 797), and other precedents cited in 11 Rose's Notes thereto; *Brown v. Brown*, 53 Wis. 29.

For the purposes of this case, it may be assumed (without deciding) that the divorce was collusive and fraudulent in the eye of the law, and that, had the fact been brought

to its attention at that term, the trial court granting the decree could very properly, and of its own motion, after due notice and hearing, have reopened the case, and, if good cause therefor had been shown, could have vacated the decree, as was done in *Todhunter v. DeGraff*, 164 Iowa 567. But in the case before us, the decree had stood unchallenged, except as to the alimony, for more than five years. Neither party was denying its effective force. Neither was ordered or notified to show cause or given opportunity to defend against the entry of a new decree, which places them both in a very embarrassing, not to say unfortunate, position; and yet, strange to say, the appellee is in this court strenuously insisting on sustaining a judgment which, of necessity, puts upon him, as well as upon his former wife, the imputation of bigamy, and upon the children of their later marriages the stigma of bastardy.

None of the cases cited by appellee is in point. They go no further than to hold that a decree of divorce may be set aside for fraud in a proceeding instituted for that purpose; but no precedent or authority can be found for the holding that, after the term at which a divorce is granted is adjourned, and both parties, accepting the decree as a finality, have contracted other marriages, the court may peremptorily and of its own motion set aside the decree. We are unwilling to establish any such precedent.

The decree vacating the divorce in this case must be reversed. In so far, however, as such decree operates to relieve the plaintiff from the payment of alimony from and after the date of his petition for such modification, there is no evidence before us on which we can try that issue *de novo*; and the order will, to that extent, be affirmed. This decision is not to be construed as relieving the plaintiff herein from the effect of the decision in *Delbridge v. Sears*, 179 Iowa 526.—*Affirmed in part; reversed in part.*

EVANS, PRESTON, and SALINGER, JJ., concur.

BERNARD A. DOLAN, Appellee, v. GEORGE KEPPEL, Appellant.

DOMICILE: Insufficient Residence. Evidence tending to show
1 residence in this state held to be overcome by counter evidence
of the taking up of a homestead in another state, and of long
continued absence from this state.

PROCESS: Insufficient Evidence of Agency. Service on an "agent"
2 may not be sustained, either on naked evidence (1) that the
alleged agent did, at times, do or perform certain things or
acts for the alleged principal,—i. e., collected rents—or (2) that
the alleged agent was "in charge of or looked after said build-
ing." *The authority of the alleged agent must be shown.*
(Sec. 3532, Code, 1897.)

PROCESS: Actions "Growing out of" Agency. An action for
3 personal injury, based on the alleged negligence of an owner
in *constructing* a porch without a railing, may not, within Sec.
3532, Code, 1897, be said to "*grow out of*" or "be connected
with" an agency which simply authorized the agent to "*be in
charge of and look after*" said building.

APPEARANCE: Special (?) or General (?) Appearance. An ap-
4 pearance "for the sole purpose of attacking the jurisdiction of
the court" is not converted into a *general* appearance because
the defendant embraced in his application to quash the service
a showing that the attachment writ had been unlawfully
issued. (Sec. 3541, Code Supp., 1913.)

Appeal from Lee District Court.—JOHN E. CRAIG, Judge.

OCTOBER 26, 1920.

DEFENDANT, by special appearance, challenged the juris-
diction of the court to enter judgment. On hearing,
jurisdiction so to do was sustained, and judgment entered
on default. Defendant appeals.—*Reversed.*

James S. Burrows, for appellant.

Hughes & Dolan, for appellee.

LADD, J.—The petition, filed December 31, 1919, alleged that, on December 14th preceding, plaintiff, on invitation of one Williams, visited the home of the latter in the second story of a building belonging to defendant, and, on departing, stepped from the porch about six feet to the frozen ground below, and was seriously injured. The negligence charged is that of maintaining the porch without railing or other protection; and it is stated that, owing to the lateness of the hour (6:30 P. M.), plaintiff could not see, and was without fault. The return of service on the original notice, in the usual form, on defendant, recites that it was served “by reading the same and delivering a true copy there to Albert Keppel, his agent in charge of the premises” (describing them). On the same day, a writ of attachment was sued out, on the allegation that defendant was a nonresident of the state, and levied on the house and lot where the injury occurred; and due notice was given to the persons in possession. On January 13, 1920, the defendant, by his attorney, appeared specially, “for the sole purpose of attacking the jurisdiction of the court,” on the grounds: (1) That defendant is a resident of the city of Keokuk, and no notice was served on him; (2) that Albert Keppel was not the agent of defendant; (3) “because, the defendant being a resident of the state of Iowa, the attachment in this action has been issued without authority of law;” and (4) “because the action does not grow out of, nor is it connected with, any business of an agency.” The court ruled that it had acquired jurisdiction, and, as defendant failed to appear or answer, entered judgment by default.

I. The evidence was such as to sustain the finding that defendant was a nonresident, at the time the notice was served on the alleged agent. True, his mother and his brother, Albert, made affidavit that defendant had been continuously a resident of Keokuk, except 4 years at Ames, for the 20 years last past, but both testified, when brought

into court for cross-examination, that defendant was unmarried; that he pursued a course of studies during 4 years at Ames, and later studied 2 years in Florida. Albert swore that "he usually spends two weeks or a month visiting in Iowa of late years;" that, many years ago, he settled on a government homestead in Oklahoma, and lived on it there for 3 or 5 years, long enough to prove up; that he is not farming the land; that "he is quite a traveler;" that "he lives with his mother when he comes home," in Keokuk; that "he is now near Duvald, Oklahoma;" and that, "when away from that place, his mail comes from there to Keokuk, Iowa." His mother testified that "he is now at Wichita, Texas, * * * selling oil leases. He has lived at Duvald;" and further, that "he comes to Keokuk three or four times a year, and stays a week or two, or a month:" stays with her, though he "gets his meals at Albert's sometimes."

"I receive mail addressed to George Keppel all the time. I think George bought that farm. We gave him the money to buy it. By the court: Q. Does George make his home with you? A. Yes, sir. Q. He always makes his home with you? A. Yes, sir, when he is in Keokuk. Q. Does his mail all come to you? A. His mail all comes to us. Q. Do you forward it back to Wichita, Texas? A. Yes, sir. Q. All of his mail does come to Keokuk? A. I don't know how much he gets. * * * He comes every year several times, and stays two or three weeks, or a month. He has always done that."

She ordinarily retained mail till he came. The old home where mother continued to live undoubtedly was still "home" to defendant, even though he was there but a week or more during the year, and had established his residence elsewhere. Many years previous, he had become a resident of Oklahoma by settling on a government homestead (*Des Moines Sav. Bank v. Kennedy*, 142 Iowa 272), and the evidence is insufficient to warrant the conclusion that he has since abandoned his residence in Oklahoma, which is presumed to have continued, and become a resident of this state. See *In re Estate of Colton*, 129 Iowa 542. That he

visited his mother frequently is not inconsistent with continuing his residence at Duvald, Oklahoma; and, notwithstanding the witnesses' conclusions to the contrary, we are of opinion that defendant was not shown to have been a resident of Iowa at the beginning of this action.

II. Conceding that he was a nonresident, he must have been served with notice such as exacted by statute, to confer jurisdiction. The service relied on is that on Albert, defendant's brother, "his agent in charge of the premises." Was this service sufficient to give the court jurisdiction? Section 3532 of the Code provides that:

2. PROCESS :
insufficient
evidence of
agency.

"When a corporation, company or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency."

Albert Keppel testified, when called for cross-examination, that:

"The rent is paid on the property to different ones. Whoever gets the money signs the receipts. I do not sign all the receipts for rent over there. The receipts are signed by different ones, but I guess I sign the majority of them."

His mother testified:

"I collect rent for him over at West Keokuk, and sign the receipts 'C. Keppel.' Sometimes one gets the rent and sometimes another."

One Ireland made affidavit that he had occupied a part of the building in question for more than a year, as a butcher shop, and that he and other tenants occupying the building pay their rent to Albert Keppel; that "said Albert Keppel has charge and looks after said building." It will be noted that neither Albert Keppel, his mother, nor Ireland swore that defendant had ever authorized the collection or receipt of the rents, or that he had ever been paid the same; and there was no other evidence bearing thereon, save Albert's affidavit that he had never been the agent of

defendant. His cross-examination did not contradict this denial of agency, and was not necessarily inconsistent therewith. The mere doing of something apparently for another does not alone warrant the conclusion that the doing is by authority, or as agent of that other. *Equitable Prod. & Stock Exch. v. Keyes*, 67 Ill. App. 460. The law, in the absence of evidence, indulges in no naked presumption that the relation of agency exists. On the contrary, a person, in what he does, is presumed to be acting for himself, and not as agent for another. *Vawter v. Baker*, 23 Ind. 63; 31 Cyc. 1638. As observed in *Gund Brewing Co. v. Peterson*, 130 Iowa 301: "Acts and declarations of an agent are not generally admissible to prove his authority." For all that appears, Albert may have been a mere volunteer, or he may have been acting under the lessee of the owner. Nor is it to be inferred from his being in charge that he was in possession, for it appears to have been occupied by tenants of someone. If Albert was in "charge of and looks after said building," there was no authority shown, unless it can be inferred from this that he was a representative of the owner. Moreover, if he was such agent, it does

3. PROCESS:
actions
"growing
out of"
agency.

not follow that one whose duty it is to look after or have charge of a building is authorized to erect a railing about a porch, to say nothing of making repairs. The allegation of the petition is "that, by reason of the negligence of defendant in failing to protect said porch by railing or guard, plaintiff suffered the injuries alleged." The defect, if any, was in the original construction; and surely, one merely looking after and in charge of a building is not thereby authorized to make additions thereto, or to remodel the structure, and thereby remedy the design manifestly adopted by the owner. The injuries complained of were consequent on the defect in the original construction, something to which the agency, even had it existed, did not extend. To render such service effective, the action must have grown out of or be connected with the business of the agency. As the agency, if existing in the respects re-

cited in Ireland's affidavit, did not extend to remedying the original construction, erecting the railing was no part of the agent's duty, and the action cannot be said to have grown out of or to have been connected with the business of the agency.

III. The third ground of defendant's objection to jurisdiction was that, because of his residence in the state, "the attachment in this action was issued without authority of

4. APPEAR-
ANCE: spe-
cial (?) or
general (?)
appearance.

law." The contention of appellee is that thereby defendant raised a question other than that of jurisdiction, and thereby waived the objection thereto. His motion recited that he appeared specially for the sole purpose of attacking the jurisdiction of the court, and no other relief was prayed. Of course, the validity of the attachment could have had no bearing on the issue as to jurisdiction, and, as no other relief was sought, we do not think it should be regarded as a waiver. The recital of frivolous or extraneous grounds for relief ought not to be construed as an abandonment of those which are pertinent and sufficient, if proven. This is in accord with the recent opinion in *Read v. Rousch*, 189 Iowa 695. The appellant's brief was in substantial compliance with the rules, and the judgment is reversed, owing to want of jurisdiction.—*Reversed.*

WEAVER, C. J., STEVENS and ARTHUR, JJ., concur.

FRISBIE BROTHERS, Appellants, v. EDWIN BECK, Appellee.

TRESPASS: Burden of Proof. In an action to enjoin a trespass, plaintiff meets his burden of proof by showing his possession under a lease from the owner. Defendant then has the burden legally to justify *his* possession, i. e., by showing that plaintiff had leased to him.

Appeal from Cherokee District Court.—WILLIAM HUTCHINSON, Judge.

OCTOBER 26, 1920.

Suit in equity to enjoin the defendant from trespassing upon plaintiffs' property, and especially from cutting a certain second crop of clover hay, then growing upon said premises. A temporary injunction was issued, and thereafter a trial was had on the merits. The trial court dismissed the plaintiffs' petition, and they appeal.—*Reversed.*

Claud M. Smith, for appellants.

Molyneux & Maher, for appellee.

EVANS, J.—The plaintiffs are two brothers, who were jointly engaged in farming, as tenants, upon a farm of 140 acres. The farm included 27½ acres of tame hay growing thereon in the season of 1919. It is undisputed that the hay then standing upon this piece of ground was disposed of to the defendant, Beck, who entered upon the ground two or three days later, and harvested the same. Thereafter, a valuable second crop of clover grew upon the same ground; and in September, the defendant, Beck, entered upon the ground, to cut and appropriate such second crop. This was the occasion for the injunction. The dispute between

the parties arises over the terms of their oral contract. The conversation between them in the making of the contract was brief and informal, and was conducted on behalf of plaintiffs by one of them. The plaintiffs' version of the contract is that they simply sold to the defendant the hay then standing upon the ground. The defendant's version is that he *rented* the land. Each party has testified unequivocally in support of his own version. Though the issue thus made between the parties was one at law, it was tried in equity, in connection with the right to an injunction. The case is, therefore, triable *de novo* here, and we cannot avoid the responsibility of passing upon the facts in the light of the evidence. Without dispute, the plaintiffs were in possession of the farm under a written lease. The burden, therefore, was on the defendant, to justify his alleged possession and to prove his alleged right thereto. We cannot, therefore, sustain appellee's contention that the burden was upon the plaintiffs in this respect. The burden was on the plaintiffs to sustain their right to an injunction. This burden was met by a showing of their possession under lease. This right of possession was entirely consistent with the permission or license to the defendant to enter upon the land, for the purpose of cutting and stacking his hay thereon, and to take and temporarily leave upon the land the implements for such purpose. We infer that the trial court must have disposed of the case on the theory that plaintiffs had the burden at this point.

Upon a separate reading of the evidence, we have all readily reached the same conclusion, that the real weight of the evidence is clearly with the plaintiffs, and not with the defendant. The version of the plaintiffs appears to us as the more natural, reasonable, probable, and, therefore, the more credible. No explanation is given by defendant as to why he should *rent* the land, rather than buy the standing hay. There was no time or term fixed for his alleged oral lease, nor were any conditions of any kind stipulated therein. He knew that the plaintiffs were themselves renters of the land. He did not know and did not inquire

whether they had a right to sublet the same or not. It is an undisputed fact that they did not have such right. On the contrary, their lease expressly forbade it, under penalty of forfeiture of the lease. This fact of itself renders it improbable that the plaintiffs would have been likely to rent the land to the defendant, when there was so little occasion or pressure for their doing so. The defendant's direct testimony as to the oral contract was as follows:

"Well, I says, 'I will give you \$14 an acre rent for it.' And he said 'No,' he said, 'it isn't money enough.' He said he didn't have any hay tools, and didn't expect to be there another year; and before he left, he said he would take \$14 an acre rent for it."

On cross-examination, he testified as follows:

"All that I wanted of that land up there was the hay. I was willing to cut it and harvest it, if I could make a proper deal for the hay. I had no other use for the land. The hay is all I was after. I can't tell you why I rented the land, instead of buying the hay. The hay is all I wanted. Well, I rented the land. I am 22 years old, lived here all my life, and knew that Frisbies were tenants of the land. We didn't say a word about first or second crop, when I was first up there. I just wanted to rent the land, and they said they wanted \$900 rent for it. They didn't say they wanted \$900 for the hay."

The difference between his testimony and that of the plaintiffs consists in the use of the word "rent." Its use in this connection by the defendant impresses us as somewhat forced. Taking the brief testimony of the contending parties, in the light of all the circumstances surrounding them, we are fully agreed that the clear weight of the circumstances was with the plaintiffs. We are constrained, therefore, to order a reversal of the judgment entered below, and to order decree for the plaintiffs.—*Reversed.*

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

F. I. GARDINER & COMPANY, Appellees, v. L. G. HAYWARD,
Appellant.

REFERENCE: Report as Special Verdict. The report of a referee as to the facts, especially when confirmed by the court, has the force and effect of a verdict by a jury. (Sec. 3741, Code, 1897.)

Appeal from Cherokee District Court.—WILLIAM HUTCHINSON, Judge.

OCTOBER 26, 1920.

ACTION by plaintiff on account. The defense was a general denial, and a counterclaim on account. The case was sent to a referee, who heard the evidence and reported his findings. Over the objections of the defendant, these findings were approved, and judgment entered accordingly. The defendant appeals.—*Affirmed.*

J. A. Miller, for appellant.

Molyneux & Maher and *Guy J. Tomlinson*, for appellees.

EVANS, J.—The plaintiff was a dealer in building material. The defendant was a general contractor. The plaintiff sued on account for a balance due of \$1.210. The defendant not only denied the plaintiff's account, but presented a counterclaim for several hundred dollars, comprising many items. The items in each account were very numerous. Those in plaintiff's account cover 33 printed pages of the present record, and those in the defendant's account cover 5 pages. The evidence was taken before a referee. At the hearing before the referee, the parties stipulated quite liberally. The defendant admitted the plaintiff's account, with certain specific reservations. Likewise, the plaintiff admitted the defendant's counter account.

with certain specific reservations. Dispute was reserved over certain alleged credits claimed by each party.

The report of the referee indicated a painstaking consideration of the evidence. The defendant complains of important items in such report. We shall not deal with these *seriatim*. One contention by the defendant was that the plaintiff had agreed to furnish him a certain grade of lumber at certain agreed prices, and that such prices were exceeded in plaintiff's statement of account. The dispute thus presented makes an item of \$229. It is enough to say that the testimony of the parties was contradictory as to this contention on the part of defendant. The plaintiff's denial was corroborated by the fact, shown by undisputed evidence, that the prices claimed by the defendant were less than the wholesale price at which the plaintiff could have purchased such lumber at the time the alleged promise was made. Clearly, therefore, we would not be justified in interfering with the report of the referee at this point. After a careful reading of the evidence in the record, and of the referee's report, we see no proper reason for interfering with such report as to any other of the items in dispute. The report was duly approved by the trial court, and it has the full effect before us of the verdict of a jury and a judgment of the trial court thereon.

We do not overlook that there is a suggestion in the statement of facts and in the brief points to the effect that the court was not warranted in making a compulsory reference of these mutual accounts to a referee. The subject is not further referred to by appellant, in his extended argument or otherwise. The record fails to indicate that the reference was compulsory, and this is doubtless the reason that the subject was not pressed in argument. We have no occasion, therefore, to consider the question whether a compulsory reference could properly have been made. We find nothing in the record which would justify a reversal of the judgment below. It is, therefore,—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

IN RE ESTATE OF AMY ANN PARKER.

FRAUDULENT CONVEYANCES: Fiduciary Relations. A presumption of fraud attends the transfer of property by a principal to his *confidential* agent, and especially when the principal is very aged and physically and mentally weak. Evidence held to render the presumption conclusive.

EXECUTORS AND ADMINISTRATORS: Enforcing Claims Against Administrator on Final Report. An administrator takes title in trust to every claim due to the testator at the time of his death, even though it be a claim for damages for fraud perpetrated on the testator *by the administrator himself*, before he became such, and he must voluntarily account therefor, or submit to an order for accounting by the probate court without a jury, on objections to his *final report*.

EXECUTORS AND ADMINISTRATORS: Waiver of Jury Trial. The act of qualifying as administrator works a legal waiver of right of trial by jury, in case claims in favor of the estate and against the administrator are sought to be enforced on objections to the administrator's final report.

EXECUTORS AND ADMINISTRATORS: Jury on Issue Arising on Final Report. An administrator may not complain that an issue arising on his final report was sent to a jury, when his only objection to such course was an untenable one.

EXECUTORS AND ADMINISTRATORS: Effect of Inquisitorial Examinations. The act of the probate court in calling the administrator into court and entering upon an inquisitorial examination as to the indebtedness of the administrator to the estate, does not exhaust the jurisdiction of the court, later, to enter upon a formal hearing of objections to the administrator's final report, and to adjudicate such indebtedness.

LIMITATION OF ACTIONS: Tolling Statute on Claims Due Estate from Administrator. The statute of limitations does not run during administration, on claims owed by an administrator to the estate.

Appeal from Cerro Gordo District Court.—JOSEPH J. CLARK, Judge.

OCTOBER 26, 1920.

EXCEPTIONS were taken to the executor's final report, and, on trial, the executor was ordered to turn over to the legatees, or their representatives, four shares of stock, of the par value of \$1,000 each, in the J. Decker & Sons Company, \$1,680 in dividends collected, with interest thereon, and a balance of \$1,722.67 on four shares in said company, appropriated to his own use, with interest. The executor appeals.—*Affirmed.*

Duncan Rule, E. P. Andrews, and Smith & Rinard, for appellant.

Blythe, Markley, Rule & Smith, for appellees.

LADD, J.—I. Amy Ann Parker died testate, May 9, 1912, at the age of 90 or 91 years. She recited in her will that she was 86 years old, and a nephew testified that she was born April 16, 1821. She had so stated her age to Mrs. Schenke, and probably this is correct, though the executor, who prepared the will, thought she had said to him, some time prior to her death, that she was but 83 years of age. A. H. Cummings was nominated in the will to be executor, and, upon its admission to probate, September 9, 1912, was appointed as such by the court. He qualified, but did not file an inventory until February 7, 1914. During that year, a legatee filed an application for his removal, but this was never heard. The executor did not file report until October 11, 1917, and, about a month later, filed a substituted inventory, list of heirs, and description of the real estate. The final report was presented April 5, 1918. This last report showed cash on hand, after discharging all claims and costs, \$500.05, and 60 shares of preferred stock in the Vulcan Iron Works Company, of Mason City, and 30 shares of its common stock issued to decedent and held by the executor, which he deposited with the clerk of court. The will, after directing payment of debts, and expenses of last

sickness and burial, gave Mrs. North, a niece, the home and furnishings, and to Mrs. North, George Fulford, and Thomas Buck, the residue of the estate. The latter had departed this life, and his son, John F. Buck, his daughter, Josephine Steward Fulford, the executor of the estate of Mrs. North, since deceased, and Henry Curbo, filed objections to this report, with amendments, alleging that the executor had failed to account for 8 shares of the stock, of the par value of \$1,000 each, issued by Jacob E. Decker & Sons Company, and some other matters, which were subsequently abandoned.

It appears without dispute that, in 1907, decedent delivered to Cummings two notes, one for \$4,500, and the other for \$3,700, and directed him to dispose of them, and invest the proceeds in nontaxable securities; that he sold these notes at a small discount, and purchased 8 shares of stock heretofore mentioned, at par, in her name; and that, thereafter, until November 9, 1911, he collected the dividends declared thereon, and turned them over to Mrs. Parker. At the date last mentioned, when she was 89 years old, he claims to have exchanged 60 shares of preferred stock, of the par value of \$100 each, in the Vulcan Iron Works Company, organized April 19, 1909, and 30 shares of its common stock, for the 8 shares of preferred stock in the Jacob E. Decker & Sons Company, paying a difference of \$2,000, of which over \$1,200 was charged for his services claimed to have been rendered, and some items he had advanced for her, and the balance in money. Whether such an exchange was made, is questioned; but, for the purposes of the case, such exchange may be conceded to have been physically effected. The objectors asserted that:

“(1) Either that said Amy Ann Parker was not mentally competent or capable of making said sale and assignment, or to make said settlement claimed by said Cummings; or (2) that, by reason of old age, feebleness of mind, and the business relations existing between her and the said Cummings, he took advantage of her, and by undue influence induced her to her disadvantage to sell

and exchange and transfer or assign said J. Decker & Sons [Company] stock to him, and to accept the payment and satisfaction and settlement claimed to have been made by him; or (3) that, whether she was mentally capable of transacting business or not, that, under the business relations existing between her and the said Cummings, he made misrepresentations to her in regard to the said stock and the Vulcan Iron Works stock, substantially as alleged by objectors, with intent to deceive and induce her to part with her said stock to him; that she believed and relied upon said statements, and was induced thereby to make the sale and exchange and transfer of said stock."

The executor, by demurrer, motion to strike, answer, motion to transfer to law side of calendar, and objections to further proceeding, raised, in substance, the following questions: (1) Whether the court had jurisdiction to determine the issues raised by the objections; (2) whether the fact that he appeared before the court for examination terminated the court's authority to pass on the objections to the final report; (3) whether, in sustaining the objections, the executor would be denied the right to trial by jury; (4) whether the issue as to fraud practiced on decedent might be heard in probate on objections to the final report; and (5) whether recovery should have been awarded on the merits.

II. Reference to the facts and conclusions to be drawn therefrom first will aid in a clear understanding of the issues raised. Cummings appears to have first acquired stock in the Vulcan Iron Works Company in July, 1909, by exchanging "an equity in a farm" and paying the difference in money, and with such stock, one half as many shares of common stock. He then occupied the same office as the president of the company's board of directors, and, in June, 1910, became a director and vice president of the board of directors. He was aware, at the time of the alleged exchange, that the company had never declared a dividend, and that it was in

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pressing need of money. As early as June, 1911, the president, secretary, and treasurer were authorized to sell additional stock, to the amount of \$25,000, on a commission not to exceed 10 per cent. At a stockholders' meeting on July 20, 1911, a motion was made that bonds in the sum of \$25,000, bearing 7 per cent, be issued in lieu of the stock so authorized, and, four days later, a special meeting of the directors was called, and the issuance of the amount of bonds mentioned above ordered, on motion of Cummings, and a committee appointed to take the necessary legal steps. On September 11th of the same year, Cummings moved that the manager be authorized to negotiate a \$1,500 loan on a house the company had taken for stock issued, in Saint Paul, Minnesota. He moved, on the same day, that the president and treasurer be authorized to issue \$25,000 of preferred and \$12,500 of common stock, over and above the original capitalization. In pursuance of an appointment July 20, 1911, a committee of three, appointed to audit the books, reported to the stockholders that the company was indebted to the banks in Mason City in the sum of \$14,350; for merchandise, \$5,200; accounts payable, \$2,805.52; and a bond indebtedness of \$7,000. On motion of Cummings, the board of directors resolved upon an issue of \$25,000 in bonds. Knapp, the manager and its president, died early in 1913, and was found to have been indebted to it in money appropriated to his own use, in the sum of \$10,000. Thereupon, its business ceased, without sufficient assets to satisfy indebtedness. Notwithstanding all this, Cummings insisted that he knew nothing of the affairs of the company, and that, at the time of the alleged deal with deceased, he supposed the shares of stock issued by the Vulcan Iron Works Company to be worth their par value. The evidence was such that he might well have been found to have been aware of the condition of the company, for he appears to have known it to be parting with its shares of stock for land, instead of cash, as exacted by law, and to have taken an active part in the meetings of the board of directors, as well as of the stockholders. From

his opportunities to know, and what he is shown to have done, the natural inference is that he was familiar with its financial affairs, and such a finding has ample support in the record. That other men of business sagacity had acquired a small amount of stock of the company, and that the cashier or president of every bank of Mason City had written letters, purporting to be in response to an inquiry by its stock salesman, speaking well of the enterprise, cannot obviate the knowledge of its directors then or six months later, when the exchange was made, that the company was hard pressed for means, and in failing circumstances. These letters but illustrate the readiness of some people to encourage others to invest liberally in building up "home enterprises," while holding fast to their own purse strings, or loosening but slightly! Of course, a cautious business man would not be misled by cheap indorsements of this kind, by opinions merely, and probably of persons unfamiliar with actual conditions. But what of the mass of investors, untrained in business, and seeking to safely place their funds? Such letters are well calculated to lull these into a feeling of security, and to prevent adequate inquiry or investigation into the value of stock put on the market. One of these who wrote of the enterprise in fine phrases testified:

"I did not have very much knowledge of the financial condition of the Vulcan Iron Works Company in 1910. I made a very small investment in it, but do not recall the date. It seemed to be necessary, under the suggestion of some of our people, that we ought to be helping these things along, and, like many others, I bought a little of it. * * * I would not say the letter was a recommendation. The first clause takes care of anything that might be said, if you read it. I would not say that this letter I wrote was intended to mislead anybody to believe that stock in the Vulcan Iron Works Company was a fine investment, and I do not see how it could be misunderstood by any ordinary business man who used ordinary precaution."

But what of the unwary, those men and women with-

out ordinary business capacity? What were the letters written for? Manifestly, to aid the stock salesmen in disposing of the stock, and to be used in convincing people of its present value and earning capacity in the future. Can men of standing in the community afford to allow such standing to be frittered away on doubtful enterprises, to the injury or disadvantage of their neighbors? On the contrary, ought they not to be jealous of their good name, and never permit its use to mislead others to their detriment? Whatever the writers of these letters may have intended, Cummings, and men of his ilk, are not likely to have labored under any delusions because of their existence, for the record is indicative that he was fully aware of the embarrassments of the corporation,—at least, this is the inference to be drawn from the evidence adduced. That the shares in J. Decker & Sons Company, exchanged, were worth par value, and paid dividends regularly, is not questioned.

Cummings had been decedent's agent in the transaction of all her business since 1907. At the time of the deal, she was 90 years old, in feeble health, and, according to the testimony of two physicians and several nonexperts, of unsound mind. The evidence leaves no doubt that she intrusted all her business to his care, reposed in him absolute confidence, and exchanged the shares of stock at his suggestion, without inquiry and without knowledge of values. The shares of preferred and common stock in the Vulcan Iron Works Company alleged to have been received by her were worthless, while the 8 shares of the par value of \$8,000 in the J. Decker & Sons Company were worth that amount. She was paid by Cummings only a difference of \$2,000. The situation was such as to cast on him the burden to prove that the deal was fairly made, and on objectors, that she was of unsound mind. They met the burden of proof, but he failed to do so.

III. The decedent, then, had a cause of action against Cummings at the time of her death. All causes of action survive the death of those in whose favor they exist, and

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against ad-
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on final
report.

may be prosecuted by personal representatives. Sections 3443 and 3445 of the Code. Title to that in favor of decedent then passed to the executor of her estate, upon his appointment and qualification. The executor, however, could not bring an action against himself. There is no statutory provision authorizing the prosecution of such an action by special or temporary administrator, or by the heirs. The only way open through which to contest his liability seems to be through objections to his final report as executor, or through his removal and the appointment of a successor, who may prosecute the action, as is the practice in some jurisdictions. At the common law, any indebtedness of an executor to the estate of his decedent was deemed satisfied upon his appointment, if nominated in the will, unless a contrary intent was manifest. This rule has never prevailed in this country. Here, his indebtedness becomes a part of the assets of the estate, and must be accounted for like other assets. *Savery v. Sypher*, 39 Iowa 675; *McEwen v. Fletcher*, 164 Iowa 517. In some jurisdictions, the debt is assumed to have been paid immediately upon becoming executor, and the amount becomes cash assets of the estate. Where courts indulge in this fiction, the indebtedness must be uncontroverted. *Shields v. Odell*, 27 Ohio St. 398. We see no reason to indulge in such a fiction. An executor ought not to be permitted, by virtue of his trust relation, to gain any advantage which he would not otherwise possess, with reference to his own indebtedness to the estate. *Coffey v. Coffey*, 193 Mass. 398; *Randall v. Turner*, 17 Ohio St. 262; *Baucus v. Stover*, 89 N. Y. 1; 2 Woerner on Administration (2d Ed.), Sections 311, 512. If insolvent when appointed, he ought not to be presumed to have paid something he did not have, and could not have paid. *Harker v. Irick*, 10 N. J. Eq. 269; *In re Piper's Estate*, 15 Pa. St. 533; *Lyon v. Osgood*, 53 Vt. 707; 2 Woerner on Administration (2d Ed.), Section 512. The denial of the right of an administrator *de bonis non* to

recover from the estate of the executor of the deceased predecessor on an indebtedness owed by said predecessor to decedent, is utterly inconsistent with the operation of the alleged fiction, and consistent with our conclusion that such a claim passes to the executor, like any other. *Hodge v. Hodge*, 90 Me. 505. We see no obstacle to treating the claim against the executor the same as those against others; for they should be subject to defenses of being unjust, or of having been satisfied or discharged, and to the plea of the statute of limitations. *Everts v. Everts*, 62 Barb. (N. Y.) 577, 582; *Black v. White*, 13 S. C. 37; *Wood v. Executors of Tallman*, 1 N. J. L. 153; *Lynch v. Divan*, 66 Wis. 490; *Dickie v. Dickie*, 80 Ala. 57. In the section of Woerner's Administration of Estates last above cited, that defense may be made by the executor, is said to be self-evident. The question was settled in *McEwen v. Fletcher*, 164 Iowa 517, at page 525. It seems to have been thought, in *Lynch v. Divan*, 66 Wis. 490, that issues raised by an executor may not be heard in probate, but that the proper practice is, when a defense is interposed, to remove the executor and appoint another in his stead, and that an administrator, by inventorying a claim against himself, "did not thereby admit that he owed the estate anything on account of either, or estop himself to deny his present indebtedness thereon. A defense to these claims has no proper place in the inventory. Whether he was the debtor of the estate on either account could only be determined in some legal proceeding appropriate to that end. Unless the county court was satisfied that the claims of the estate against the executor could not be enforced, it should have removed him, and appointed a competent administrator, who should have been required to bring suit against the late executor on the note and for the rent." But in *Wood v. Executors of Tallman*, 1 N. J. L. 153, 154, after noting the authority of the orphan's court of that state to compel an accounting, the court observed that:

"It has been strenuously argued that, although the orphan's court may compel executors to account for assets

or effects of the testator in their hands, yet they have no authority to try an action of debt; or, under pretence of citing an executor to account, to try a claim for a debt which he denies that he owes, or which he alleges he has paid. It has been said that, in this case, the executor is as much a stranger as any other debtor, and the orphan's court have no more right to adjudicate upon a claim against him by the testator, than upon a demand against any other individual. They allege that nothing is assets until recovered or reduced by the executors into actual possession, and proved to have come into his hands. But in this case, neither the bond nor the rents came to Woodward junior as executor; but, if they came to his hands at all, it was as a debtor; and these moneys cannot be charged to his account as executor, until they have been recovered by due course of law. These doctrines cannot be recognized by us, and they are contrary to the act of assembly. The law has given the orphan's court full power to compel the executors to account generally, and to decree the balance due to the legatees in their hands, without restraining them in the exercise of this power to any particular kinds of claims, or subjects of controversy. There is no real difference, as regards the executor, between assets in his hands, or a debt in his hands; it is, therefore, nothing more than an inquiry upon the subject of the inventory. All the argument turns upon the objection that the executor is thereby deprived of the benefit of a trial by jury; whereas, it is evident that, being both executor and debtor, no action could be instituted against him at common law, to try the validity of the claim. Unless he can sue himself, the remedy must be against him as accountant to the legatee, either in chancery or in the orphan's court, and in either case the trial by jury is equally out of his reach; by taking upon himself the *trust*, he knows he must *account*, and *volenti non fit injuria*. * * * It has been contended, also, that, if such a power be really granted to the orphan's court, it is unconstitutional, because the right to a jury is secured by that instrument to each individual of the

community. To this I answer: The Constitution does not extend the right to a trial by jury to cases which did not fall within its province before the existence of that charter. The chancery, prerogative, and spiritual courts have always proceeded without the intervention of a jury; and the orphans' courts, being invested with those powers as defined and limited by the act of assembly, may exercise them as before, without any violation of the right to trial by jury."

In *Everts v. Everts*, 62 Barb. (N. Y.) 577, the court, speaking of a claim against an executor, said:

"The executor is *prima facie* chargeable, but it is competent for him to show the claim unfounded and unjust. The validity or justice of the claim must, when denied, be in some way determined, and, as the executor cannot sue himself, and as the question must be settled before the estate can be finally settled, it must be tried in the surrogate's court, in the same way and for the same reason that claims against the estate in favor of the executor must be tried in that court. By trying in that court, the parties lose the benefit of a trial by jury; but that results from the voluntary act of the creditor in the one case, and the debtor in the other, accepting a trust which makes another mode of trial absolutely necessary."

The district court is given jurisdiction in probate matters, and especially of "the management and disposition of the property of and settlement of such estates." Section 225 of the Code. The executor is bound to "account for all the property inventoried at the price at which it was appraised, as well as for all other property coming into his hands belonging to the estate." Section 3395 of the Code. Under Code Section 3399:

"Any person interested in the estate may attend upon the settlement of his accounts and contest the same."

The executor did not file his final report until April 5, 1918, over five years after his appointment, and does not appear to have referred to the Vulcan stock before filing his amended inventory in 1917. To this final report the

objections were interposed, as authorized by the statute last cited, and, as we think, the issues raised thereby were triable before the district court sitting in probate. The court is the same in issues arising at law, in equity, or in probate, but separate dockets are kept, as matter of convenience in distinguishing the one class of actions from the other. *Niemand v. Seemann*, 136 Iowa 713; *Tucker v. Stewart*, 121 Iowa 714. The practice is peculiar to each; and, though the issues raised by the objections to the final report must have been tried to a jury, had these been adjudicated in the lifetime of decedent, contests arising on final reports of administrators and executors are to be heard by the court without a jury. See *Duffy v. Duffy*, 114 Iowa 581. By accepting appointment as such, the

3. EXECUTORS
AND ADMIN-
ISTRATORS:
waiver of
jury trial.

executor acquiesced in the requirement that he account to the court for all property held by him as such, and waived the right to trial by jury, to which otherwise he would have been entitled. This inevitably

follows from voluntarily putting himself in a situation where his liability to decedent could not be litigated, save on objections to his final report. Though the issues were

4. EXECUTORS
AND ADMIN-
ISTRATORS:
jury on
issue arising
on final
report.

submitted to the jury, the executor is not in a situation to complain, for the cause was set down for trial to jury without objection thereto, save that the court was without jurisdiction to pass on the issues raised in objections to the final report.

IV. The executor filed his final report, as heretofore stated, and objections were interposed by those having an interest in any property to be distributed, praying that

5. EXECUTORS
AND ADMIN-
ISTRATORS:
effect of
inquisito-
rial exam-
inations.

“such report be not now allowed or approved until further investigation and report is had,” and then praying that executor be cited to appear in court at a certain time for examination. An amendment to the objections was filed, specifically pointing

out the objection, as heretofore made, to the report, and

declaring that the executor should be required to account for the eight shares of stock. On the same day, the executor appeared, and was examined in detail concerning the entire transaction. Under Section 3395 of the Code, he was required to account for all the property inventoried, at the price at which it was appraised, as well as all other property coming into his hands belonging to the estate. But examinations of this character are merely to aid in discovering the assets in the executor's possession or control, and, though bearing on the final settlement, it does not defeat the right, as contended by appellant, of "any person interested in the estate" to "attend upon the settlement of his accounts and contest the same." Section 3399 of the Code. The examination of the executor determined nothing; for he denied that decedent owned the stock in the Decker Company. The issues as to the ownership raised by the objections were not determined, and could not have been. Other witnesses might not have been called. Nothing in *Smyth v. Smyth*, 24 Iowa 491, and *Rickman v. Stanton*, 32 Iowa 134, is to the contrary. These decisions relate to a statute like Section 3315 of the Code, but, as pointed out in *Barto v. Harrison*, 138 Iowa 413:

"The proceeding authorized is inquisitorial in its nature, and designed especially as an economical and efficient mode of discovering property of the estate. The parties are not to be heard as on a trial. The person cited to appear only may be examined. The court or judge is not to try any issue of fact as to whether such person cited to appear is in the wrongful possession of property of the estate, but only to determine whether there is such an issue, and, if there is not, and the title is conceded to be in the estate, the order should be entered. * * * But if it develops in the examination that the title to the property is in dispute, or that there is some controversy as to whether the estate is entitled thereto, then the administrator or executor must be relegated to procedure usually resorted to in order to adjudicate such issues."

The testimony of the executor on citation did not con-

clusively establish his liability, or that he held the stock belonging to decedent in his possession as such executor, and, therefore, the court might not properly direct him to treat the property as that of decedent. The issues raised by the exceptions to the final report remained undisposed of, and were not affected by the executor's examination, save as this was introduced as evidence bearing on the issues raised by the objection to the final report.

V. The executor pleaded in bar the statute of limitations. Less than a year had elapsed after the deal complained of, when he became executor of her estate; and,

6. LIMITA-
TION OF
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claims due
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as action might not have been maintained since, it is manifest that the period of five years fixed by Section 3447 of the Code had not expired. The indebtedness of himself as an individual was payable to himself in his fiduciary capacity. The statute of limitations does not apply in such a

case. *Long v. Long*, 118 Md. 198 (84 Atl. 375). As remarked by Bleckley, C. J., in *Thompson v. Thompson*, 77 Ga. 692 (3 S. E. 261):

"An examination of the authorities makes it clear to us that an administrator who is a debtor to the intestate individually or as surviving copartner, is chargeable as administrator with the amount of such debt; and that the statute of limitations will not protect him against accounting for it, so long as he remains accountable for assets generally."

See, also, *Haines v. Haines' Exrs.* (N. J.), 15 Atl. 839; 18 Cyc. 230.

What we have said, disposes of other matters argued. We are content with the conclusion reached by the trial court, and the judgment is—*Affirmed*.

WEAVER, C. J., STEVENS and ARTHUR, JJ., concur.

JOHN W. LEE, Appellee, v. JOHN BLUMER, Executor,
Appellant.

EXECUTORS AND ADMINISTRATORS: Interrogatories in re
Claims. The statutory provisions (Secs. 3604 *et seq.*, Code,
1897), relative to the attaching of interrogatories to petitions,
answers, or replies, are applicable to proceedings in probate
for establishment of claims. (Sec. 3341, Code, 1897.)

Appeal from Shelby District Court.—THOMAS ARTHUR,
Judge.

OCTOBER 26, 1920.

APPEAL from a judgment establishing a claim in probate.
The material facts are stated in the opinion.—*Reversed.*

Preston & Dillinger, for appellant.

Cullison & Cullison, for appellee.

PER CURIAM.—I. On May 19, 1916, the claim in controversy, which is based upon an alleged promissory note for \$1,500, dated at Shelby, Iowa, September 1, 1905, and at the time of the trial amounting to \$4,374.08, was filed in the office of the clerk of the district court of Shelby County, against the estate of Fredolin Blumer, who died in 1915. The administrator filed answer, denying the claim, and alleging that the instrument was executed without consideration, and that same had been fully paid. To this answer were annexed several interrogatories, accompanied by affidavit, to be answered by claimant. Exceptions to the interrogatories were filed November 6, 1918, and again on September 17, 1919, upon the grounds that same were immaterial and incompetent; that claimant was incom-

petent, under Section 3604 of the Code, to answer said interrogatories; and that the statute permitting the filing thereof is not applicable to proceedings for the establishment of a claim in probate.

On February 22, 1919, the motion of defendant to require claimant to answer the interrogatories was submitted and sustained, claimant being given until September 1st following to answer same. Claimant having failed to do so, the defendant, on September 2d, filed a motion for judgment. This motion was, on September 20th, overruled, at which time the court also declined to grant claimant further time to answer the interrogatories.

Some months later, the case proceeded to trial to a jury. After identifying the signature upon the note and offering same in evidence, claimant rested. Thereupon, the defendant moved for judgment, upon the ground that claimant had failed to answer the interrogatories, making the interrogatories and affidavit a part thereof. This motion was overruled. Defendant then moved for a directed verdict, upon the grounds stated in the motion for judgment. This motion was also overruled. Defendant then introduced evidence for the purpose of showing that the signature upon the note was not genuine, and sought to introduce testimony which, it is claimed, tended to sustain the plea of payment; but, upon objection of claimant, this testimony was excluded. Both parties having rested, defendant again moved for a directed verdict, basing the same largely upon the failure of claimant to appear at the trial for cross-examination, in obedience to a written notice served upon his counsel, requesting him to do so. The motion was overruled. Before submitting the case to the jury, the court, upon motion of counsel for claimant, withdrew the issues of payment and failure of consideration, and submitted only the question of the genuineness of the signature upon the note.

The facts disclosed, in some respects, take the case out of the ordinary. As already stated, the note bears date September 1, 1905, and was filed for probate May 19,

1916. By its terms, it became due in one year, and thereafter, both principal and interest bore interest at the rate of 8 per cent. No interest was ever paid. It is suggested in defendant's offer of proof that the maker, on the date of the note, owned 840 acres of land in Shelby County, incumbered for \$2,500; that he had money in the bank, and notes amounting to more than \$1,000; that, during much of the time, he had considerable sums on deposit or loaned, his deposits at times aggregating \$10,000; and that, at his death, they amounted to several thousand dollars. The note was received from claimant by G. W. Cullison, an attorney at Harlan, by mail, together with a letter dated at Chicago, April 13, 1916, in which claimant stated that the consideration for the note was a loan of \$1,500; that he wrote the maker annually, demanding payment of the interest; that none of the letters were returned; and that he received no reply thereto. Nothing was thereafter heard from claimant by his attorney, although the latter wrote him, advising that answer and interrogatories had been filed to the claim, and requesting him to forward the information necessary for the preparation of interrogatories, or that he come to Harlan for conference. No reply was received from this or a subsequent letter, calling attention to the same matter.

It was contended by counsel for claimant in the court below that Section 3604 of the Code, authorizing the filing of interrogatories, and requiring the adverse party to answer same, is not applicable to proceedings in probate for the establishment of claims; and that the interrogatories submitted do not call for answers material to any issue involved; and that, if same had been answered most favorably to defendant, such answers would not sustain either of the special defenses pleaded. These contentions present the principal questions for decision upon this appeal. The material sections of the Code are as follows:

"Sec. 3604. Either party may annex to his petition, answer or reply written interrogatories to any one or more of the adverse parties, concerning any of the material facts

in issue in the action, the answer to which, on oath, may be read by either party as a deposition between the party interrogating and the party answering.

“Sec. 3609. The answers to the interrogatories shall be verified by the affidavit of the party making them, to the effect that the statements therein made of his own personal knowledge are true, and those made from the information of others he believes to be true. And when the party interrogated is a corporation, the answers and affidavit verifying the same shall be made by the officers or agents of such corporation who have knowledge of the subjects and matters covered by the interrogatories.

“Sec. 3610. Where a party filing interrogatories shall also file an affidavit that he verily believes the subject of the interrogatories, or any of them, is in the personal knowledge of the opposite party, and that his answers thereto, if truly made from such knowledge, will sustain the claim or defense, or any part thereof, and the opposite party shall fail to answer the same within the time allowed therefor, or by the court extended, the claim or defense, or the part thereof, according to such affidavit, shall be deemed to be sustained, and judgment given accordingly.”

It is true, as claimed by counsel for appellee, that pleadings in probate are somewhat less formal than in other cases; but they are subject to motions for more specific statement and demurrer. Some of the usual formalities must, therefore, be observed.

Section 3610, *supra*, provides that, if the adverse party shall fail to answer the interrogatories filed within the time allowed, the claim or defense, or the part thereof supported by affidavit, shall be deemed sustained, and judgment given accordingly. This section is identical with Section 2991 of the Revision, construed in *Perry v. Heighton*, 26 Iowa 451, and held to establish a rule of evidence. To the same effect, see *Independent School Dist. v. Independent School Dist.*, 148 Iowa 154. In *Free v. Western Union Tel. Co.*, 135 Iowa 69, it was held that, under Section 3610, the failure of the

party to answer interrogatories obviated the necessity of proof.

Section 3341 of the Code provides:

"If a claim filed against the estate is not fully admitted by the executor or administrator, the court may hear and allow the same, or may submit it to a jury, and on the hearing, unless otherwise provided, all provisions of law applicable to an ordinary action shall apply."

It is contended by counsel for appellee that this section relates only to procedure upon the hearing. If this limitation were conceded, it would hardly aid appellee's contention. The same rules of evidence, unless otherwise provided by statute, that govern in the trial of ordinary actions, govern in the trial of claims offered for allowance in probate. We perceive no reason why different rules should apply in the trial of an ordinary action upon a promissory note, and a trial upon a claim based thereon against the administrator of an estate—at least so far as special defenses are involved. The question is not one of pleading, and it is not controlling that pleadings in proceedings of the kind in question are somewhat less formal than in other forms of action. We hold, therefore, that Section 3604 and succeeding sections relating to interrogatories are applicable to proceedings in probate for the establishment of claims.

II. Of course, the statute contemplates that the interrogatories filed must relate to and seek facts material to some issue in the action. If exceptions are filed to the interrogatories, the court must determine the propriety thereof, and which, if any, of the questions shall be answered, and the time within which same shall be answered (Section 3606, *Free v. Western Union Tel. Co.*, supra); so that the court must have found that all of the interrogatories filed were proper and material, before claimant was ordered to answer them. This order was not set aside, nor permission asked to file other exceptions. Perhaps the questions are not as carefully or skillfully framed as they might have been; but claimant was asked, among many

other material matters, to state specifically if it were not true that the note was executed without consideration. Failure of consideration was a complete defense to the whole claim, and, if established, was determinative of the controversy. Had all of the interrogatories been answered most favorably to defendant, the defense of failure of consideration would have been established.

The motion filed September 2d for judgment, and overruled September 20th, was submitted to Judge Peters. The grounds upon which the ruling was based were not made of record; but the court may, in view of our holding in *Perry v. Heighton* and *Independent School Dist. v. Independent School Dist.*, supra, have deemed it premature. In any event, this ruling was in no wise binding upon the trial judge. The interrogatories were not answered, and, therefore, the defense pleaded, to which they related, was deemed sustained, and the necessity of further proof obviated. The motion for judgment, filed at the close of plaintiff's testimony, should, therefore, have been sustained. The interrogatories and affidavit were a part of the record, and made a part of the motion for judgment. The showing was complete, and every requirement of the statute met.

It follows that the judgment of the court below must be and is—*Reversed*.

ARTHUR, J., took no part.

E. M. MITCHELL, Appellee, v. ALEXANDER MUTCH, Administrator, Appellant.

VENDOR AND PURCHASER: Wrongful Withholding of Possession

- 1 —**Damages.** A vendee who, in compliance with his contract, tenders his purchase-money note to the vendor, and for a series of years is wrongfully excluded from the premises, and in the meantime keeps his tender good, has the right, on obtaining possession, to elect to have a cancellation of the accrued interest on his note as damages, in lieu of accepting the rents and profits as damages.

VENDOR AND PURCHASER: Wrongful Withholding of Interest
2 on Deposit. A purchaser who has been wrongfully kept out of possession by the vendor has the right, on obtaining possession, to recover of vendor legal interest on a cash tender kept good during the period of detention.

VENDOR AND PURCHASER: Wrongful Withholding—Election to
3 Accept Rent as Damages. A purchaser who has been wrongfully kept out of possession by the vendor will not be held to have elected to accept as damages the rents and profits for the period of such detention, because of the fact that, prior to any default by vendor, the purchase terminated the tenancy of the tenant then in possession of the premises.

VENDOR AND PURCHASER: Obligation to Pay Taxes. A ven-
4 dor who has covenanted to convey good title, and thereafter, for a series of years, wrongfully withholds from the grantee both deed and possession, rests under a legal obligation to pay taxes on the premises accruing during the period of detention.

Appeal from Tama District Court.—JAMES W. WILLETT,
Judge.

OCTOBER 26, 1920.

SUPPLEMENTAL proceedings after decree of specific performance, seeking to adjudicate plaintiff's damages for defendant's wrongful delay of performance. There was a decree for plaintiff, and the defendant appeals.—*Affirmed.*

E. H. Lundy, Peisen & Soper, and C. E. Walters, for appellant.

Sherman W. DeWolf, Thomas & Thomas, and Nichols & Nichols, for appellee.

EVANS, J.—I. The defendant is the administrator of James Mutch, deceased, who was the original defendant. For convenience of discussion, the decedent will be referred

1. VENDOR AND PURCHASER :
wrongful withholding of possession :
damages.

to herein as the "defendant." In April, 1913, James Mutch entered into a written contract of sale of his half-section farm to the plaintiff, Mitchell, for a consideration of \$57,600. The contract called for a down payment of \$600, and for a further payment of \$5,000 on March 1, 1914, and for a note of \$52,000, secured by a purchase-money mortgage, and drawing 5 per cent interest, the same to be executed and delivered on such latter date. On the same date, Mutch was to execute and deliver to Mitchell a warranty deed, with full covenants, and to give him possession of the farm. Before the arrival of that date, Mutch had repented the sale, and later resisted performance of his contract. The vendee, Mitchell, made full tender of performance on his part, which was refused by the vendor, Mutch. Thereupon, vendee brought a suit for specific performance, which was prosecuted to a final decree. See *Mitchell v. Mutch*, 180 Iowa 1281. The case being remanded from this court, these supplemental proceedings were had in the district court. Pursuant to the decree of specific performance, the vendor was required to deliver a warranty deed to the vendee, and to surrender possession to him on March 1, 1918. During the four years of delay of performance, the note for \$52,000 executed and tendered by the vendee purported, on its face, to draw interest from March 1, 1914. During the same time, the vendor had received all the rents and profits of the farm. Instead of claiming as his damage the accrued rents and profits during such period of delay, the vendee, plaintiff, elected to ask a remission of interest for such period of four years upon his \$52,000 note, and to ask an allowance of interest for the same period upon the \$5,600 which he paid or tendered to the vendor.

The first and most important question in the case is whether the vendee has a right to make such election, the contention of the vendor being that the vendee is limited in his measure of damages to a recovery of the rents and profits.

We deem it clear that the vendee's right of election must be sustained. The vendor, having wrongfully delayed the performance of the contract, is not allowed to derive any advantage from his own fault. Since he has wrongfully withheld from the vendee the possession of the property, it would be clearly inequitable to permit him to collect interest upon the purchase-money note during the period of such wrongful delay, if the vendee elects to claim a remission of interest as his measure of damages. Only a few cases are to be found in the books where this direct question is involved, but these few are unanimous in sustaining the right of plaintiff's election. *Worrall v. Munn*, 38 N. Y. 137; *Worrall v. Munn*, 53 N. Y. 185; *Abrahamson v. Lamberson*, 79 Minn. 135 (81 N. W. 768); *Crockett v. Gray*, 39 Kan. 659; *Lynch v. Wright*, 94 Fed. 703.

The rule of these cited cases is concisely stated by Sutherland as follows:

"A purchaser who obtains a decree for specific performance may elect to pay interest on the purchase price for the time elapsed since the conveyance should have been made, and take the rents and profits received by the vendor, or allow the latter to retain these, and thereby relieve himself of liability for interest." 2 Sutherland on Damages (3d Ed.) Section 588.

No authorities are cited to us to the contrary, and we find none. We hold that the trial court properly permitted the plaintiff to elect to claim interest as his measure of damages, in lieu of rents and profits.

The decree below remitted all accrued interest upon the \$52,000 note up to March 1, 1918. It also allowed to the plaintiff 6 per cent interest upon \$5,600, being the amount paid or tendered on March 1, 1914. Objection is made to the allowance of this latter item. The plaintiff tendered the \$5,000 payment on March 1, 1914, and kept his tender good during the period of four years. The tender was the equivalent of payment, and the vendor is deemed to have the benefit of it as such. It appears af-

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PURCHASER:
wrongful
withholding
of interest
on deposit.

firmatively that the vendee had not made any use of the money thus tendered. We have no occasion, therefore, to consider whether account should be taken of the value of the use, if he had actually used the same. It is true, also, that the vendor had no use of the money, but this was the result of his wrongful refusal to accept the same. He cannot, therefore, be compensated. The same reason that awards to the vendee a remission of the interest on his purchase-money note entitles him to an allowance of interest upon the money actually paid, or kept in tender.

II. It is urged by the appellant that the appellee was estopped from making his present election, by reason of a former election to claim the rents and profits. It is made

3. VENDOR AND PURCHASER: wrongful withholding: election to accept rent as damages. to appear that, at the time of the purchase and sale of the farm, it was in the possession of a tenant who held the same under lease expiring March 1, 1917. The lease, however, contained the proviso that it could be terminated by the lessor on the first day of March of any year, by giving notice of an election to terminate on or before October 1st preceding. Prior to October 1, 1913, and while the contract of purchase and sale was in force, the vendee, Mitchell, served upon the tenant a notice to terminate the lease as of March 1, 1914. This was done for the purpose of enabling the vendee to obtain the actual possession for himself on such date. This is the fact upon which the appellant now bases his claim of former election. This was not an election at all. It was not a choice of remedies. The only right that the vendee had, at that time, was to do what he did. He was seeking no remedy, at that time, against the vendor. The vendor was not then in default. He was not liable to the vendee for any measure of damages. The default did not occur until after March 1, 1914. No remedy, as against him, accrued to the vendee, prior to such time. No election of remedies by the vendee was possible, until such right of remedy accrued to him. The contention of appellant at this point, therefore, cannot be sustained.

III. A question is involved concerning the accruing taxes during the four-year period of delay. The trial court adjudicated the question. The appellant insists that it

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obligation to pay taxes. had no jurisdiction to do so, because the question was outside the scope of the pleadings, and outside of the jurisdiction reserved to the court. We think the question

was fairly within the scope of the pleadings, and within the jurisdiction of the court. So far as the taxes of 1913 are concerned, the vendor would have been liable for the payment of these, under his contract and under his warranty deed, if the same had been delivered on March 1, 1914. That obligation has not been diminished by the delay of performance. During the four years of delay of performance, the taxes for such years accrued, and the vendor paid the same. The evidence indicates that the vendor had made some claim to recover from the vendee the taxes so paid, and this furnishes the occasion for the request of the vendee that the question be adjudicated.

It is undoubtedly the general rule that the person who is in possession of land, claiming ownership and receiving the rents and profits thereon, is primarily liable for the payment of taxes. *Mohr v. Joslin*, 162 Iowa 34; *Nunnegger v. Hart*, 122 Iowa 647. And this is so whether he holds the legal title or only an equitable title. In this case, the appellant held both the legal title and the possession, and received the rents and profits. Not only so, but, under his contract, he was bound to protect the legal title which he had covenanted to convey. Equity will treat the covenants of warranty of his deed as warranting the title against all incumbrances resulting from the acts of the vendor up to the date of delivery of his deed. In paying the annual taxes, therefore, appellant performed his own obligation, and that alone. The appellee was under no obligation to pay taxes, until he had obtained his title and his possession, pursuant to his contract. It cannot be said, therefore, that the appellant paid the taxes on behalf of the appellee. He paid them in discharge of his own obligation, an obligation

which attached to the attitude chosen by himself in respect to the property.

We think the trial court properly adjudicated the question of taxes. The decree below is, accordingly,—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

SCANLAN & MURPHY et al., Appellees, v. ED FAHEY et al.,
Appellants.

TRIAL: Submission of Nonpleaded Contract. On the sole issue whether plaintiff was entitled to recover on a conceded contract for services the amount pleaded by him, or a lesser amount, as indicated by defendant in his testimony, the court, in presenting both contentions to the jury, is not guilty of the vice of according to plaintiff the right to recover on a *contract* not pleaded. Even conceding error *arguendo*, the same is fully effaced by the act of the jury in finding exactly in accord with plaintiff's pleadings.

Appeal from Woodbury District Court.—GEORGE JEPSON,
Judge.

OCTOBER 26, 1920.

ACTION at law to recover commission for the sale of real estate. The answer was a general denial. There was a trial to a jury, and a verdict and judgment for the plaintiffs. The defendants appeal.—*Affirmed*.

A. H. Bolton, and Pendleton & Wakefield, for appellant.

Van Oosterhout & Kolyn, and Sears, Snyder & Gleysteen, for appellees.

EVANS, J.—We fail to discover any reason in the record why Matt Fahey should have been made a party defendant.

However, judgment was rendered against Ed Fahey alone. The plaintiffs are two real estate firms, each doing business as such at Rock Valley. Defendant Ed Fahey resided at Sioux City, but owned a half-section farm in Lyon County, near Rock Valley. Matt Fahey is the son of Ed Fahey, and represented his father as agent in matters pertaining to said farm. On behalf of his father, he listed the farm for sale upon identical terms with each of the plaintiff firms. These terms were that the price should be \$235 per acre, out of which a commission of \$2.00 was to be paid by Ed Fahey. The commission was to be divided, \$1.00 to the selling agency, and \$1.00 to Matt Fahey, who also was in the real estate business. Concededly, this contract pertaining to the commission was later modified. What the modification in fact was, presents the question of dispute. After such modification, the two real estate firms at Rock Valley co-operated in procuring a purchaser. Through such co-operation, a satisfactory purchaser was found, and a sale was made. The plaintiff firms sued jointly for a total commission due to themselves of \$1,120. Under the testimony for the defendant, the jury could have found that the first modification of the contract was to put the price of the land at \$237 per acre, and the commission at \$3.00 per acre, of which Matt Fahey was to receive one third, and the selling agencies the remaining two thirds. The jury could also have found that, by a later modification, the price of the land was put at \$237.50, and the commission fixed at \$1,000, one half thereof to be retained by Matt Fahey, and the other half to be paid to the selling agencies.

Under the testimony of one member of the firm of Scanlan & Murphy, the jury could have found that, after the price of the land was put at \$237.50, it was agreed that the commission should be \$4.50 an acre, of which Matt Fahey should retain one half, and the selling agencies should receive the other half. Under the other testimony for the plaintiffs, the jury could have found that the increased price put upon the land was so put for the purpose of allowing a larger commission, and that the final commission

agreed upon was \$4.50 per acre, of which \$1.00 per acre should be retained by Matt Fahey. The verdict of the jury sustained this latter contention, and awarded a recovery of \$1,120. The authority of Matt Fahey to make the commission contract on behalf of his father was conceded on the trial. That there was an express oral contract for the payment of a commission was also conceded. The trial court, therefore, instructed the jury that the plaintiffs were entitled to recover in some amount. It submitted the question of amount to the jury by appropriate instructions, and presented the respective contentions of the parties, as indicated by the evidence, to the consideration of the jury. This method of submission presents the principal grievance complained of by the appellant. It is urged in argument by appellant that only one contract was pleaded by the plaintiffs, and that this was denied by the defendant; that the plaintiffs must recover upon the contract pleaded, or not at all; and that they could not, in any event, recover upon a contract other than that pleaded by them; and that it was, therefore, error in the court to submit to the jury the question of liability as for any contract indicated by the mere testimony of the defendant. The legal propositions thus contended for by appellant are quite elementary, and would be tenable if they were applicable. Concededly, there was but one contract in force between these parties. There was no dispute as to its identity, or as to the time and place of its making. The sole dispute in the evidence was as to the terms of such contract. Both concede that an oral contract was consummated when the price was raised to \$237.50, and that an express commission was fixed. This was the contract sued on by the plaintiffs. They were entitled to recover thereon the amount agreed upon in such contract. If they claimed too much, the jury was not thereby precluded from awarding them less.

Even if there were technical error on the part of the court in submitting the issue of amount as made by conflicting testimony, no prejudice resulted therefrom to the defendant. The jury found the contract to be as alleged

by the plaintiffs. The plaintiffs did, therefore, recover upon the precise contract, in the terms alleged by them. The fact that the court permitted the jury to award a smaller sum, in response to the testimony of the defendant, was favorable to the defendant, and not prejudicial. If the jury had awarded a verdict for the smaller sum, there would have been some room for argument upon defendant's theory that, inasmuch as the plaintiffs had failed to recover upon the contract in the form and terms alleged by them, they should not be permitted to recover at all. The verdict of the jury for the larger amount is a complete answer to this feature of appellant's argument. The only errors urged by appellant rest upon the foregoing general proposition. The verdict of the jury is quite conclusive against him. The judgment below is, therefore,—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

A. W. SHUCK, Appellee, v. FRANK CONWAY et al.,
Appellants.

BROKERS: Purchaser on Contract Terms. Record reviewed, and held wholly insufficient to justify the court in directing a verdict for plaintiff, on the theory that plaintiff had procured a purchaser in accordance with his contract with defendant.

Appeal from Adair District Court.—H. S. DUGAN, Judge.

OCTOBER 26, 1920.

ACTION to recover for a commission for the sale of real estate. Trial to a jury, and, at the close of the testimony, the court sustained plaintiff's motion for a directed verdict against two of the defendants, Frank and Ernest, and dismissed the petition as to Faye Conway, on the ground that as to her no agency was proven, and that the evidence does

not show that either of appellants had any authority to make a contract for Faye. Judgment was entered against said two defendants for \$480, with interest from August 14, 1919, and costs. The two defendants appeal.—*Reversed and remanded.*

Carl P. Knox, for appellants.

A. M. Fagan, for appellee.

PRESTON, J.—160 acres of the 240 in controversy belonged to the two appellants, and the other 80 to their sister Faye. There was no sale of the land. The defendants would not sell unless \$14,000, or at least \$11,000, as they seemed later to be willing to take, was paid down, and the purchaser alleged to have been produced by plaintiff refused to pay either of these amounts.

The petition alleges that, in July, 1919, defendants listed with the plaintiff for sale the 240 acres described, at \$225 per acre, upon the following terms: All cash March 1, 1920, except \$10,000, which amount was to be carried by them for 10 years from March 1, 1920, upon a mortgage on the 80 acres, and to draw 5½ per cent interest; that the defendants agreed to pay plaintiff the sum of \$2.00 per acre, or \$480, if he would find them a purchaser for said farm at the above price; that, thereafter, and in July, 1919, plaintiff found a purchaser able, ready, and willing to purchase said real estate at the price and on the terms listed; that defendants refused to enter into a contract with the purchaser, Kromri. By an amendment to the petition, plaintiff alleged:

“Plaintiff alleges that the real estate described in his original petition was listed with him for sale, as therein described, and that he procured a purchaser in the person of one August Kromri, who was able, ready, and willing to purchase the real estate upon the terms therein specified, and offered to purchase the same at the price therein listed, and further offered to pay the sum of \$5,000 down,

upon the execution of the contract, and the balance of the same on the first day of the next March, which payment was more than the customary and usual payment ordinarily and usually paid upon farms of this size and of this price in said community; and that the ordinary and customary time of the payment of the balance on the sale of farms in this community is upon the first day of March following the sale; and that the plaintiff has complied with all respects in regard to the payments of procuring a purchaser upon the ordinary and customary terms of payment in said community."

The answer of defendants denied generally, but admits that defendant Ernest listed with the plaintiff the real estate described, at \$225 per acre, upon the following terms: Cash \$44,000, to be paid at such times and on such terms as might be agreeable to him, and the balance to run for 10 years, to be secured by a mortgage on part of the said land. The plaintiff's testimony does not correspond with the allegations of the petition as to what the contract was. He says that he is a rural mail carrier, and is acquainted with the defendants and their land.

"One day when it was raining, I stopped at their place for dinner, and told them I was selling some real estate, and that I believed I could sell their place, if they would list it with me, and I tried to get them to list their farm at \$210 an acre, and they said that they would list it for \$225 an acre, and, if I got them a buyer for their place at \$225 an acre, they would give me \$2.00 an acre. That is all the conversation I remember having at that time. Afterwards, I tried to sell the place, and the purchaser asked me what the terms were on the place, and I told him I guessed I had forgot part of my business; so, the next time I met the defendant Ern and his sister, and they talked it over, and I asked them what the terms on the place were, and I told them I could not very well sell the place without terms, and Ernest said he would talk it over with his brother, and let me know the next day. The next day, I talked the matter over with Ernest and Faye Conway, and

they said they would have to have cash for the quarter section, and also cash for the 80 acres, with the exception of \$10,000, which they would carry for 10 years, at 5½ per cent interest—that is all the terms they gave me, and all I asked them.”

He says that, soon after, he took defendant Ernest to Mr. Kromri, and Ernest asked Mr. Kromri if Mr. Shuck had told him the terms, and he (Kromri) says, “Yes, sir, he [Shuck] says, cash \$44,000, on the first of March, and leave \$10,000 on the 80;” and Mr. Kromri says, “Where shall we go to make out the papers?” and Ernest said, “Most any place,” and then Ernest asked Kromri if Shuck had told him they wanted \$11,000 down on the contract, and Kromri said, “No.” Then plaintiff said, “Why, Ernest, you are surely not standing there wanting \$11,000 on the contract;” and Ernest said, “Yes,” he wanted \$11,000 on the contract; and then plaintiff said this was unreasonable.

It will be observed that defendant Ernest did not say that was the contract, nor did he assent thereto; for he at once mentioned the \$11,000. It appears that the three then discussed the matter, and there were some negotiations by which plaintiff was trying to induce Ernest to accept a smaller down payment; but the evidence does not show that Ernest or any of the defendants at any time consented to take less than \$11,000 down. We do not understand the evidence to show, as contended by appellee in argument, that the defendants, or any of them, agreed to abide or be bound by what Mr. Rutt would say was a reasonable down payment. Even the testimony leaves it indefinite as to what he would consider a reasonable payment. He gives different amounts, and makes it depend on other circumstances, such as the standing of the purchaser, and other things, and finally says it would depend upon what the contract was. When plaintiff said that defendant’s terms of \$11,000 down were unreasonable, plaintiff said Kromri would give \$2,000 down, and Kromri said he would, and then plaintiff said Kromri would pay \$5,000 down on the contract, and Mr. Kromri said he would do that; but, as

said, defendants at no time agreed to take less than \$11,000 down. Plaintiff says he told Ernest that the interest on \$11,000 would amount to \$500 until March 1st, and that the buyer had no equity in the place, and that \$11,000 was unreasonable; and Ernest said he did not think it was. Plaintiff testifies further that Mr. Rutt said, in the presence of Ernest, that \$1,000 on a quarter on a contract to a responsible man was perfectly safe, and \$2,000 down was perfectly safe; but that Mr. Rutt said, "It is owing to how you make out the contract," etc.; that, after the conversation, Ernest said, "I am going to stick for the \$11,000," and then plaintiff said to Ernest:

" 'It is immaterial to me, if you think your land is worth \$250 an acre. All I am working for is the commission, and if you want to raise the land to \$250 an acre, and stick for the \$11,000, that is your business. All I care for is the commission.' Ernest said that they were figuring on buying, if they sold, and that they would have to pay \$15,000 down on their contract on the land they were wanting to buy, which was the reason he wanted so much down on the deal with Kromri. We were trying to convince Conway that the amount he was asking down was unreasonable. The reason I tried to talk Ern out of the \$11,000 was, I was satisfied it would knock me out of the sale of the land, if Mr. Conway didn't take a reasonable amount on the contract. The purpose of the visit to Rutt with Ern was to convince him that he was asking an unreasonable amount in cash."

Afterwards, plaintiff says he talked with defendants as to whether they were going to pay the commission, and they said they thought they did not owe any commission; that they claimed the right to name the amount paid down on the contract. At the very last of plaintiff's testimony, on recross-examination, and after he had been recalled, he does say:

"Q. Let us see what your claim is, whether you had authority to sell that land at \$225, either with the customary amount down in cash or \$11,000 down in cash, or all

of it in cash. A. The terms that Mr. Conway gave me was \$225 an acre for the land. I was to sell it for cash, except \$10,000 which was to be carried back in the 80 acres, payable the first of March. Q. Who said, payable the first of March? A. The boys."

The latter part of his first answer is in the nature of a conclusion, without stating what was said, as he had before stated. But he also said:

"Q. Now did they, or either or any of them, at any time up to the time and after the time that Mr. Kromri had said that he would take it, had they ever, at any time, asked the payment of any amount on the contract? A. No, they did not say anything to me at all, never mentioned any kind of terms, except the ones they gave me in the first place."

And he had already testified in chief, and in the fore part of his testimony, as to all that was said, and as we have before set it out. It seems that, during later negotiations, Kromri was willing to pay \$44,000 March 1st, and give a \$10,000 mortgage; but under no version of the testimony of any of the witnesses, much less the testimony of plaintiff, can it be claimed that that was the contract made between plaintiff and defendants, or the terms upon which plaintiff was to procure a purchaser, in order to earn his commission. Plaintiff seems to now claim that such was the contract, but plaintiff's own evidence does not so show. It is admitted that Kromri was financially able to meet an obligation of \$44,000 on March 1, 1920. Mr. Rutt gives the conversation between plaintiff and Ernest substantially as before set out in the testimony of plaintiff. The testimony of Kromri need not be further referred to. It is similar to that before set out in plaintiff's evidence, in so far as it pertains to him. Ernest Conway says that they never listed the land with Shuck with the agreement that he could sell it without the payment of any money down; that he told Kromri, when he asked for the terms, that they wanted \$11,000 down on the contract, and that his sister would leave \$10,000 in the 80. Kromri did not say very

much about the payment of the \$11,000, but Shuck said considerable: said it was too much; that, the only land they had ever bought, they had to pay more than 10 per cent down, and that there was so much land changing hands, he thought 10 per cent was not enough to make things safe; that land was going up, and there were many deals coming off in the spring, and someone would be short of money: and Shuck said he was unreasonable in asking that amount down. Doesn't think he would make a deal for the first of March, if he could do it at any other time, because it is too hard to borrow money then; says he never made deals, and did not know that it was customary to make the transfer of possession March 1st; thinks more are given the first of March than at other times; says that, in listing the land with Mr. Shuck, there was nothing said about the cash payment, at the time the contract was made; nothing said about that. Frank Conway says he never listed the 240 acres or any part of it with Shuck; knew it was listed through his brother, but didn't know how until afterwards; considers anything that was done by his brother would be binding on him, but as to whether it would be binding on his sister, did not know; never gave his consent for his brother to list the land and sell it without the payment of any money down on the contract. At the close of the testimony, plaintiff filed his motion for a directed verdict, as follows:

"1. That the undisputed evidence herein shows that the listing of this farm in controversy by the defendant with the plaintiff, and the undisputed testimony shows that the plaintiff procured a purchaser able, ready, and willing to purchase the same upon the terms listed.

"2. That the preponderance of the testimony shows that plaintiff has complied with the terms of the listing of the real estate for sale, and has procured a purchaser ready, able, and willing to purchase upon the terms listed; and that a verdict for the defendant in this case would be contrary to the preponderance of the same."

The court stated that he considered the motion good, if

plaintiff's pleadings were in shape, and thereupon, plaintiff amended, setting up the custom, and the motion was sustained. A part of the motion seems to be upon the theory that it was for the court to determine what the preponderance of the evidence shows. We are unable to see any theory of the evidence upon which the court could direct a verdict for the plaintiff. We do not quite understand the theory of the court in directing a verdict for \$480, after he had held that there was no evidence of agency to bind the sister as to her 80 acres. This would leave but 160 acres, and, at \$2.00 an acre, would not amount to \$480.

But aside from all this, plaintiff's own testimony shows, in one place, that there was nothing whatever said, when the property was listed, as to the terms of payment: that is, as to the amount that was to be paid down, or in regard to deferred payments. He concedes that that was a part of his business which he had forgotten. When the contract is silent as to such matters, we understand the rule to be that it means a cash sale. It was so held in *Sanden & Huso v. Ausenhuis*, 185 Iowa 389; *Staten v. Hammer*, 121 Iowa 499, 501; *Anderson & Rowley v. Howard*, 173 Iowa 4, 14. There is no pretense in his own evidence or anywhere in the evidence that plaintiff secured a cash purchaser, and the evidence for the defendant shows, without dispute, that there was no agreement to sell the land without any down payment. Defendant's evidence also shows that, at the time the property was listed, and in the contract as originally made, there was nothing said about the terms. Again, it appears from plaintiff's own testimony, before set out, that, when plaintiff asked what the terms were, they told him they would have to have cash for the quarter section and cash for the 80 acres, with the exception of \$10,000; and he says, "That is all the terms they gave me." Plaintiff says nothing here about different payments being March 1st, so that, thus far, under plaintiff's own evidence, it was either a cash sale, because the terms were silent, or it was a cash sale by which there was to be a payment of \$44,000 down, and a mortgage for \$10,000 for the balance. Con-

cededly, plaintiff did not find a purchaser on those terms. It appears, then, that defendant was either entitled to all cash, or \$44,000 cash. If, as it appears, he was willing to waive either of those amounts down, and accept \$11,000 instead, he was within his rights. Concededly, plaintiff did not furnish a buyer who was willing to pay even \$11,000 down. Clearly, if defendant was entitled to all cash, or \$44,000 in cash, he would be entitled to demand \$11,000. Defendant's demand for a payment of \$11,000 was in response to plaintiff's question as to what the terms were. Even though defendant might be held bound to accept the \$11,000, the most that plaintiff could claim, under the circumstances, would be that the cash payment was to be \$11,000, and that such was the contract. This being so, we are unable to see how the question of custom cuts any figure.

Without further discussion, the trial court was not justified, under any theory of the evidence and the pleadings, to direct a verdict for the plaintiff. At the most, it was a question for the jury to say what the contract was, as to the terms and time of payment. It follows that the judgment of the district court must be and it is reversed, and the cause remanded.—*Reversed and remanded.*

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

STATE OF IOWA, ex rel. Anna Erdahl, Plaintiff, v. DISTRICT COURT OF O'BRIEN COUNTY et al., Defendants.

VENUE: Arbitrary Right to Change. A defendant sued in a 1 county which is not the county of his residence, but which is the county in which his written contract is performable, has an *absolute* right to a change of venue to the county of his residence, when he files (1) a sworn answer properly alleging fraud in the inception of the contract, as a complete defense, and (2) a bond to cover costs, in case he is unsuccessful on the trial. (Sec. 3505, Par. 6, Code Supp., 1913.)

VENUE: Fraud as Ground for Change. The appellate court, in 2 matters properly before it, will not pass on the technical sufficiency of an answer as a good pleading of fraud as a basis for change of venue, when plaintiff has not seen fit to question the sufficiency in the trial court.

CERTIORARI: Refusal to Grant Change of Venue. Certiorari will 3 lie to review the refusal of the trial court to grant a change of venue to the county of defendant's residence on the ground of fraud in the inception of the contract sued on, proper answer and bond having been filed as provided by law. Appeal in such case after trial in the wrong county affords no adequate remedy.

VENUE: Fraud and Forgery as Basis for Change. A defendant 4 who pleads fraud in the inception of the written contract sued on, as a basis for change of venue to the county of his residence, is none the less entitled to said change because he also pleads forgery or alteration of the contract.

VENUE: Indorser of Fraud-Induced Contract. Indorsers of a 5 written contract, sued in the county where the maker had contracted for performance, and being residents of the county of which the maker is a resident, may, in common with the maker, who is likewise sued, join in the maker's plea of fraud in the inception of the contract, and will, on the filing of the statutory bond, be entitled, equally with the maker, to a change of venue to the county of their residence. (Sec. 3505, Par. 6, Code Supp., 1913.)

Certiorari to O'Brien District Court.—WILLIAM HUTCHINSON, Judge.

OCTOBER 26, 1920.

PROCEEDINGS in certiorari, to test the legality of the action of the district court in refusing a change of venue to the relator, pursuant to Section 3505, Subdivision 6, of the 1913 Supplement, in an action brought against the relator, as defendant therein, in O'Brien County, the relator being a resident of Winnebago County.

John F. D. Meighen, Bennett O. Kindson, and Thomas A. Kingland, for plaintiff.

O. H. Montzheimer, for defendants.

EVANS, J.—I. The relator, Erdahl, was sued upon a promissory note, drawn payable in O'Brien County. She filed an answer therein, setting up as a defense that the note was obtained from her by false and fraudulent representations. At the same time, she filed an application for a change of venue to the county of her residence, pursuant to the provisions of Subdivision 6, Section 3505, of the 1913 Supplement. Her application for a change of venue having been denied, she has brought these proceedings. Section 3505, Subdivision 6, is as follows:

1. VENUE:
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change.

"In an action brought on a written contract in the county where the contract by its express terms is to be performed, in which a defendant to said action, residing in a different county in the state, has filed a sworn answer alleging fraud in the inception of the contract constituting a complete defense thereto, such defendant, upon application and the filing of a sufficient bond, may have such action transferred to the district court of the county of his residence. If upon the trial of the action judgment is rendered against the defendant, it shall include the reasonable expenses incurred by the plaintiff and his attorney, on account of change of place of trial, as part of the costs. The bond above referred to shall be with sureties to be approved by the clerk, in an amount to be fixed by the court or judge in vacation for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other to which it may be carried, either to the plaintiff or to the officers of the court."

This subsection constitutes an amendment to the original statute pertaining to change of venue. It is directed to a particular class of litigation. It is a matter of general observation that written contracts are not infrequently obtained by means of fraudulent representations and other guile, and that such contracts, when so obtained, are usually made payable at some place remote from the maker's

residence. The result is that the innocent maker, as such, finds himself at a discouraging disadvantage, in that he is compelled to submit to the wrong, or else to defend in a remote county. Such requirement becomes a lever of oppression in the hands of the wrongdoer. The general rule of the statute was and is that personal actions must be brought against residents of this state in the county of their residence. The general exception to this general rule is that a defendant may be sued upon a written contract where payable. The purpose of the amendment above quoted is to withhold such exception from a written contract, where there is a good-faith issue of fraud in the inception of the transaction. In order to insure such good faith, it requires that the facts constituting the alleged fraud shall be set forth under oath, and that bond be given for costs, including expenses of plaintiff and his attorney in attending at wrong county, if the defense fails.

The relator filed her answer, purporting, at least, to comply with the requirements of the statute, and setting forth the purported defense on the ground of fraud in the inception of the contract. She also tendered her bond. Two questions naturally arise:

(1) Did the trial court err in refusing her application for a change of venue?

(2) Will certiorari lie to correct such error?

The ground upon which the court denied the application does not appear in the record. We can only surmise that the distinguished trial judge acted under the impression that he had a discretion in the matter, as provided by Subdivision 3 of Section 3505. We deem it clear, however, that the discretion provided in Subdivision 3 has no application to Subdivision 6. The right of the relator to a change of venue, upon compliance with the requirements of said Subdivision 6, is mandatory. It follows that it was error to deny such application. Indeed, the burden of attack for appellees is directed to the second question, and not to the first, and we turn thereto.

Was the ruling of the court denying the application for

a change of venue a mere error, or did such denial amount to an illegality, within the meaning of the statute, which may be corrected upon certiorari? If yea, was there any other speedy and adequate remedy to the relator?

Some attack is made by appellee upon the sufficiency of the answer set up by the relator. We will not scrutinize the answer to the same degree that we would upon a motion

or demurrer attacking the sufficiency of the same. The sufficiency of the answer was in no manner attacked in the court below, and we think that the appellee should not

2. VENUE: fraud as ground for change. be permitted to attack it indirectly by mere argument here, in the absence of attack below. The answer purported to set up the very defense described in Subdivision 6. It charged the fraudulent representations, and purported to set the same out. Whether these allegations are sufficiently specific, or whether they charge legal conclusions to an undue degree, are proper questions for the consideration of the district court, upon the settling of issues. Without passing, therefore, upon the perfection of the answer as a pleading, or upon the question whether it is vulnerable to any attack, we only say now that it was sufficient, at least in the absence of attack, to entitle the relator to the change of venue asked for.

It is urged that the relator had speedy and adequate remedy by appeal, and that for that reason certiorari was not available to her. She had no right of appeal from the

order of denial. She could not obtain a re-
3. CERTIORARI: refusal to grant change of venue. view thereof by appeal, except by appeal from an adverse final judgment. Is such an appeal an adequate remedy? Does it

meet the spirit and purpose of the amending legislation? The question is fairly ruled by our previous cases; and these are comparatively recent. *Chicago, B. & Q. R. Co. v. Castle*, 155 Iowa 124; *Corn Belt Tel. Co. v. Superior Court of Oelwein*, 180 Iowa 985; *Atchison, T. & S. F. R. Co. v. Mershon*, 181 Iowa 892.

Unless we are ready to overrule these cases, it must be

held that certiorari will lie herein. As against these cited cases, appellee relies upon *Barry v. Black Hawk County Dist. Court*, 167 Iowa 306. That this latter case, in its discussion, is out of harmony with the other cases, must be conceded. The result in that case could well have rested upon the delay and default of the relator, in failing to file his application until after many continuances. The discussion in the opinion, however, does sustain the contention of appellee. The *Castle* case was referred to therein and distinguished, the distinction being that the illegality in the *Castle* case consisted of imposing unwarranted conditions upon the order granting a change. Imposing unwarranted conditions, however, amounted to a denial of the change, and this is why it was illegal. We think the reasoning of the *Barry* case at this point is not quite sound. The case should be deemed overruled, as to its reasoning, by our later cases.

Following our first-cited cases, we hold that the right to a change of venue was mandatory, and that, upon an erroneous refusal to grant it, certiorari will lie, in advance of trial, there being no other speedy and adequate remedy.

If, under the statute, the granting of a change of venue rested in any degree upon the discretion of the district court, a very different question would be presented. Where change is applied for under Subdivision 3 of Section 3505, such discretion is involved. In such a case, we have held that the remedy of the aggrieved party is by appeal.

II. Up to this point, we have confined our discussion to one case, and have omitted all reference to any other. In fact, 14 cases have been submitted to us upon the same set of printed matter. In the main, they all turn upon the same decisive question. Ten of them are identical in their controlling facts with the case considered in our foregoing division. These appear upon our docket under the following numbers, respectively: 33452, 33453, 33454, 33455, 33456, 33457, 33458, 33462, 33463, 33464. Other questions are involved in the other four cases. We find the record in

some confusion as to the particular case in which these other questions arise.

It appears that, in each of two of these cases, a defense of forgery or alteration of the instrument was set up. It is urged that such defense does not bring the case within

Subdivision 6, Section 3505, and does not entitle the applicant to a change of venue. If this were the only defense set up, there might be merit in this contention. This is

only *one* defense in each case. Each case sets up, also, the defense of fraudulent representations, which we have already considered in the first division hereof. That is sufficient to entitle the relator to a change. That right is not impaired by the fact that she claims, also, other defenses.

It appears, also, that, in one of the cases, indorsers were joined as defendants. These also were all residents of Winnebago County. The maker of the note set up the defense

of fraudulent representation, and asked for a change of venue, in the same manner as set forth in Division I hereof. That is to say, so far as the maker is concerned, his case is identical with the case considered

in Division I. The indorsers presented two applications for a change of venue. The first was filed before answer, and was predicated upon the general statute regulating changes of venue, and not upon Subdivision 6. The general ground of that application was that, as residents of Winnebago County, they were entitled to a change of venue to such county, because the action was a personal one against them, and because they were not bound by the provision on the face of the note, making the same payable in O'Brien County. This application being denied, the indorsers answered, and, in effect, joined with the maker in the defense set up by him. They thereupon filed an application for a change of venue, under Subdivision 6, Section 3505, above quoted. Whether these indorsers were entitled to a change under their first application, we will not consider. The

4. VENUE:
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5. VENUE: in-
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situation presented by their second application was that all the defendants, maker and indorsers, were before the court, with the same defense of fraudulent representations in the inception of the contract; all were shown to be actual residents of Winnebago County; and all were asking for a change of venue to that county. We see no impediment to the granting of the change as to all of them, nor any valid reason for refusing the same. The various writs of certiorari are each and all, therefore, sustained, and the order of the district court refusing the change of venue is annulled, with direction to the court in each case to grant the same.—*Annulled*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

WILLIAM H. WATLAND et al., Appellees, v. F. L. Good, Appellant.

TRUSTS: Trustee's Power to Lease. A testamentary trustee, though invested with legal title, and in actual possession and occupancy of the property with the consent of the trust beneficiaries, and though the property be a homestead, may not, in the absence (1) of necessity therefor and (2) of the consent of the trust beneficiaries, and especially after the trust period has expired and the right to distribution among the beneficiaries has matured, execute a valid lease of the trust property, either in an individual or a trust capacity.

Appeal from Woodbury District Court.—W. G. SEARS, Judge.

OCTOBER 26, 1920.

ACTION in equity, by the heirs of Osman Watland, deceased, and by his widow and sole surviving trustee, under the will of said Osman, against defendant, to cancel a certain written lease made between Mary Watland and

defendant, on the ground that the widow had no authority to execute the lease, because made after the termination of the trust, and without the consent of the heirs. Plaintiffs further allege that she was induced to execute the lease by the fraudulent pretense by defendant that the optional clause for renewal was in her favor, and that defendant has claimed and still claims the right to renew said lease at the end of each six months. The widow, as trustee, also asked that she be authorized to distribute the property by making deeds to the heirs. An injunction was prayed, to enjoin defendant from dispossessing the widow of a part of the premises occupied by her, and for general equitable relief. There was a decree for plaintiff, as prayed. Defendant appeals.—*Affirmed.*

E. E. Wagner, for appellant.

Carter & Carter, for appellees.

PRESTON, J.—Deceased left other property, which had been disposed of, under the provisions of the will, about six years before,—at least, it is not in controversy in this case. The property in controversy is a ten-room residence in Sioux City, which was the homestead of deceased and his family, prior to his death, and was occupied as such by the widow and perhaps some of the children, for a time. At the time of the death of the testator, some of the children were minors, and, at the time of the trial, Mary Watland, the mother, was guardian for one of them. The lease covered the entire property, and the rental was \$45 per month, but the widow desired to retain three rooms, because she was there alone, and needed someone in the house: and it was orally arranged that she should pay defendant \$20 per month in the summer and \$25 in the winter therefor, or the rent reduced that much. The widow and one Elliott were made trustees under the will. Elliott died before the lease in question was made. The lease was not executed or signed by the widow as trustee or guardian, but individu-

ally. She was in possession under the circumstances before indicated. The lease was renewed, from time to time, for six-month periods, as provided in the lease, by defendant's giving notice thereof, as required. Later, the defendant served notice on the widow of his intention to terminate her occupancy of the three rooms. Soon thereafter, this suit was brought. At the time the lease was made, some of the children lived at a distance, or were temporarily absent from the state; others were in the army. They did not know of the execution of the lease by their mother, and did not consent thereto. After the execution of the lease, some of them knew by correspondence, or otherwise, that someone was occupying a part of the house, but did not know there was a lease. One of the plaintiffs says he first saw the lease about July or August, 1919, after he had returned from the war in May, when his mother thought her copy of the lease was lost, and defendant submitted a photograph of his copy, defendant refusing to produce his original; that he disapproves of the lease, and is demanding his share of the property; that he is kept out of it by the occupancy of defendant. Others of plaintiffs' witnesses give similar testimony. The lease was executed after the eight-year trust period in the will. The heirs, or some of them, were willing that the mother should occupy the premises as her homestead, for a time at least, or until she got the children through high school. There is evidence tending to show that the rental value of the property was \$75 to \$100 per month, and that the small rent paid was used to keep up the property, which was not self-sustaining. The widow testifies that she intended to sell the property, and that she told defendant that, if the war closed, and her boys came home, she wanted to sell the property, and would not tie it up for any great length of time, not more than six months at a time; that defendant told her she could sell it just the same, notwithstanding the lease. Testator died June 27, 1906, and his will was executed the day before, which provides, among other things:

"I give devise and bequeath all my property of every

kind and character, real, personal and mixed, to my wife, Mary J. Watland, and my son-in-law, John Elliott, to be held by them in trust for the term of eight years from the date of my decease, but with full and complete power of disposal and substitution, or reinvestment according to their judgment for the following purposes:

"I have eight children, all equally dear to me, and of about the ages following: Jesse M. Watland, 30 years old; Mrs. Bessie Elliott, 27 years old; Elsie M. Watland, 24 years; William H., 15 years old; Maurice O., 14 years old; Walter K., 10 years old; Frances L., 8 years old, and Ralph C., 5 years old. I desire that my property shall be held by said trustees for said term of eight years, and the income thereof applied to the support of my said wife and minor children, and the education of my said minor children, to the end that my said minor children shall, as nearly as may be, have the same advantages that my older children had during their minority; and at the end of said term of eight years I will and desire that my property shall be distributed to my wife and all my children in the same manner and proportions as by law provided as if no will had ever been made, that is, to my wife, one third, and the remaining two thirds to my said children in equal parts: provided if any of my said children shall have deceased at that time without issue then the property shall go in equal parts to the surviving children, but if any of my said children shall have died leaving issue then such issue shall take the part that would otherwise have gone to the parent if living; and when such distribution shall have been made the property received by each shall be held to such distributee and to his or her heirs forever in fee.

"3. If at any time the income from my said property shall prove insufficient for the comfortable support of my said wife and minor children, and the proper education of my said minor children according to the judgment of my said trustees then said trustees are thereby directed and empowered to dispose of such portion of said property as may be necessary from time to time for such support and

education; and if at any time my said trustees should deem it for the best interest of my estate that any portion of my property should be disposed of and the proceeds re-invested, in other property, then they shall have the right and power to dispose of such property, giving good and perfect title thereto by their joint deed, as such trustees without the order of court therefor, and the title of the property so conveyed shall not be affected in the hands of the grantee by any acts of said trustees in handling the proceeds thereof."

The will also makes the parties named as trustees, the executors.

The lease, executed June 1, 1918, provides, among other things, in addition to provisions before referred to:

"It is further agreed by the party of the first part that party of the second part, or his legal representatives can underlet said premises or any part thereof, or assign this lease without the written assent of the party of the first part had hereto.

"And it is further covenanted and agreed, between the parties aforesaid that lessee has the privilege of further renewals of this lease for similar periods of six months each at the same terms at his option, not to exceed six in all, by giving notice to lessor thereof one month before the expiration of the preceding period."

The notice given defendant to require plaintiff to vacate the three rooms by August 1st, was given June 23, 1919. This suit was brought in August, 1919, so that there would be about 2½ years to run, if defendant renewed six times. The testimony of defendant as to the conversations is somewhat different from that of plaintiffs, but not materially so. He says that Mrs. Watland became hysterical, when he served notice on her to vacate, and that she said she was a widow and that, her boys being away, he had taken advantage of her, and that she asked to be released, which he refused to do.

The principal contention of appellant, as we understand it, is that Mrs. Watland had authority to make a binding

lease, because, as they say, under the will, she, as sole surviving trustee, was vested with the title in fee; and that, because it was the homestead and she was in possession, with the knowledge, consent, and acquiescence of plaintiffs, they cannot say that the mother did not have authority to make the lease. He complains, also, that the court erred in authorizing the trustee to distribute and divide the property, and execute deeds therefor.

1. Briefly, as to the occupancy by the widow as her homestead, appellant cites Code Section 2985, and *Floyd v. Mosier*, 1 Iowa 512.

It is said in the *Floyd* case that, under the statutes then in force, the surviving husband or wife has a right to continue the possession and occupy the homestead until it is otherwise disposed of, according to law; and that, if there is no survivor, then it descends, in the absence of a will, to the issue, etc. That was an action by the widow to recover rent for a part of the 40 acres which she had rented to the defendant. To the same effect, see *Fehd v. City of Oskaloosa*, 139 Iowa 621, 624.

In the instant case, doubtless, as between plaintiff and defendant, she could maintain an action for rent for the time defendant actually occupied the premises, under the lease signed by her, for the reason that the tenant may not deny the landlord's title. But it does not follow that the heirs are bound by a contract by her, contrary to the will, without their authority, and without their knowledge or consent. In the *Floyd* case, there was no will. The real question in the *Floyd* case was as to the competency of children to testify. In the instant case, there is no claim that the widow had elected to take her homestead rights, or distributive share. She was claiming only under the will. Incidentally, it appears that the property had been the homestead, prior to the death of the testator, and that she occupied it during the trust period of eight years, and that the children permitted her to use the property, or a part of it, for a time thereafter, but that there was no agreement by them that she should occupy it for any

definite time after the eight years; so that, after the eight-year period, they had the right to demand a division of the property, according to the terms of the will.

2. To sustain the contention that, under this will, Mary Watland took the title in fee, appellant cites *In re Estate of Petranek*, 79 Iowa 410; *Olsen v. Youngerman*, 136 Iowa 404; *Potter v. Couch*, 141 U. S. 296 (35 L. Ed. 721). The *Petranek* case was an action to remove two persons alleged to have been trustees, and the holding was that persons to whom money is bequeathed, but who are charged with the duty to use it for the benefit of others, are, considered in their relation to the testator and the will, legatees, but, considered in their relation to the beneficiaries of the property, they are trustees, and as such, upon their refusal to act, they may be removed by the court, etc. That has little, if any, bearing here, since this will names the persons as trustees. In the *Olsen* case, the holding was that a court of equity, under some circumstances, has power to dissolve a trust before the expiration of a term for which created; but in that case, where the bequest was to trustees, with absolute control and power of disposition, the income from which was to be paid, part to the donee and the balance to his children, and, upon the death of the donee, any portion then remaining was to go to his children, or the survivor of them, the trust was an active and existing trust, which would not be terminated prior to the death of the donee. In the *Potter* case, a trust was created for 20 years after the death of the testator. The specific provisions of the will are too long to set out herein, but the holding was that the legal title vested in the executors, and did not terminate at the end of 20 years from the death of testator, but continued in them until they had, by sale or otherwise, settled the estate and made the division and conveyed the shares. We do not understand appellees to contend otherwise, nor do they contend that the legal title is not in the trustee. Indeed, in the present case, the heirs ask that the mother, as trustee, be required to divide the property and execute deeds, and she, as trustee, asks

that she may do so. True, the title vests in the trustee, coupled, however, with a trust. Mrs. Watland, who, alone and as an individual, executed the lease, did not, as an individual, take the fee-simple title. Appellees do contend that a lease after or beyond a period of the trust, in the absence of equitable circumstances or necessity, is void as to the excess period of time beyond the expiration of the trust (citing *Hubbell v. Hubbell*, 172 Iowa 538; *In re Hubbell Trust*, 135 Iowa 637). The cases are not quite in point, perhaps, because, in that case, the lease was for 99 years, which would extend unreasonably beyond the period of the trust. Some of the rules, however, governing trust estates are given, one of which is that trustees may lease, for such reasonable terms as are customary and essential to the care of and to procure a reasonable income from the property. In the instant case, the income going to the estate and the heirs was much less than its worth, and practically nominal. Another rule is that such terms should not, save on showing of reasonable necessity to effectuate the purposes of the trust, extend beyond the period the trust is likely to continue. In the instant case, there was no necessity for continuing the trust beyond the eight years. Another of the rules is that, only upon a showing of such reasonable necessity, when not given such power by the instrument creating the trust, are the trustees authorized to bind the estate so as to effectually deprive those ultimately entitled thereto, of the property itself. As said, there is no reasonable necessity in this case, and the trustee was, therefore, not authorized to bind the estate, and deprive these heirs of the property. Under this record, it would be detrimental to them to continue it. It was the duty of the trustee to act for the best interests of the heirs. The testator had some purpose in fixing the trust period at 8 years. Doubtless, one reason was that some of his children were very young. But whatever his reason, he had a right to so provide. At the end of the 8 years, the children had a right to demand a division; and, even though they did not do so immediately at the expira-

tion of the 8 years, they had a right to do so at any time thereafter. Equity regards that as done which ought to be done. If a trustee fails in this respect, the court will do it for them. We think the trustee, had she been attempting to act as such, instead of individually, had no authority to tie up a division of the property to the disadvantage of the heirs, indefinitely or for a term of years. The provisions of the lease seem to be all in favor of the defendant. It provides that he may assign the lease, and sublet the premises without her consent. Under this, he could, if the lease is valid, sublet the premises at a greatly increased rental, and thus speculate to the disadvantage of the heirs. The evidence shows that the rental values did increase after the execution of the lease. Again, the lease provides that there may be six renewals, or, in all, $3\frac{1}{2}$ years. If the number of renewals was not limited, the lease could be continued indefinitely. If the trustee could tie up the property for $3\frac{1}{2}$ years, why could she not do so for a much longer period, or indefinitely? The lease does not purport to have been made by Mrs. Watland as trustee or guardian, or in any capacity except as an individual. We think, then, that in so far as it is claimed that the heirs are bound by Mrs. Watland's act as trustee, they are not bound.

3. We are of opinion, too, that, under the record, the heirs are not bound by the act of their mother as an individual. We have seen that, though she was using a part of the property as her home, she was not claiming or acting under any homestead right. Appellees contend that the widow and children were tenants in common, and that a lease by one tenant in common of the entire estate is void as to cotenants (citing authorities). Appellant's answer to this is that, assuming that they are cotenants, the mother, in leasing the property, acted with the knowledge, consent, and acquiescence of the heirs, and that, therefore, they are bound. Enough has been said to show that the heirs did not have such knowledge, and that they did not consent to or acquiesce in the making of the lease. The

evidence is not sufficient to create an estoppel against the plaintiffs.

Appellant complains of that part of the decree authorizing the trustee to execute deeds, and divide the property. This does not concern him, if he did not have a lease binding upon the heirs. Under the will, it was the duty of the trustee to do so, and no reason is shown why the distribution or division should be longer delayed. We approve the decree of the district court, and it is—*Affirmed*.

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

WICKHAM & BURTON COAL COMPANY, Appellant, v.
FARMERS LUMBER COMPANY, Appellee.

CONTRACTS: Want of Mutuality. An agreement relative to the sale and purchase of a commodity at a specified price and for a specified time, which leaves the purchaser with the option to purchase much or to purchase little or not to purchase at all, is void for want of mutuality, and mutuality is not supplied by the act of the seller, in complying with *some* of the orders. So held where the agreement was to deliver such carload shipments of coal "*as defendant would want to purchase from plaintiff*."

Appeal from Webster District Court.—R. M. WRIGHT, Judge.

OCTOBER 26, 1920.

COUNTERCLAIM asserting that damages were due from plaintiff because of a contract made between plaintiff and defendant. A demurrer to the counterclaim was overruled. Hence this appeal.—*Reversed*.

Frank Maher, for appellant.

E. H. Johnson, for appellee.

SALINGER, J.—I. The counterclaim alleges that, about August 18, 1916, defendant, through an agent, entered into an oral agreement “whereby plaintiff agreed to furnish and to deliver to defendant orders given them” for carload shipments of coal from defendant F. O. B. mines, “to be shipped to defendant at such railroad yard stations as defendant might direct, at the price of \$1.50 a ton on all orders up to September 1, 1916, and \$1.65 a ton on all orders from then to April 1, 1917.” It is further alleged that “said coal ordered would be and consist” of what was known as plaintiff’s Paradise 6” lump, 6x3” egg, or 3x2” nut coal. It is next alleged that defendant has, for several years last past, been engaged in owning and operating what is commonly known as a line of lumber yards, located at different railroad station points tributary to Fort Dodge, where defendant has its principal place of business; that, at these several lumber yards, among other merchandise and commodities the defendant handles coal in carload lots, with purpose of selling the same at retail to its patrons.

Then comes an allegation that the agent made oral agreement “that plaintiff would furnish unto defendant coal in carload lots; that defendant would want to purchase from plaintiff” on stated terms, with character of the coal described; and that the oral contract was confirmed by the letter Exhibit 1. It is of date August 21, 1916, and recites that plaintiff is in receipt of a letter from their agent, “asking us to name you a price [repeating the price and coal description found in the counterclaim]. Although this is a very low price, our agent, Mr. Spalding, has recommended that we quote you this price and we hereby confirm it. Any orders received between now and September 1st are to be shipped at \$1.50. We would like to have a letter from you accepting these prices and if this is satisfactory will consider same as a contract.”

On August 26, 1916, the defendant responded:

“We have your favor of the 21st accepting our order for coal for shipment to March 31, 1917.”

The basis of the counterclaim, so far as damages are concerned, is the allegation that a stated amount of coal had to be purchased by defendant in the open market at a greater than the contract price, and that, therefore, there is due the defendant from the plaintiff the sum of \$3,090.

The demurrer asserts that the alleged contract is "void for failure of mutuality and certainty;" is void because there is no consideration between the parties; because it appears affirmatively that the offer was simply an offer on part of plaintiff, which might be accepted by giving an order until such time as it was actually withdrawn or expired by limitation, each order and acceptance of a carload lot constituting a separate and distinct contract; and void because the agreement could not be enforced by the plaintiff on any certain or specified amount of tonnage, or for the payment of any specified tonnage.

II. The demurrer makes, in effect, three assertions: (a) that the arrangement between the parties is void for uncertainty; (b) that it lacks consideration; (c) that it lacks mutuality of obligation. We have given the argument and the citations on the first two propositions full consideration. But we conclude these first two are of no importance if mutuality is wanting.

The authorities that deal with uncertainty and indefiniteness hold, in effect, that whatsoever is ascertainable with reasonable effort is sufficiently certain to be enforced, if there be no objection to enforcement other than uncertainty. Now, grant that it was not difficult to ascertain how much coal defendant would sell in the time stated in the negotiations, how does that help, if there was no obligation on one side to sell, or on part of the other to buy? If the defendant was under no binding obligation to buy of plaintiff, it does not matter how much defendant could sell. In fewer words, though an offer to sell a specified number of tons of coal is not uncertain, or lacking in definiteness, such offer is no contract, unless the other party agrees to receive what is offered. In still fewer words, while a writing may be so uncertain as not to be enforceable,

a perfectly definite writing may still be unenforcible because there is no mutuality of obligation.

2-a

And the asserted lack of consideration is bottomed on the claim that mutuality is lacking. Appellant does not deny that a promise may be a consideration for a promise. Its position is that this is so only of an enforceable promise. That is the law. If, from lack of mutuality, the promise is not binding, it cannot form a consideration. *Bailey v. Austrian*, 19 Minn. 535. To like effect is *Walsh v. Myers*, 92 Wis. 397 (66 N. W. 250), which holds there *was* consideration, because there were mutual promises which were enforceable. And so of *Young Co. v. Springer*, 113 Minn. 382 (129 N. W. 773); *Hazlehurst Lbr. Co. v. Mercantile L. & S. Co.*, 166 Fed. 191; *Chicago & G. E. R. Co. v. Dane*, 43 N. Y. 240, at 242. There is no consideration by promises which lack mutuality. *Cold Blast Trans. Co. v. Kansas City Bolt Co.*, (C. C. A.) 114 Fed. 77, at 81, 82; *Campbell v. Lambert & Co.*, 36 La. Ann. 35. In the last-named case, it is said that, while a promise may be a good consideration for another promise, this is not so "unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement" (citing 1 Parsons on Contracts 448). To the same effect are *Utica & S. R. Co. v. Brinckerhoff*, 21 Wend. (N. Y.) 139; *Missouri, K. & T. R. Co. v. Bagley*, 60 Kans. 424 (56 Pac. 759, at 762); *Tucker v. Woods*, 12 Johns. (N. Y.) 190; *Corbitt & Macleay v. Salem Gaslight Co.*, 6 Ore. 405; and 1 Chitty on Contracts (16th Ed.) 297.

The question of first importance, then, is whether there is a lack of mutuality. In the last analysis, the counter-claim is based on the allegation that plaintiff undertook to furnish defendant such described coal "as defendant would want to purchase from plaintiff." The defendant never "accepted." Indeed, it is its position that it gave orders, and that plaintiff did the accepting. But concede, for argu-

ment's sake, that defendant did accept. What was the acceptance? At the utmost, it was a consent that plaintiff might ship it such coal as defendant "would want to purchase from plaintiff." What *obligation* did this fasten upon defendant? It did not bind itself to buy all it could sell. It did not bind itself to buy of plaintiff only. It merely "agreed" to buy what it pleased. It may have been ascertainable how much it would need to buy of someone. But there was no undertaking to buy that much, or, indeed, any specified amount of coal of plaintiff. The situation is well stated in some of the cases. In *Crane v. Crane & Co.*, (C. C. A.) 105 Fed. 869, at 872, it is put thus:

"Should the contract under discussion be upheld, the plaintiffs in error would be held to occupy this advantageous situation: If the price of dock oak lumber rose, they would, by that much, increase their ratio of profits, and probably, coming into a situation to outbid competitors, increase, also, the quantum of orders. If, on the other hand, prices fell below the range of profits, the orders could be wholly discontinued. On the contrary, the situation of the defendant in error would be this: Should prices fall, it could not compel the plaintiffs in error to give further orders; but, should prices rise, the orders sent in would be compulsory, and the loss measured, both by the increase of the ratio of profits, and the probable increase of the quantum of orders."

In *American Cotton Oil Co. v. Kirk*, 68 Fed. 791, 793, it is said:

"If the market price of oil should fall below the contract price, then, according to their contention as to the terms of the contract, the plaintiffs could purchase their supply of oil elsewhere, and at the lower price, resorting to the contract when, and only when, the price stated was lower than the market price,—and this without respect to time. Such a contract is one-sided, and without mutuality."

The "contract" on part of appellee is to buy if it pleased, when it pleased, to buy if it thought it advantageous, to buy much, little, or not at all, as it thought best.

A contract of sale is mutual where it contains an agreement to sell on the one side, and an agreement to purchase on the other. But it is not mutual where there is an obligation to sell, but no obligation to purchase, or an obligation to purchase, but no obligation to sell. 13 Corpus Juris 339. There is no mutuality or enforcibility where the agreement is that, on 60 days' notice, either party might cancel same "for good cause." *Cummer v. Butts*, 40 Mich. 322. A provision that it is understood the purchase of apples commences "as soon as it is deemed advisable by both parties to this contract, when apples can be purchased in sufficient quantities to insure getting a carload in a reasonable length of time, not to exceed three days on fall apples," lacks mutuality. This, because no party is compelled to deem anything advisable, and the courts cannot deem it for them. *Woolsey v. Ryan*, 59 Kans. 601 (54 Pac. 664). There is such uncertainty as to destroy mutuality, where the obligation to take is conditioned upon being "as long as we can make it pay." *Davie v. Lumberman's Min. Co.*, 93 Mich. 491 (53 N. W. 625). It is said that, under such an agreement, plaintiffs must be presumed to be the sole judges of whether it would or would not pay them to do the work, and of how long they should continue it; and that the defendant has no voice on whether or not plaintiffs could make it pay, and no right to say in what manner they should conduct the work, in order to make it pay.

Where one party agrees to cut for the other hay "not to exceed 200 tons," there is lack of mutuality, because the offerant was not bound to deliver any particular quantity of hay, and could cut as little as he pleased. *Houston & T. C. R. Co. v. Mitchell*, 38 Tex. 85, at 86. So where a defendant who binds himself to receive and pay for all the ties plaintiff could produce and ship at a stated price between stated dates. As to this, it was held mutuality was lacking, because there was no enforceable duty to deliver any ties. *Hazlehurst Lbr. Co. v. Mercantile L. & S. Co.*, 166 Fed. 191. And so of an offer to receive and transport railroad iron, not to exceed a stated number of tons, dur-

ing specified periods, and at a specified rate per ton. As to this, it was held that, though plaintiff answered, assenting to the proposal, there was still no contract, because there was no agreement on his part that he would deliver any iron for transportation. *Chicago & G. E. R. Co. v. Dane*, 43 N. Y. 240; *Hoffman v. Maffioli*, 104 Wis. 630 (80 N. W. 1032, at 1034). An agreement to purchase all that the manufacturer desires to sell at a specified price is void. 13 Corpus Juris 340. A written proposition to buy a stated quantity of coal at a stated price is not enforceable, because there is no corresponding obligation on the other to sell the coal at said price. *Corbitt & Macleay v. Salem Gaslight Co.*, 6 Ore. 405.

No contract is created by a willingness to ship such gauge glasses as the other "might order." *Ashcroft v. Butterworth*, 136 Mass. 511, 513. Nor by an engagement to deliver at a stated price "as many grapes as he (the other party) should wish." *Keller v. Ybarra*, 3 Cal. 147. A so-called contract by which one engages to deliver to the other such quantities of coal as the latter may require during the year, up to a specified limit, at a specified price, but containing no engagement on part of the buyer to take or pay for any of the coal, is not enforceable against the promisor. *Campbell v. Lambert & Co.* 36 La. Ann. 35. So of an agreement by one party to furnish to the former all the oak wood that the other "would require for their trade in the Chicago market during the year 1897," at stated prices. *Crane v. Crane & Co.*, (C. C. A.) 105 Fed. 869, at 871. And so an engagement by which one party engages to deliver to the other such quantities of coal as the latter may require during the year, "to the extent of 60,000 barrels, with privileges of 20,000 more," at a stipulated price, does not work an obligation on part of the other to take or pay for any stipulated quantity, and is, therefore, a *nudum pactum*. *Campbell v. Lambert & Co.*, 36 La. Ann. 35. Where plaintiff offers to deliver stone "in such quantities as may be desired," and the other party accepts this without qualification, and without making

reference to any existing contract for using the stone, there is no mutuality, because the defendant was not bound to desire any stone. *Hoffman v. Maffioli*, 104 Wis. 630 (80 N. W. 1032). To same effect is *American Cotton Oil Co. v. Kirk*, 68 Fed. 791, 793.

A contract to sell personal property is void for want of mutuality, if the quantity to be delivered is conditioned entirely on the will, wish, or want of the buyer. 13 Corpus Juris 339; *Cold Blast Trans. Co. v. Kansas City Bolt Co.*, (C. C. A.) 114 Fed. 77. So of an agreement to supply all pig iron wanted by defendants in their business between stated dates, at specified prices, even though the other party promised to purchase such iron. The argument advanced is that the buyer did not engage "to want any quantity whatever," nor even agree to continue in their business. *Bailey v. Austrian*, 19 Minn. 535. It is said in *Hickey v. O'Brien*, 123 Mich. 611 (82 N. W. 241, at 242), that, in *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427, the case of *Bailey v. Austrian* is distinguished by pointing out that, in the *Bailey* case, stress is laid on the word "want;" while in the Illinois case, the plaintiff agreed to sell to defendant all the iron "needed" in its business during the three ensuing years at \$22.35 a ton, and the defendant agreed to take its year's supply at that price. We are unable to find any substantial difference between an "agreement" to buy what one might "want" and what one might "need." Be that as it may, in the case at bar the language was, "would want to purchase." And the *Austrian* case is well supported in authority. An agreement to receive and pay for such beer as the plaintiff might, from time to time, want from the defendant, lacks binding force for want of mutuality, though plaintiff agreed to sell all the beer of specified brands which plaintiff should order at prices to be agreed on. *Teipel v. Meyer*, 106 Wis. 41 (81 N. W. 982). To like effect is *Gipps Brewing Co. v. De France*, 91 Iowa 108. And see *Hoffman v. Maffioli*, 104 Wis. 630 (80 N. W. 1032, at 1035); *Tarbox v. Gotzian*, 20 Minn. 139; *Stensgaard v. Smith*, 43 Minn. 11 (44 N. W.

669); *Dayton, W. V. & X. Turnpike Co. v. Coy*, 13 Ohio St. 84; *Utica & S. R. Co. v. Brinckerhoff*, 21 Wend. (N. Y.) 139.

Indeed, in *American Steel & W. Co. v. Copeland*, 159 N. C. 556 (75 S. E. 1002, at 1004), and in *Hickey v. O'Brien*, 123 Mich. 611 (82 N. W. 241), our case of *Drake v. Vorse*, 52 Iowa 417, is construed to support the rule in *Bailey v. Austrian*, 19 Minn. 535, to wit: That there is no mutuality on an offer to supply all the other wants, because he is under no engagement to want any quantity whatever. Now, while we are not prepared to say that the rating which these cases have given to *Drake v. Vorse* can be accepted, it is certainly true that, at the least, it leans toward supporting appellant. Drake and Vorse, on January 15, 1873, signed the following:

"I hereby agree to make all the school seat castings that A. S. Vorse may want during the year 1873, at 6 cents per pound, except ink well covers, and them at 3 cents each, deliverable on the cars in Eddyville, Iowa, payments cash on delivery."

All that seems to be *decided* as to this is that, where Vorse entered into a partnership after this paper was signed, it should not be construed that this contract precluded entering into a partnership during the year 1873, or that the writing would become obligatory upon the partnership. But the course of the argument leans strongly to the reasoning of cases like *Bailey v. Austrian*. For we said:

"It binds the plaintiff to make what castings the defendant may want. It does not expressly bind the defendant to anything except to pay in cash on delivery the prices specified."

Then the case proceeds *pro arguendo* to the decision as we have before stated. The concluding argument is this:

"He did discontinue business upon his individual account. After that, he did not individually want or need any castings, and, as the firm was not bound to take any, we do not think that the defendant became liable."

So the case seems to amount to an argumentative holding that the contract lacked mutuality.

Both reason and the very great weight of authority work that the "contract" in review was no contract, because defendant was under no binding obligation.

III. Three cars of coal were shipped and received. Upon this, appellee urges that thereby the so-called contract was completed, and made mutual. Part performance was ineffectual in *Hoffman v. Maffioli*, 104 Wis. 630 (80 N. W. 1032), to found a case as for breach of contract on refusal to ship more. The same is held in *Crane v. Crane & Co.*, (C. C. A.) 105 Fed. 869, at 871; *Cold Blast Trans. Co. v. Kansas City Bolt Co.*, (C. C. A.) 114 Fed. 77, at 82; *Teipel v. Meyer*, 106 Wis. 41 (81 N. W. 982); *Campbell v. Lambert & Co.*, 36 La. Ann. 35; *Utica & S. R. Co. v. Brinckerhoff*, 21 Wend. (N. Y.) 139; *Missouri, K. & T. R. Co. v. Bagley*, 60 Kans. 424 (56 Pac. 759, at 762); and *Chicago & G. E. R. Co. v. Dane*, 43 N. Y. 240, 243.

If there never was a contract to ship anything, that is still the situation when a contract to ship what has not yet been shipped, is asserted as the basis of an action. As said in *Cold Blast Trans. Co. v. Kansas City Bolt Co.*, (C. C. A.) 114 Fed. 77, at 80, even though there had been some shipments, there was still no consideration and no mutuality in the contract as to any articles which defendant had not ordered, or which plaintiff had not delivered, and, therefore, the refusal of plaintiff to honor the orders of defendants was no breach of any valid contract, and formed no legal cause of action whereon to base a counterclaim. It was further said:

"As to all undelivered articles, that defect still inheres in the agreement. The plaintiff is not bound to deliver, nor the defendant to take and pay for, any articles that have not been delivered [that is to say, so much as has not been performed still rests upon an agreement which is not enforceable, and for the refusal to honor which there can be no recovery]. * * * The defendant never agreed to order or to pay for any quantity of these undelivered

articles. If it had refused to order and take them, no action could have been maintained for its failure, because no court could have determined what amount it was required to take."

It is thus stated in 13/Corpus Juris 341:

"Accepted orders for goods under contracts void within these rules constitute sales of the goods thus ordered at the price named in the contracts, but they do not validate the agreements as to articles which the one refuses to purchase, or the other refuses to sell or to deliver, under the void contracts, because neither party is bound to take or deliver any amount or quantity of these articles thereunder."

Defendant alleges further that, by reason of the conduct of plaintiff in furnishing defendant two carloads at \$1.50 per ton under the contract terms, plaintiff is now estopped from claiming there was no binding contract between the parties for furnishing coal to defendant under the contract contended for by defendant. But the claimed estoppel is no broader than the claimed breach of a contract which is no contract.

IV. Cases relied on by appellee do not, on careful consideration, militate with what we have declared. All that *Keller v. Ybarru*, 3 Cal. 147, holds is that, when one party offers to sell as much as the other wishes, there is a contract, after the other declares what quantity he will take. In *Cooper v. Lansing Wheel Co.*, 94 Mich. 272 (54 N. W. 39), the defendant entered the following order:

"Owosso, Mich., Dec. 16, 1889.

"Mess. Lansing Wheel Co.,

"Lansing, Mich.

"Gentlemen:

"Please enter our order for what wheels we may want during the season of 1890, at following prices and terms: B, \$6.00; C, \$5.00; D, \$4.00—per set, F. O. B. Owosso, 30 days. All the wheels to be good stock, and smooth. Should you want a few D wheels to be extra nice stock, all selected

white, they are to be furnished at same price, not to exceed 10 set in a 100.

“Very respectfully yours,

“Owosso Cart Co.”

Upon receipt of this instrument, defendant indorsed thereon: “Accepted. Lansing Wheel Co.” It is held there was a contract after shipment at the specified prices.

In *American Steel & W. Co. v. Copeland*, 159 N. C. 556 (75 S. E. 1002), it is ruled that an agreement by a manufacturer to furnish a dealer all the wire he needed for his trade constitutes a continuing offer on the part of the company to sell, which, when accepted *pro tanto* by an order before withdrawal of the offer, becomes effective as a contract. The facts distinguish *McCall Co. v. Icks*, 107 Wis. 232 (83 N. W. 300). In *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427, and *Smith & Co. v. Morse & Co.*, 20 La. Ann. 220, there was what is indubitably a mutual promise. Of course, we are not concerned with the cases wherein it is plain that the court enforced the agreement by justifiably holding that, while certain things were not expressed, there was an affirmative agreement by necessary implication. See *Cold Blast Trans. Co. v. Kansas City Bolt Co.*, (C. C. A.) 114 Fed. 77; *Shadbolt & B. I. Co. v. Topliff*, 85 Wis. 513 (55 N. W. 854); *Minneapolis Mill Co. v. Goodnow*, 40 Minn. 497 (42 N. W. 356).

If any of these may be said to conflict with our conclusions, they are against the great weight of authority, and we decline to follow them.

The case of *Holtz v. Schmidt*, 59 N. Y. 253, is not relevant. It merely holds that, where there is an engagement to supply goods at prices represented to be the lowest made to any buyer, then, on proof that the same kind of goods were sold to another at lower prices than to complainant, he may recover, though either might have refused to deal. What is decided is that, having been induced to deal by such representation, the law will imply a promise to restore the money inequitably obtained by having exacted a price beyond said representation, and

that the payment is to be held as one made under a mistake of fact, and to have been received by the other with knowledge that it was not entitled to it.

The demurrer should have been sustained.—*Reversed.*

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

GERRITT DE ZEEUW, Appellee, v. FOX CHEMICAL COMPANY,
Appellant.

SALES: Statement of Opinion. The naked statement that an article, when fed to animals, "*would improve their growth and physical condition,*" does not, as a matter of law, constitute a warranty, in the absence of a plea that the language was so intended.

Appeal from Cherokee District Court.—WILLIAM HUTCHINSON, Judge.

NOVEMBER 1, 1920.

In substance, this was a suit to recover on an alleged warranty. The trial court declined to direct a verdict for defendant, and, on submission to the jury, it returned a verdict for plaintiff. Defendant appeals.—*Reversed.*

J. A. Miller and Sullivan & Sullivan, for appellant.

Klay & Klay and Herrick & Herrick, for appellee.

SALINGER, J.—I. The petition alleges that plaintiff, in June, 1918, owned 100 hogs, weighing about 35 pounds each; that defendant corporation, through its agent, E. P. Quirin, stated to the plaintiff that his hogs were troubled with worms, and that, if he would feed defendant's worm powder, it would improve the growth and physical condition of said hogs. Terming this an oral warranty, the petition further alleges that plaintiff, relying on the said war-

ranty, purchased from the defendant 50 pounds of the worm powder, and fed the same to his hogs, as he was instructed and directed by the said E. P. Quirin. Next, it is alleged that the oral warranty was broken as follows: Defendant had carelessly and negligently used poison in said worm powder, to such extent that said hogs immediately began to die, after eating same, and that, in all, 60 of said hogs died, within 4 or 5 days; and that, instead of improving the physical condition of the hogs by the use of the worm powder, it killed the same.

Now, while it is expressly alleged that the breach of this claimed warranty consisted of administering a deadly poison to the hogs, such poisoning would be no breach of the alleged warranty. Such poisoning, no doubt, would constitute a cause of action, but it is no breach of the warranty, so called, that is asserted in this case. This charge of poisoning is, however, immediately followed by an allegation that, instead of an improvement in the physical condition of the hogs through use of this powder, it killed the hogs. And we construe the petition to charge: First, that defendant is liable for carelessly mixing poison into the worm powder in lethal doses; and, second, that the breach of warranty, so called, consists of a failure of the powder to improve the physical condition of the hogs.

II. The charge of the negligent admixture of poison is not only utterly unsupported by any evidence, but it is shown affirmatively and overwhelmingly that the powder contained nothing poisonous, except in medicinal quantities, and that the powder did not cause the death of the hogs by poison.

III. This leaves the allegation that the agent stated the hogs were troubled with worms, and that, if plaintiff would feed them the worm powder to be furnished by defendant, such powder would improve the growth and physical condition of said hogs.

The theory of the appellee is stated thus:

"Here is a case where a witness says he was about to buy a hog medicine which he had used successfully for a

number of years in the past; this fact was known to the agent of defendant; it is unreasonable to believe a total stranger could sell plaintiff an article without, at least, convincing him that he had the remedy;" that, no matter what may be disputed, the jury could find, on the testimony of appellee, "the agent told plaintiff that, if he could get a crack at the pigs, he could turn them out all right." Appellee argues that this constitutes "sufficient facts to go to the jury, and for them to decide whether the statement so made was a warranty, on which the appellee had a right to rely;" and that, the jury having answered this question in the affirmative, that finding of fact is beyond interference here. This is followed with the related argument that, ordinarily, the question whether there is a warranty is for the jury, under proper instructions. For this a number of our decisions are cited, and we have no quarrel with it; nor do we dispute that, ordinarily, it is not for the court to say "which words are or represent a warranty, but that this must be considered from the nature of the transaction and the acts of the parties, and submitted to the jury under proper instructions."

But if this means that the question of whether there has been a warranty is always for the jury, we cannot agree. Whether there is a warranty, in common with thousands of other questions, is *ordinarily* a jury question. But the things that are ordinarily jury questions may become law questions. That is always so where facts are not in dispute, and reasonable men can find but one set of facts, or draw but one set of deductions from the facts. We are of opinion that here is such a case. We find nothing that pleads a warranty, or that would make a jury question of whether such plea, if made, was sustained. The most that appears is the claim and opinion of one who desired to sell worm powders that its use would be beneficial to certain animals that were then ill, or not thriving.

If, on this, it may go to the jury whether there has been a warranty, then the same is true if a physician expressed an opinion that a certain prescription which he

was willing to give would benefit one who was then ill, and it proved that the medicine did not improve his condition. Or, if a lawyer expressed the opinion that he could win a suit, and that he thought certain defenses or tactics would bring about that result, and if, despite the use of these tactics, the suit failed, it would be for a jury to say whether, the suit not having been won, there was or was not a breach of warranty.

We decline to hold this to be the state of the law, either on what is a warranty or on what makes a jury question of alleged warranty. There is neither plea nor proof of a warranty, and verdict should have been directed for defendant. See *McDonald Mfg. Co. v. Thomas*, 53 Iowa 558, at 561; *Ellis v. Barkley*, 160 Iowa 658, at 661; *Davis v. Berkheimer*, 152 Iowa 270, at 272, and cases cited; and *Schlichting v. Rowell*, 140 Iowa 731, at 735.

IV. This disposition of the case, of course, makes it unnecessary to pass on whether the loss suffered by plaintiff was due to his own negligence and want of care, because of alleged failure to carry out the instructions given by the defendant, and to pass upon complaints as to instructions given. Of course, it makes it unnecessary to consider the contention of appellant that there was objectionable argument of counsel. See *Davis v. Hansen*, 187 Iowa 583.—*Reversed*.

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

HENRY GOSLAR, Appellant, v. JESSE REED, Appellee.

ANIMALS: Negligence in re Line Fence. In an action for damages caused by trespassing animals, verdict may not be directed against plaintiff, on the theory of negligence *per se in the maintenance by plaintiff of his part of the fence*, when the jury might find that both parties maintained legal partition fences, but that defendant's hogs escaped from defendant's land by digging under plaintiff's fence, and that defendant had knowledge of such fact.

ANIMALS: Liability for Escape—Negligence. It is the duty of
 2 the owner of stock to prevent the escape of his stock from his
 premises, when such stock is prohibited from running at large
 at any time; and if he fails in such duty, and damages result,
 he is liable. It follows that verdict may not be directed, under
 such a state of facts, in favor of the owner, on the ground that
 no actionable negligence on his part is made to appear. (Sec.
 2315, Code, 1897.)

DAMAGES: Speculation and Conjecture. Evidence reviewed, and
 3 held not so speculative and uncertain as not to furnish fair
 basis to the jury to estimate the damages done by defendant's
 trespassing hogs, even though plaintiff's hogs were also in the
 same field.

Appeal from Monona District Court.—J. W. ANDERSON,
 Judge.

NOVEMBER 1, 1920.

THE plaintiff sues for damages on account of an alleged
 trespass by defendant's permitting his hogs to escape up-
 on lands owned by the plaintiff, and there to destroy the
 corn of plaintiff. Verdict was directed for defendant,
 and plaintiff appeals.—*Reversed.*

Prichard & Prichard, for appellant.

Lutz, Bennett & Lutz, for appellee.

SALINGER, J.—I. One ground of the sustained motion
 to direct verdict is contributory negligence. Appellee
 asserts that plaintiff was guilty of such negligence, in that
 he did not maintain the fence on the line
 1. ANIMALS: negligence of the lands of the parties in such proper
 in re line condition as "by law he was bound to do."
 fence.

At one point on the line, the land of plaintiff is much
 higher than that of defendant. On the evidence, the jury
 could find that the hogs of the defendant got upon the land
 of plaintiff by burrowing a hole under the line fence. It

could find, too, that both parties properly maintained a lawful line fence. And it is clear that the hogs dug in under the fence, and defendant knew it. Manifestly, then, no breach of duty as to the fence was the proximate means of the trespass, or the proximate cause of whatsoever damage was done. The true issue is whether plaintiff was negligent in not meeting the situation created by the digging under the fence. Whether he was, is at least a question for the jury, if there be evidence that plaintiff knew of the hole in time to stop the coming in of the hogs, or evidence that he did nothing, although he knew the hogs were in. Hence it was error to direct verdict because of contributory negligence.

II. Another ground of the sustained motion was that defendant had been guilty of no actionable negligence. Section 2313 of the Code provides for the distraint of animals trespassing upon land. See *Conway v. Jordan*, 110 Iowa 462. Code Section 2314 prohibits swine from running at large at any time. Code Section 2315 permits, instead of distraint, a recovery of damages caused by escaping stock or animals; and this action was brought under this section. We held, in *Foster v. Bussey*, 132 Iowa 640, that, where stock is prohibited from running at large, and injury is done by their escaping from their inclosure, their owner is liable for damages. The effect of this is to make it the duty of this defendant to prevent the escape of his hogs upon the land of his neighbor. Moreover, he knew his hogs had escaped, and were on the corn land of the plaintiff. We are clear it was error to direct a verdict for defendant on the ground that, as matter of law, he was guilty of no negligence.

III. There remains the further contention that plaintiff was rightly nonsuited, so far as appellate review goes, because, under the evidence, no jury was warranted in finding more than nominal damages. And defendant says we have settled in the following cases that the evidence in this case will not sustain more than a nominal ver-

2. ANIMALS :
liability for
escape :
negligence.

3. DAMAGES :
speculation
and con-
jecture.

dict. In *Williams v. Brown*, 76 Iowa 643, at 644, it was said:

"Defendant herded his cattle upon the land; but the evidence wholly fails to show how long the land was so used by defendant, how many cattle he herded, and the value of such use, or any other fact which would enable the jury to estimate the damages, if any, which plaintiff sustained. It appears that other persons herded cattle upon the land, during the time it was used by defendant."

And we held that not more than nominal damages were due. In *Foster v. Bussey*, 132 Iowa 640, at 643, 644, we reach the same conclusion, saying:

"The stock of different people were in the corn at different times, and the injuries thereto were distinct and separate. There was nothing to enable the jury to estimate the damages caused by that of each or of defendant."

Of course, the mere statement of a trial rule has no bearing on whether evidence meets or fails to meet such rule. Of course, on such facts as are found in these two cases, this plaintiff could have no appellate relief, because we will not reverse for failure to obtain purely nominal damages. But the question remains whether the evidence is such as is commented upon in the said cited cases. The appellee insists, of course, that the evidence here is, in substance, what it was there, and says that the damages shown were speculative, problematic, and conjectural; and that, therefore, no recovery beyond nominal damages was warranted. But we are of opinion that the evidence in this case is not so speculative and not so void of a basis upon which a jury could estimate damages as that the trial court was justified in holding, as matter of law, that the jury had no material upon which to award beyond nominal damages.

True, the plaintiff, too, had hogs run in the cornfield which the hogs of the defendant injured. True, the jury could find that it was difficult to ascertain just what damages had been caused by the hogs of defendant. For it is

in testimony that the hogs of the plaintiff "were running near to the fence, from one end to the other; that plaintiff's hogs were in the field a couple of weeks, and were eating the corn all the time; that plaintiff's hogs went all over the corn." It is true that one witness, in answer to a question whether or not he knew just what was eaten by the hogs of plaintiff and by those of defendant, answered, "Nothing," but adding what we shall refer to later.

But the jury could also find, on the testimony of the witness Dorothy, that, on the one side of the field farthest from the line fence, only a few acres were "hogged," and that, from there on through the middle of the field, there was no more damage until one got to the east end, where was the hole through which the defendant's hogs entered the plaintiff's land. The jury could find, from the testimony of this witness, that many circumstances indicated that the hogs of defendant did their injury at a spot quite distinct from the territory covered by those of plaintiff. The jury could reasonably make the same deductions from the further testimony of the witness Riley, and could believe the statement of McClary, that several with him "examined the entire field, so that we could tell whose hogs had destroyed the corn." And if it believed the witness Dorothy, they could find: "Mr. Reed made no denial, while we were there, but what his hogs had eaten the corn."

Nor is this a case where the amount is pure conjecture, and where there is no tangible evidence upon which a jury could estimate damages. The witness Dorothy testified he was a farmer, and that, in his opinion, the corn destroyed by the defendant's hogs would equal at least 200 bushels; and the witness McClary, also a farmer, testifies to like effect. McClary adds that he and Dorothy made an estimate as to the amount of corn destroyed, and Dorothy said they estimated four acres entirely gone, and that he thinks there was more than that damaged; that it was possibly five acres; that they estimated the loss would amount to about four acres of absolutely wasted corn, which, in his opinion, would have gone 50 bushels to the acre.

It was error to dispose of the case on the motion to direct. Wherefore, the judgment below must be—*Reversed*.

WEAVER, C. J., EVANS and PRESTON, J.J., concur.

EVANS, J. (specially concurring.) I disagree with the discussion in the opinion, but concur in the reversal. The rights and obligations of the parties are statutory, and are fixed by Chapters 3 and 4 of Title XII of the Code. Section 2313 provides:

“Any animal trespassing upon land fenced as provided by law may be distrained by the owner of such land, and held for all damages done thereon by it, unless it escaped from adjoining land in consequence of the neglect of such landowner to maintain his part of a lawful partition fence. The owner of the land from which such animal escaped shall also be liable for such damages if it escaped therefrom in consequence of his neglect to maintain his part of a lawful partition fence,” etc.

Section 2315 gives an action for damages without distraint, upon the same condition. Section 2367. Code Supplement, 1913, provides:

“In case adjoining owners or occupants of land shall use the same for pasturing sheep or swine, each shall keep his share of the partition fence in such condition as shall restrain such sheep or swine.”

Code Section 2368 provides that the chapter is alike applicable “where stock is restrained from running at large as where not so restrained.”

In the light of the foregoing statutes, I do not agree that plaintiff's *neglect*, if any, was, as a matter of law, *not the proximate cause* of the damage, as held in the opinion. Nor do I agree that the fact that Section 2314 prohibits swine from running at large is a controlling consideration; nor does such fact make the liability of the owner of the hogs either greater or less than it would be in the case of escape of cattle or other stock upon plaintiff's land. On the first point, if these hogs were lawfully upon defendant's

land, and escaped through the partition fence, the question presented is: Through whose neglect of maintenance of the fence did they escape? If it was plaintiff's neglect, he cannot recover. If it was the neglect of defendant, he is liable. If the escape resulted proximately from the negligence of both, manifestly plaintiff could not recover. This question of neglect was a jury question, under the evidence, and was quite decisive. On the second point, Section 2314 is obsolete, so far as its differentiation is concerned between stock prohibited from running at large and that permitted to do so. *All* stock is now prohibited. Furthermore, Section 2368 expressly makes the partition-fence statute alike applicable, as above quoted. The liability of the defendant for the escape of his hogs was precisely what it would have been if his cattle had thus escaped.

I specially disagree, therefore, with that part of the opinion which holds that the effect of Section 2314 was to "make it the duty of this defendant to prevent the escape of his hogs upon the land of his neighbor."

MARCKRES BROS., Appellee, v. PERRY GAS WORKS et al.,
Appellants.

PRINCIPAL AND AGENT: Authority — Accepting Benefits.

- 1 Authority in the principal's local agent to execute a lease in the principal's name, may be shown by testimony that, after the lease was entered into, the principal recognized the same, paid the rent accruing thereunder, and accepted the full benefits thereof.

FRAUDS, STATUTE OF: Election to Renew Lease. An election

- 2 by a tenant to avail himself of the option to extend the lease for an additional number of years at a *quantum meruit* rate, as provided in a written lease, need not be in writing—may be proven by the same kind of evidence which would establish delivery of a written instrument, i. e., oral testimony or acts.

LANDLORD AND TENANT: Evidence of Option to Renew Lease.

- 3 The exercise of the option to "renew" a lease for a definite

number of years at a *quantum meruit* rate, as provided in a written lease, is sufficiently shown by evidence (1) that the tenant remained in possession, and (2) that the parties mutually agreed on the new rental.

Appeal from Dallas District Court.—J. H. APPLGATE,
Judge.

NOVEMBER 1, 1920.

ACTION by plaintiff, as a lessor, to recover upon a lease the rentals due thereunder for a period of 10 months, the defendant, as lessee, having surrendered the premises prior to the accrual of such rents. The general defense was that the defendant was a tenant at will, and terminated his tenancy in due form, by service of a 30-day notice. There was a trial to a jury, and verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed.*

William Winegar, J. A. Reed, and William Smyth, for appellants.

S. Trevarthan, for appellee.

EVANS, J.—The defendant Perry Gas Works was the lessee in a lease executed to it by the plaintiff as of March 1, 1914, for a term of three years, with a certain option of renewal to the defendant. Such option was

1. PRINCIPAL
AND AGENT:
authority:
accepting
benefits.

in writing, and in the following terms:

“It is further understood and agreed that the second party, his heirs or assigns, at the expiration of the period covered by this lease are to have the privilege optional with them of renewing this lease for a further period of two years from and after March 1, 1917, at an adjusted rental based upon what other rooms of similar size and location may be renting for at that time.”

One Ingle was in local charge of the business of the

Perry Gas Works in the city of Perry, where the leased property was situated. The leased premises appear to have been used as the local office or headquarters at Perry of said company. The evidence for the plaintiff tended to show that, about two months prior to March 1, 1917, the said Ingle, purporting to act on behalf of the defendant company, asked for an adjustment of rental, pursuant to the foregoing option, which adjustment was assented to and agreed upon by both Ingle and the plaintiff. The result of this adjustment was to reduce the rental of \$60, provided for in the original lease, to the sum of \$55 per month. After March 1st, the defendant paid and the plaintiff accepted the monthly rental at \$55. On September 1, 1917, the defendant vacated the premises, having served a 30-day notice in due form, on the theory that it was at that time only a tenant at will. It refused to pay further rent. The plaintiffs re-rented the premises temporarily, for the purpose of mitigating damages, and have brought their suit for the difference between the agreed rent and the amount thus received. The appeal is based upon two alleged grounds of reversal.

I. One of these grounds is that Ingle, who purported to represent the defendant Perry Gas Works, was not authorized to exercise the stipulated option. It appears that Ingle was the only person in charge of the business of the company locally at Perry. He negotiated with the plaintiff for the original lease, and obtained the signature of the plaintiff thereto. He did not, however, sign the lease, but sent the same to Reed, the owner of the gas company, for signature. During the three years' occupancy under the original lease, Ingle paid the rent monthly, but did so with checks signed by Reed. After March 1, 1917, when the purported renewal went into effect, Ingle continued the payment of the monthly rental at the new rate of \$55 per month. These payments were also made by the check of Reed. It is to be noted that, in the adjustment of rental, Ingle obtained for the Perry Gas Works a reduction of \$5.00 per month. The Perry Gas Works, through

its owner, took the benefit of such reduction, without raising any objection to the authority of Ingle to agree upon the same. This fact of itself was in the nature of an admission, and was evidence tending to show the authority of Ingle. Needless to say, also, it tended to show ratification of Ingle's conduct, even though express authority had been lacking. The boundaries of authority and the scope of duty of an agent are often indefinite. Such is the case here. The scope of the agency of Ingle does not appear to have been set forth in any writing. It seems to have rested in parol, and in a general understanding between principal and agent. The circumstances above enumerated were clearly sufficient, and tended to show authority in Ingle. None of these circumstances was denied. They were rebutted by the testimony of Ingle alone, to the effect that he had no such authority.

II. It is urged that the oral testimony introduced by the plaintiff was all inadmissible, because of the statute of frauds. The right of defendant to continue as lessee of the premises for an additional period of two years was provided for in the original lease. The option thus stipulated for was supported by the consideration of the lease, and was undoubtedly enforceable by the defendant at its election, before the expiration of the original term. The extended term, therefore, was fixed, not by the oral agreement of the parties, but by the original lease. We do not think that it would have been competent for these parties orally to agree upon a term longer than one year. They did not purport to do so. If, upon an election by the defendant to take the longer term, the plaintiff had refused to recognize its right of option, the defendant could undoubtedly have enforced its rights under such option, either by continuing in possession upon a *quantum meruit* of rental, or by suing for damages. The statute of frauds forbids oral evidence of contracts "for the creation or transfer of any interest in lands, except leases for a term not exceeding one year." The contract in this case was, in fact, made in

2. FRAUDS,
STATUTE OF:
election to
renew lease.

the original lease, with a rental for the extended term at a *quantum meruit*, and could have been enforced by the defendant, even though there had been no agreement as to what the reduced rent should be. In other words, no further agreement was *necessary* between the parties. The written agreement for renewal was made subject only to the election of the defendant. Was it requisite that such *election* should be in writing? No authorities are cited to us in support of the affirmative contention. The election by defendant was an *act*, and could be proved by acts, as well as by words. We see no reason why the acceptance of the option by the defendant might not be proved in the same manner as the delivery of a written instrument might be proved. The delivery of a written instrument is essential to its efficacy as a writing; but the delivery is no part of the writing. It may be proved by oral evidence or by acts. Likewise, the election or the acceptance by defendant was essential to the efficacy of the renewal; but the terms of the renewal were already fixed by the original writing. The election of defendant added nothing to them, although it put them into effect. It was not essential to the election or to its effect that there should be an agreement upon the rental. The agreement that was reached was a mutual declaration of what a *quantum meruit* would be.

We think, therefore, that the oral evidence in question was admissible only for the purpose of showing that the defendant did elect to accept the option; and that it was not objectionable under the statute of frauds, because it added nothing to the terms of the contract as written in the original lease.

III. It is further urged that the evidence was not sufficient to show an election or renewal. It is urged that there is a distinction between an option to *extend* a lease and an option to *renew* it. It was so held in

3. LANDLORD
AND
TENANT:
evidence of
option to
renew lease.

Andrews v. Marshall Creamery Co., 118 Iowa 595. The cases on this question from other jurisdictions are collated in 16 Ruling Case Law, 883, Sections 388 to 401. The dis-

inction is that a mere *extension* is an enlargement of the original term of the lease; whereas a *renewal* creates an additional term, rather than an enlargement of the first. The practical effect of this distinction is held to be that, where a written lease contains an option to the lessee to have an *extension*, then, if he continues in possession after the expiration of the original term, he is presumed to have elected to take the extension without any other evidence on the question. In other words, the presumption that he is holding as a tenant at will does not obtain in his favor. On the other hand, if the option be for a *renewal*, then mere continuance in possession after the expiration of the term of the original lease, is not, in itself, sufficient evidence of an election to *renew*. In the absence of other evidence to show an election, the lessee holding over must be presumed to be a tenant at will. The reservation in this case purported to be an option of "renewing this lease." It will be seen that the distinction between the two forms of option is a very close one, in any event, and somewhat artificial, if not fanciful, in its reasoning. Where the option is one to "renew *this lease*," we see little ground for recognizing the distinction at all. In such a case, the words "extension" and "renewal" might be deemed fairly synonymous. There are authorities so holding: *Insurance & Law Bldg. Co. v. National Bank of Missouri*, 71 Mo. 58; *Ranlet v. Cook*, 44 N. H. 512 (84 Am. Dec. 92); *Clarke v. Merrill*, 51 N. H. 415; *McBrier v. Marshall*, 126 Pa. 390 (17 Atl. 647). Be that as it may, we have no occasion here to pass upon it. The evidence on behalf of the plaintiff was not confined to the fact that the defendant continued in possession after the expiration of the original term. It was direct and definite that Ingle sought an understanding as to the rate of the adjusted rent for the additional period. That the rate was adjusted in fact is conceded. In the absence of an acceptance of the option, there was no occasion for the new adjustment. The direct testimony on behalf of the plaintiff at this point has abundant corroboration in

the circumstances. This evidence was sufficient to go to the jury.

The trial court submitted this question to the jury, as well as the question of the authority of the agent, upon instructions of which no complaint is made. We are clear that the finding of the jury has sufficient support in the evidence. The judgment below must, therefore, be—*Affirmed.*

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

STATE OF IOWA, Appellee, v. JAMES DAVIS et al.; WILLIAM McCLAIN, Appellant.

LARCENY: Recent Possession. Evidence held to justify the court in instructing as to the effect of possession of recently stolen property.

Appeal from Woodbury District Court.—GEORGE JEPSON, Judge.

NOVEMBER 1, 1920.

THE above-named defendants were jointly indicted for the larceny of an automobile, a Cole Eight coupe. The defendant William McClain was separately tried. From a judgment of conviction, he has appealed.—*Affirmed.*

George G. Yeaman, for appellants.

O. T. Naglestad, County Attorney, and *O. D. Nickle*, Assistant County Attorney, for appellee.

EVANS, J.—The automobile in question was stolen from a garage in Sioux City, on the night of July 10, 1919, some time after 11 P. M. At 4 or 4:30 A. M. on the morning of July 11th, this defendant and six companions appeared at

the farm home of Martin Moeller, in Sioux County near Ireton, and obtained breakfast there. They had come in two automobiles, one of which was the stolen Cole car in question here; the other, a Cadillac. They came to the Moeller farmyard before the family was up, so that none of the Moeller family observed then who were the occupants of the Cole car. After breakfast, the party of seven left in the two cars, the Cole car being then occupied by James Davis, Red Burzette, and this defendant. Late in the evening of the following day, July 12th, the same party returned, and obtained supper at the same farm home. At this time, they were in the possession of the same Cadillac and Cole cars, and a Ford. During the night, five of the party left in the Cadillac car, leaving two of their number to guard a quantity of intoxicating liquors, which was also left behind. The Cole and the Ford cars were left at this Moeller farm home until the 21st day of July. On the latter date, it was taken by certain of these defendants, McClain not being present at that time. Public officers traced the car to Bonesteel, South Dakota. On July 24th, one Terrell, a state agent, appeared in quest of the car at Bonesteel, and later located the car there. This defendant was, at that time, present at Bonesteel, and left immediately upon the arrival of the state agent. The defendant was a witness in his own behalf, and denied the larceny and denied the possession. He testified, on cross-examination, that he left Sioux City, with his companions, at about 3:30 in the morning of July 11th. He also admitted that he was at Bonesteel on July 24th; that he had a sister living there; and that he had gone there to stay permanently; and that he left there on July 24th. The defendant admitted that he was one of the group that called at the Moeller home, but denied that he was one of the occupants of the Cole car. The foregoing is the substance of the testimony upon which the State bases a claim of possession of recently stolen property. The instructions were predicated upon this testimony, as tending to show possession of such property. The assignment of errors is based upon the in-

sufficiency of the evidence to justify a submission to the jury of the question of possession by this defendant of such automobile. We think the evidence was sufficient to go to the jury. Not only was it sufficient, but it was quite significant and persuasive. The evidence was very definite indeed that this defendant was one of the three persons in possession of the Cole car, as the party drove away from the Moeller farm. No explanation of such occupancy was attempted by the defendant, as a witness. We think that the rule as to the possession of property recently stolen was available to the State. This is the principal question presented in argument for the appellant. We have examined the record with care, and find no error therein. From such examination of the record, we find little room for doubt as to the guilt of the defendant. The judgment below is, therefore,—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, J.J., concur.

STATE OF IOWA, Appellee, v. GEORGE GIBSON, Appellant.

INDICTMENT AND INFORMATION: Waiver of Defects and Ob-
1 jections—**Related Objection.** An objection that an indictment does not enable a person of common understanding to know what was intended, as required by Sec. 5280, Code, 1897, cannot be made for the first time on appeal.

INDICTMENT AND INFORMATION: Requisites and Sufficiency of
2 **Accusation—Duplicity.** An indictment charging that one "did attempt by speech, action, and manner of speaking to incite, abet, promote, and encourage hostility and opposition to the government of the state of Iowa and the United States," charged a single offense against the state, and not separate offenses against the state and nation, and therefore did not charge two offenses. (Sec. 5284, Code, 1897.)

CRIMINAL LAW: Appeal—Constitutionality of Statute. While,
3 in a civil case, the constitutionality of a statute may not be raised for the first time in the appellate court, in a criminal

action the defendant is entitled to be heard on appeal on his claim that the statute under which he was prosecuted is in violation of the Constitution, even though such objection is raised for the first time on the appeal.

CONSTITUTIONAL LAW: Personal, Civil, and Political Rights—

- 4 **Freedom of Speech.** Ch. 372, 37 G. A., against inciting, abetting, promoting, and encouraging hostility and opposition to the government of the state and nation, does not violate Sec. 7, Art. 1, of the state Constitution, guaranteeing freedom of speech, as the right of free speech does not include the right to promote sedition; nor can one who utters slander or publishes a libel shield himself behind the right of free speech.

STATUTES: Validity in General—Constitutionality—Title. Ch.

- 5 372, 37 G. A., denouncing hostility to the government, is not unconstitutional because of the failure of the title of the act to mention the United States, as the crime denounced is against the state, and not against the United States, and the title, "An act relating to offenses against the state of Iowa," might have been sufficient, under the state Constitution, even if it had created two distinct offenses (which it did not do); as a statute, under such objections, will be given a liberal, and not a critical or technical construction, and all doubt as to the sufficiency of the title will be resolved in favor of its validity.

CONSTITUTIONAL LAW: Legislative Proceedings—Title of Stat-

- 6 **ute.** The title of a statute must not contain matter utterly incongruous to the provisions of the body of the act, but need not be an index of the act or its details; and, no matter how broadly the general subject is expressed in the title, the statute is valid, unless it contains matter utterly incongruous to that general subject, the purpose of the provision of Sec. 29, Art. 3, of the state Constitution, that every act shall embrace but one subject and matters properly connected therewith, which subjects shall be expressed in the title, being to prevent surprises or fraud upon the legislature.

TRIAL: Evidence—Related Objections. It is discretionary with

- 7 the trial court as to receiving objections to a question after the witness has answered; and its ruling in overruling such objection will not be reviewed on appeal.

TRIAL: Evidence—Nonresponsive Answer. An objection that an

- 8 answer was not responsive is not available to the party who is not interrogating.

EVIDENCE: Relevancy, Materiality, and Competency—Inference
9 from Failure to Speak. In a prosecution for inciting and encouraging hostility to the government, evidence that the defendant had never been heard to say anything in favor of the United States in time of war was admissible.

WITNESSES: Cross-Examination — Explanation on Redirect.
10 Where a witness gave an opinion during his cross-examination by defendant, the State, on its redirect examination, was entitled to have the witness explain the facts upon which said opinion was based.

CRIMINAL LAW: Evidence—Financial Ability to Aid Government.
11 In a prosecution for inciting and encouraging hostility to the government, the matter of defendant's ownership of land was purely collateral, and could be proved by parol evidence, for the purpose of showing his ability to financially aid the government, the Red Cross, and other organizations.

CRIMINAL LAW: Evidence—Omission of Immaterial Matter. In
12 a prosecution for inciting and encouraging hostility to the government, omission of evidence as to statements pertaining to religious matters, written by defendant on the back of checks, held immaterial and harmless.

EVIDENCE: Judicial Notice—Societies Auxiliary in War Work.
13 The courts will take judicial notice that the Red Cross, Y. M. C. A., and similar organizations were auxiliaries in the war work of the government during the World War; and, in a prosecution for inciting and encouraging hostility to the government, the jury may consider the hostility of defendant, during the war, to such organizations.

APPEAL AND ERROR: Reservation of Grounds—Insufficient Ob-
14 jections. Under Ch. 24, 37 G. A., the Supreme Court, on appeal, will not review instructions where the only objections are statements of counsel, objecting to each and all of the instructions, for not being correct statements of law, and an objection in the motion for new trial that the court gave the jury improper and erroneous instructions.

TRIAL: Argument and Conduct of Counsel—Failure to Preserve
15 Remarks in Record. The Supreme Court will not reverse judgment of conviction because of improper argument of counsel, where the improper remarks, although excepted to, were not preserved by the reporter.

APPEAL AND ERROR: Reservation of Grounds—Failure to Renew
16 Motion for Directed Verdict. The defendant waives any right

to assert, on appeal, the error of the trial court in overruling his motion for a directed verdict at the close of the State's evidence, by his failure to renew the motion at the close of all the testimony; but such failure does not preclude him from asserting, in his motion for new trial, that the verdict is contrary to the evidence.

CRIMINAL LAW: Appeal—Substantial Evidence in Support of Verdict. Where there is substantial evidence in support of the allegations of the indictment, the Supreme Court, on appeal, will not disturb a verdict of conviction.

Appeal from Union District Court.—HOMER A. FULLER, Judge.

SEPTEMBER 26, 1919.

REHEARING DENIED NOVEMBER 1, 1920.

THE defendant appeals from a conviction on an indictment charging that he "did attempt, by speech, action, and manner of speaking, to incite, abet, promote, and encourage hostility and opposition to the government of the state of Iowa and of the United States, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Iowa."—*Affirmed.*

Charles T. Gibson and E. A. Lee, for appellant.

H. M. Havner, Attorney General, for appellee.

SALINGER, J.—I. One complaint lodged is that, contrary to Section 5280 of the Code, the indictment does not enable a person of common understanding to know what was intended.

1. INDICTMENT
AND INFORMATION:
waiver of
defects and
objections:
belated objection.

It is conceded that this objection is made here for the first time. It comes too late, thus made, and we cannot review it.

II. It is contended that the indictment violates Section 5284 of the Code, because it charges the commission of two offenses:

to wit, one against the government of the state, and one against the government of the United States. The indictment is substantially in the language of the Iowa statute,

2. INDICTMENT
AND INFOR-
MATION :
requisites
and suffi-
ciency of
accusation :
duplicity.

and the crime is against the state. It can be committed by directing the forbidden acts against the government of the state, that of the United States, or both. The indictment does not charge distinct offenses, but distinct means of accomplishing the one offense.

III. The State presents that certain constitutional questions urged on this appeal cannot be considered because the objection is raised here for the first time. The

3. CRIMINAL
LAW : ap-
peal : consti-
tutionality
of statute.

validity of this objection depends upon what is the status of a criminal statute which violates some provision of the fundamental law. So far as civil cases go, it is very generally held in them that the constitutionality of a statute may not be first raised in the appellate court. *Journey v. Dickerson*, 21 Iowa 308; *Hass v. Leverton*, 128 Iowa 79; 3 Corpus Juris, Section 608, Note 73; *Ross v. Hawkeye Ins. Co.*, 93 Iowa 222; *Hopper v. Chicago, M. & St. P. R. Co.*, 91 Iowa 639. And see *Sheets v. Iowa State Ins. Co.*, 226 Mo. 613 (126 S. W. 413); *Hartzler v. Metropolitan St. R. Co.*, 218 Mo. 562 (117 S. W. 1124); *Paul v. Western Union Tel. Co.*, 164 Mo. App. 233 (145 S. W. 99); the Colorado cases of *Hill v. Bourkhard*, 5 Colo. App. 58 (36 Pac. 1115); *Rice v. Carmichael*, 4 Colo. App. 84 (34 Pac. 1010); and *Vindicator Consol. Gold Mining Co. v. Firstbrook*, 36 Colo. 498 (86 Pac. 313); also *Allopathic St. Board v. Fowler*, 50 La. 1358 (24 So. 809).

Our own decisions are in some confusion as to whether some constitutional rights,—say, trial by a jury of twelve,—may be waived in a criminal case. This case does not require consideration of that subject. But we have held that, where an indictment charges no crime, the point may be first raised on appeal. *State v. Potter*, 28 Iowa 554. And we said, in *State v. Daniels*, 90 Iowa 491:

"We could not, in a criminal case, affirm a judgment when it appears that the defendant is charged with no offense against the laws, though he should in no stage of the proceedings, either in this court or the court below, object on that ground."

If the fact that the indictment charges no crime can be first urged on appeal, it surely follows that, if the statute under which prosecution is had is, in law, no statute, then the defendant is prosecuted for something that does not constitute a crime, as much so as when he is convicted under an indictment which fails to charge a crime.

As said, this brings us to the status of an unconstitutional act. It is held, in *State v. Tieman*, 32 Wash. 294 (73 Pac. 375, at 376), that an unconstitutional criminal statute is "never legally enacted;" and in *Struthers v. Peckham*, 22 R. I. 8 (45 Atl. 742), that, where a requirement precedent in a suit for criminal process has not been met, that may be raised for the first time on appeal. We therefore conclude that appellant is entitled to be heard here on his claim that the statute under which he was prosecuted is violative of the Constitution. And we address ourselves next to whether the attack upon the statute is well made.

IV. It is presented that the statute violates the guarantee of Article 1, Section 7, of the Constitution of the state, that all may speak, write, and publish their senti-

4. CONSTITUTIONAL LAW: personal, civil, and political rights: freedom of speech.	ments on all subjects, being responsible for the abuse of that right, and that no law shall be passed to restrain or abridge the liberty of speech or of the press. The constitutional guaranty itself qualifies the immunity, by a plain indication that, while the
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right is given, the abuse of that right is not to be tolerated. The framers of our Constitution were laboring for the good of the commonwealth. They did not intend to protect what might destroy the state. It was not intended that the right to free speech included the right to promote sedition. One who utters a slander or publishes a libel cannot shield himself behind the privilege of free speech. We decline to

hold that he who uses his tongue for the purpose of annihilating a free government may so be shielded.

V. The next contention is that the title of the statute (Chapter 372, Acts of the Thirty-seventh General Assembly) is condemned by the Constitution. The title challenged is:

"An act relating to offenses against the state of Iowa and providing for punishment for violation thereof."

The statute has three substantive sections. The first is that, if any person shall excite an insurrection or sedition, etc., or shall attempt by writing, speaking, or other means

to do this, a prescribed punishment shall attach. The second is that anyone who shall, in public or private, by any mode or means, including speech and writing, advocate the subversion and destruction by force

of the government of the state or of the United States, or who shall, by such methods or any methods, incite, abet, promote, or encourage hostility or opposition to either government, shall suffer a prescribed punishment. The third prescribes a punishment for becoming a member of any association, etc., formed to incite, abet, promote, or encourage such hostility or opposition, or attending upon any meeting or council having that object, or soliciting others so to do, or in any manner aiding, abetting, or encouraging any such organization in the propagation or advocacy of such a purpose.

The argument is that the act creates an offense against each of said governments, and provides punishment for so offending against either, and that the title fails to mention either government, though they are separate and distinct entities. We have already held that the act does not make separate offenses as against the state and the nation, respectively, and charges but a single offense; and that, an offense against the state. So much of the objection to the title, then, as rests upon this claimed duality, fails for want of sound premise, if for no other reason. But we are not saying that the title would be insufficient if this

5. STATUTES:
validity in
general: con-
stitutional-
ity: title.

statute created two distinct offenses. In *State v. Brown*, 103 Tenn. 449 (53 S. W. 727), the title was:

"An act to raise the age of consent from ten to twelve years and to prescribe punishment for carnal knowledge of females over twelve years and under sixteen."

The title was held to be sufficient, though it is conceded it was broad enough to include two or more grades of crime; and it was further held to be no objection to the act that it treated of different offenses and prescribed different punishments for them, and that it did not invalidate it to have a further provision that all persons aiding or abetting in the commission of the two offenses named in another part of the act should be deemed joint principals, and punished as such. In *State v. Taylor*, 34 La. Ann. 978, the title was: "An act relative to crimes and offenses." The statute denounces several acts as crimes and offenses, and prescribes a punishment for each. It is said that, while the title was not artistically expressed, the constitutional provisions must not be strained into a requirement to reproduce nearly the whole act in the title, as would be the case if, as contended, every crime and every punishment denounced had been specifically referred to in the title. The concluding holding is that the statute treats of no other subject but crimes and offenses, and that such subject is covered by such title. In *Peachee v. State*, 63 Ind. 399, at 401, the title was: "An act defining certain felonies and prescribing punishment therefor." The attack was that no subject is expressed or embraced in the title, because the particular felonies defined are not in the title, designated by their particular name. The court held the title to be sufficient. In *Cook v. Marshall County*, 119 Iowa 384, the title was: "An act to revise, amend and codify the statutes in relation to crimes and their punishment." We held that this was sufficient for a statute providing for the assessment of a tax against any person dealing in cigarettes and the real property within or whereon the same are sold, and the manner of collecting such tax.

Judge Brewer says, in *Woodruff v. Baldwin*, 23 Kan.

491, that, on the authority of *Bowman v. Cockrill*, 6 Kan. 335, "the breadth and comprehensiveness of a title is a matter of legislative discretion." This, con-

6. CONSTITU-
TIONAL LAW :
legislative
proceedings :
title of stat-
ute.

finer to proper limits, works, of necessity, that, on a challenge of the sufficiency of the title, the interpretation should be liberal; and that is the unanimous voice of authority. See *Cook v. Marshall County*, 119 Iowa 384, at 398; *State v. Hutchinson Ice Cream Co.*, 168 Iowa 1; and *State v. Taylor*, 34 La. Ann. 978. It was said in the *Woodruff* case, *supra*, that, under this rule, the courts must do nothing to prevent or embarrass ordinary legislation. The construction is to be liberal, and not critical or technical. *McAunich v. Mississippi and M. R. Co.*, 20 Iowa 338. Where there is doubt as to the sufficiency of the title, it should be resolved in favor of validity (*Beaner v. Lucas*, 138 Iowa 215, 216); and the attack upon the title is not to be sustained unless a most cogent showing is made in support thereof. *State v. Schlenker*, 112 Iowa 642, at 651; *State v. Taylor*, 34 La. Ann. 978. It must appear clearly that the underlying reasons of the constitutional provision have been disregarded.

The title need not be an index or epitome of the act or its details. *Beaner v. Lucas*, 138 Iowa 215, 216; *State v. Brown*, 103 Tenn. 449 (53 S. W. 727); *Christie v. Life, etc., Co.*, 82 Iowa 360, at 365. And the subject of the bill need not be specifically and exactly expressed in the title. *Beaner v. Lucas*, *supra*. The prohibition is against incongruity. The title must not contain matter utterly incongruous to the provisions of the body of the statute, and that is the limitation of the prohibition. *State v. County Judge*, 2 Iowa 280; *State v. Hutchinson Ice Cr. Co.*, 168 Iowa 1, at 7. That only is prohibited which by no fair intendment can be considered germane. *Johnson v. Harrison*, 47 Minn. 575 (50 N. W. 923); *Morford v. Unger*, 8 Iowa 82, at 86. No matter how broadly the general subject is expressed in the title, the act is valid, unless the statute contains matter utterly incongruous to that general subject. *Sisson v.*

Board of Supervisors, 128 Iowa 442. The matter must be incongruous to the unity or object in the statute—its ultimate purpose. *State v. Hutchinson*, 168 Iowa 1; *Beresheim v. Arnd*, 117 Iowa 83; *Cook v. Marshall County*, 119 Iowa 384, at 397; *Beaner v. Lucas*, 138 Iowa 215; *Ritchie v. People*, 155 Ill. 98 (40 N. E. 454). It does not matter that the title does not reveal means and methods, if those means and methods are reasonably adapted to secure the general objects set forth in the title, and the objects of the statute. *Cohn v. People*, 149 Ill. 486 (37 N. E. 60); *Porter v. Thompson*, 22 Iowa 391; *Beresheim v. Arnd*, 117 Iowa 83; *State v. County Judge*, 2 Iowa 280; *State v. Fairmont Cr. Co.*, 153 Iowa 702; *Boggs v. School Township*, 128 Iowa 15; *McGuire v. Chicago, B. & Q. R. Co.*, 131 Iowa 340; *City of Newton v. Board of Supervisors*, 135 Iowa 27. The Constitution is not violated if all the provisions relate to the one subject indicated in the title, and are parts of it, or incidental to it, or reasonably connected with it, or in some reasonable sense auxiliary to the subject of the statute. *Beaner v. Lucas*, 138 Iowa 216; *State ex rel. Walter v. Town of Union*, 33 N. J. L. 351; *Montclair v. Ramsdell*, 107 U. S. 147. The purpose of such constitutional provisions is to prevent hodgepodge or logrolling legislation (Cooley on Constitutional Limitations, cited with approval in *State v. Hoadley*, 20 Nev. 317 [22 Pac. 99]; *State v. Hutchinson*, 168 Iowa 1); to prevent surprise or fraud upon the legislature by means of provisions of which the titles give no intimation, and which might, therefore, be overlooked, and carelessly and unintentionally adopted. Cooley on Constitutional Limitations, cited with approval in *State v. Hoadley*, 20 Nev. 317 (22 Pac. 99); *State v. County Judge*, 2 Iowa 280; *Cook v. Marshall County*, 119 Iowa 384. The purpose is to prevent the introducing of surreptitious provisions, with intent to prevent deliberate action by the legislature (*Woodruff v. Baldwin*, 23 Kan. 491, 36 Cyc. 1017, *State v. County Judge*, 2 Iowa 280, *State v. Hutchinson*, 168 Iowa 1, at 7); to avoid trickery by designing persons (*Woodruff*

v. Baldwin, 23 Kan. 491, 36 Cyc. 1017, Paragraph 3, *State v. Hutchinson*, 168 Iowa, at 7).

There is involved, in analogy, that rule by which purchasers need not follow up a description found in the record of a mortgage, where, as distinguished from being uncertain, the description is misleading, and affirmatively indicates property to be located in a place other than where it in fact is. See *Lee County Sav. Bank v. Snodgrass*, 182 Iowa 1387. The object of the constitutional provision is to prevent surprises in legislation, by having matters of one nature embraced in a bill whose title expresses another (*State v. County Judge*, 2 Iowa 280, *Cook v. Marshall County*, 119 Iowa 384), another way of saying that the only limitation is that the title shall not mislead. And that this is the true view is indicated in *State v. Tieman*, 32 Wash. 294 (73 Pac. 375), where the title was, "An act relative to crimes and punishments and proceedings in criminal cases," and where it was held that germane to this was anything relating to crimes, punishments, and proceedings of a criminal nature, and that the only limitation was that nothing in the way of provisions of a civil nature would be sustained by such title.

It may be that the title in investigation is not as full as it might well have been, but certainly it misled no one. It advised all that it was proposed to enact a statute relating to offenses against the state, and to provide punishment for violation. That was done. The statute is not something other than what the title expresses. It is just that. The title was a sufficient key to the act, and that is all that is required. *State v. Board of Supervisors*, 128 Iowa 442; *State v. Fairmont Cr. Co.*, 153 Iowa 702, at 715; *State v. Hutchinson*, 168 Iowa 1; *Schultz v. Parker*, 158 Iowa 42.

It suffices the title is "calculated to advise the members of the legislature and the people of the nature of the pending legislation" (*State v. Hutchinson*, 168 Iowa 1, at 7); that it "fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects

of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire." Cooley on Constitutional Limitations, cited with approval in *State v. Hoadley*, 20 Nev. 317 (22 Pac. 99).

Too much do the cases loosely deal with this question as though the insufficiency of a title in a statute invoked some such rule as prevails under the recording acts. Under them, certain persons are bound by nothing which does not duly appear in the record of the instrument. They do not need to examine the original instrument. They may stand upon what the recording shows or fails to show. But that is not the rule as to a statute title. It is not intended that the citizen is immune from punishment though the statute itself may be read by him, merely because he cannot find all that the statute provides by reading the title. The constitutional provision does not deal with time subsequent to the enactment of the statute. Its object is to guard the rights of the public and of the legislature while the statute is being proposed; to give such notice by the title as that those who care to have the legislature hear them on a given subject shall have the opportunity, and such notice as does not mislead the legislature.

We have approved two statutes wherein the title was "An act to amend" (a section described by number). and wherein the statute being amended had no further description, beyond, respectively, that it relates "to building and loan associations," and that it relates to "food standards." *Iowa Sav. & Loan Assn. v. Selby*, 111 Iowa 402; *State v. Hutchinson*, 168 Iowa 1. It is difficult to see why these are more definite than the title in the instant case--why these give more advance notice of the subject than is given in the instant case; difficult to see why a statement that a statute relates to building and loan associations or to food standards does more than a title which advises that the statute relates to offenses against the state. and provides a punishment for violation, or gives less notice than a title "Of the practice of medicine," which we held suffi-

cient. *State v. Edmunds*, 127 Iowa 333. And in *Woodruff v. Baldwin*, 23 Kan. 491, Judge Brewer calls attention to a Missouri case, wherein the title "Practice and proceedings in criminal cases" was held sufficient.

It would unduly extend this opinion to make full comment upon the many decisions which, in various ways, sustain the basic reasoning upon which the ones we have analyzed are founded. See *Woodruff v. Baldwin*, 23 Kan. 491; *State v. Forkner*, 94 Iowa 1; *Beaner v. Lucas*, 138 Iowa 215, 216; *Beebe v. Tolerton*, 117 Iowa 593; *Christie v. Life, etc., Co.*, 82 Iowa 360, at 364; *State v. Snow*, 81 Iowa 642; *State v. Squires*, 26 Iowa 340, at 345; *Williamson v. City of Keokuk*, 44 Iowa 88, at 91; *State v. Schroeder*, 51 Iowa 197, at 200; *McAunich v. Mississippi and M. R. Co.*, 20 Iowa 338; *Morford v. Unger*, 8 Iowa 82, at 86; *Whiting v. City of Mt. Pleasant*, 11 Iowa 482, at 484; and *Schultz v. Parker*, 158 Iowa 42.

Great research has found us but a single decision to the contrary. It is the case of *In re Snyder*, 108 Mich. 48 (65 N. W. 562). There, a petitioner was discharged on habeas corpus, because he had been convicted of a felony created by an act the title of which was, "An act to provide for the punishment of crimes in certain cases." The reported case is of the briefest, and without citation of authority. In fact, all that is said is that the constitutional provision is violated, because the title of the act "gives no hint as to the character of the act to be punished." We think the case is contrary to the overwhelming weight of authority, and, as has already been indicated, we decline to follow it.

VI. To a question whether witness, as a representative of the Red Cross, had solicited defendant for subscription, he answered, over objection, that he had. It will be conceded that the naked statement that such subscription had been solicited by him could not be prejudicial, without more. After making this answer, the witness was asked to state what conversation he had with defendant at

7. TRIAL: evidence: belated objections.

the time, and in regard to the Red Cross. To this, which might or might not prove prejudicial, no objection whatever was made. Other testimony by this witness, complained of, was also received without objection.

A witness was asked whether he knew anything as to the attitude of the defendant toward the army Y. M. C. A. and the Red Cross. Objection was made and overruled, and defendant excepted; but no answer was made. Then the witness was asked:

"Q. Have you heard any statements on the part of the defendant in regard to the Y. M. C. A. or the Red Cross?"

No objection was made, and the witness answered, "Well, I heard him say that he gave 17 cents to the Y. M. C. A., and done it in a very light-mannered way, I think." At this time, the first objection was made, and that was by motion to strike all of the answer after the words: "I heard him say he gave 17 cents to the Y. M. C. A." This was overruled, and exception taken. We cannot interfere, because the objection came too late. It was at least within the discretion of the court whether to receive objection first made at that time.

A witness was asked whether, since the beginning of the war, he at any time, in talking with defendant, had heard him speak favorably of the United States government. Ob-

jection was made and overruled that the form of the question was leading, and suggested an answer, and that it was not a part or parcel of, or in any way connected with, the information. Then the question was repeated. The objection was renewed, and counsel added:

"It is immaterial whether or not he ever spoke favorably of the United States; he is not charged with speaking favorably of the United States government. It is certainly incompetent, irrelevant, and immaterial."

Thereupon, the court said: "The whole matter goes to the question of the motive and intent of the defendant in what he did or said." Counsel for defendant: "The form of the question is, 'if he ever heard him speak favorably or

8. TRIAL: evidence: non-responsive answer.

not.' It is immaterial." This objection being overruled, the witness answered, "I believe that I have heard him speak unfavorably." Then the defendant urged that the answer was not responsive. This, too, was overruled. It is elementary that this objection is not available to the party who is not interrogating. The witness then said he had forgotten the question, if he had not answered it, and his answer was read. He finally said that he had not heard defendant speak favorably of the government since the beginning of the war. No objection was interposed to the question which elicited this final answer;

9. EVIDENCE:
relevancy,
materiality,
and compe-
tency: infer-
ence from
failure to
speak.

and, though motion to strike was made, assuming that it is not too late, it was, in effect, a repetition of positions that we have already disposed of. But when one witness was asked whether, during the period of the war, he had heard defendant at any time speak favorably of the United States government, there was timely objection that the matter was incompetent, immaterial, and not pertinent to the issues, and irrelevant. The witness answered he had not. We cannot agree that this is vulnerable to the objection made. At the time in inquiry, loyal citizens generally were so stirred with patriotism that speaking favorably of their government was as natural as breathing; and it was some evidence that, during this time of stress, it should occur that one citizen, in being conversed with, never had a thing to say in favor of the government of the United States. It may not of itself be weighty, but the court was not justified in taking its weight from the jury by excluding it on objection.

One witness was asked:

"Have you at any time heard any statement made by the defendant since the beginning of the war in regard to what our boys were fighting for?"

It was objected to for being leading and suggestive, and the court said that this question was leading. The next question was whether or not witness had heard any statement by defendant as to what our boys were fighting for.

The record shows that here the same objection was made, and the same ruling had, which means that the court once more held that the question was leading. Notwithstanding that, the witness answered: "Well, so I gathered from what I heard him say." No objection was made that answer had been excluded, and therefore should not stand. On the contrary, defendant insisted that "this witness repeat what, if anything, he heard defendant say, and confine his answer to the question asked." All that follows was received without any objection whatever, and the effect of it is that defendant said, in substance, that what they were fighting for was because the rich men wanted a war; that they were fighting for the rich; and that there was a graft in the war. We are not prepared to say that this testimony was not permissible. But, at any rate, no objection to its reception was made.

VII. It would seem that witnesses had, on their examination, given some opinion. The State inquired as to what was the basis for that opinion. One inquiry was whether that opinion was not, in part, based on the statement of defendant that this was a rich man's war. It was objected that this was incompetent, irrelevant, and immaterial, and that the defense claimed the jury has a right to form the opinion. There was no ruling, but the court said: "The question who asked him, about what he thought about." Thereupon, counsel for defendant said:

10. WITNESSES:
cross-exam-
ination:
explanation
on redirect.

"Possibly I might be allowed that attitude on cross-examination. If the court understands now that I have asked him for his opinion, I just refer to the stenographer's record. I respectfully insist I did not ask this witness for his opinion; I asked him as to what acts and facts, within his knowledge."

This objection or remark was overruled, under exception. The witness answered that such pronouncement by the defendant was one of the bases of witness's opinion. And he gave other alleged acts by the defendant as reasons for that opinion. Upon the whole, this record shows

nothing competently at this point except that it is indicated that the opinion of the witness got into the case on cross-examination by defendant. That being assumed, it was not error to have the witness explain to the jury upon what facts he based such opinion.

VIII. The State made some attempt to show that the defendant was financially able to give such aid to the government and the Red Cross and like associations as he

had declined to give. On that point a witness was asked to say whether or not some farm was listed with him by defendant to be sold. Objection that this was incompetent, irrelevant, and immaterial was over-

11. CRIMINAL
LAW: evi-
dence: finan-
cial ability
to aid gov-
ernment.

ruled with the statement by the court that it supposed this to be preliminary. The witness answered that he had listed "their" farm with him last fall; listed "our" farm; wanted the witness to sell it for him. Without further objection, the witness was inquired of whether defendant still occupied this farm, and he answered that he (witness) had not succeeded in selling it, and that defendant still occupied it. At this point, defendant moved to strike all the testimony of the witness with reference to the listing of any farm described as "our farm," for the reason that the same was incompetent, irrelevant, and immaterial as to any issue connected with the trial of the cause. On an explanation by counsel for the State of the purpose of the evidence, counsel for defendant said that he renewed the objection to "this extent," to wit: "That it is not the proper method of proving title, and the witness does not say that he knows." With the objection thus limited in scope, it is clear that it is not well taken. This view is reinforced by the brief, which, at this point, is merely a complaint that the State was permitted to show by parol that defendant was a man of means, who was able to contribute to the said organizations. The testimony was not objectionable for being in parol. The matter of the title was purely collateral.

IX. The defendant was asked, without objection: "In

regard to the government, what is the nature of the statements that you put on the backs of these checks?" and he

12. CRIMINAL
LAW: evi-
dence: omis-
sion of im-
material
matter.

answered, "Religious matters." He was then asked, "What kind of religion?" An objection by defendant that this was immaterial was overruled, and he excepted, and counsel for defendant then said: "I think

that question might be elucidated a little bit; I don't believe I understand the nature of the question myself." The court then said: "He stated he sent out religious matter on the back of these checks, and the county attorney asked him what religion it was." Thereupon, the county attorney said: "What is the nature of the matter that you sent out in this way?" The defendant objected that this was incompetent, irrelevant, and immaterial, and not proper cross-examination, because the question of religion was not called in question. Thereupon, the court said: "The question of religion is not being called in question; it is the question of what is being written on these checks. Overruled." Defendant excepted. Then came the following question: "What were some of the things you wrote on the back of checks?" This was objected to by defendant, for the reason that it is not the best evidence; that, if counsel for the State had the checks, the defense would be glad to put them in evidence. Then defendant said, on inquiry, that he did not have these checks or drafts with him. Then came this:

"Q. Do you remember some of the things that you wrote on the back of the checks and drafts? A. Yes, sir, I remember. Q. Will you state to the jury some of them? A. I remember one that I put on a check not very long ago with a typewriter. I wrote something pertaining to religion on the back of a check. Q. What was that statement? A. 'In the beginning man created God out of the dust of superstition, Father, Son, and Holy Ghost created he it.'"

We are utterly at loss to see how this testimony can have been prejudicial to the defendant. It is doubtful

whether there is apt objection. It is certainly true that, at worst, the objection that the matter is immaterial is good. And it is so immaterial that, as said, one cannot conceive what harm it did.

X. We are told in argument that certain things were the theory of the defendant, and that certain other things were not an offense, within the purview of the statute or of the indictment. This abstract announcement of abstract intention presents nothing for review. No efficient vehicle is employed, telling us why this theory was sound, or what was done in negation of it. All we have on this point is an assignment in the motion for new trial that the court erred in refusing proper instructions requested by defendant, and erred in failing to give to the jury instructions as to the theory of the defense made by defendant. This does not entitle appellant to review.

XI. An instruction was refused which asked the court to charge that:

“In considering your verdict, you are instructed that the crime charged must be proven by competent evidence to have been committed against the government of the state of Iowa or the government of the United States or some department thereof, and that you are not permitted to consider acts against or remarks made to or concerning private citizens or corporations or associations.”

13. EVIDENCE:
judicial
notice:
societies
auxiliary
in war work.

There is no evidence that defendant said anything against private citizens, and no doubt the complaint addresses itself to testimony received, tending to show that defendant was hostile to the American Red Cross, the Y. M. C. A., the Army Y. M. C. A., and perhaps Red Cross nurses. We cannot agree that the attitude of the defendant to these organizations should not have been considered by the jury at all. The record shows, and indeed it is a matter of common knowledge, of which we may take notice, that these organizations were, in effect, auxiliaries in the task which this government and this state undertook, after

declaration of war on part of the United States. Whosoever by act or speech crippled efforts of these associations in some degree made victory less sure, less easy, and increased the chances of defeat, and so put himself in opposition to the nation. The offered instruction told the jury that the nation was receiving no help in the war from the activities of these organizations. As already indicated, we think that this position is untenable.

XII. The brief has many criticisms of several instructions given. But the record does not permit us to review them. While, at the time of the trial, the statute requiring

the presentation of objections before the charge was read to the jury had been repealed, the substitute therefor (Chapter 24, Acts of the Thirty-seventh General Assembly) did no more than to change the time

for presentation, and did not dispense with presenting specific objections. While the exceptions may now be filed within the prescribed time after verdict, they must still state "the grounds of such objections." And this does not mean some generality by way of a reason, but some definite statement which will direct the attention of the trial court to just what is complained of, so worded as that, say, the court may readily know where to search in the law, if minded to search. The sole objection was, first, an unverified statement by counsel that he did not have time to properly investigate the instructions before they were read to the jury, and therefore would merely object to the giving of each and all of the instructions, for not being correct statements of the law. Then followed a statement that, within the time prescribed by statute, defendant would submit more specific and certain objections. Such objections as were subsequently made, were made in the motion for new trial. They are: First, that the court erred in giving Instruction 8; second, that the court erred in giving Instruction 12; third, that the court erred in giving to the jury improper and erroneous instructions. Clearly, these

14. APPEAL AND
ERROR:
reservation
of grounds:
insufficient
objections.

do not meet the statute, and we therefore decline to review the charge given.

XIII. As to the assignment that the county attorney was guilty of misconduct in discussing matters not within the record, appellant concedes that "the reporter failed to

preserve the remarks, though the record shows the exception." We have repeatedly held that, unless we have the argument complained of before us, that we will not reverse, merely because counsel excepted to the argument on the trial.

15. TRIAL :
argument
and conduct
of counsel :
failure to
preserve re-
marks in
record.

XIV. While there was a motion made and overruled at the close of the testimony for the State, asking that a verdict be directed for defendant, this motion was not repeated

at the close of all the testimony. We have repeatedly held that, in all cases, such failure to repeat waives the right to assert here that a verdict should have been directed. This disposes, in a way, of several complaints that are made; for their effect is to assert that the motion to direct verdict

16. APPEAL AND
ERROR: res-
ervation of
grounds :
failure to
renew mo-
tion for
directed
verdict.

should have been sustained.

Of course, that does not dispose of the motion for new trial; for, as frequently as we have held that failure to repeat the motion to direct verdict will waive the refusal to direct it, have we held that this does not preclude raising, on the motion for new trial, that the verdict returned is contrary to the weight of the evidence.

Some of the complaints made in the motion for new trial charge that to have been erroneous which we have already held was not erroneous. We have repeatedly held that, if the right to review the refusal of directed verdict has been waived by failure to repeat the motion, then, for practical purposes, the denial of the motion is deemed to be rightful; and hence the assertion in motion for new trial that it was not rightful is of no avail. The assertion in the motion that the verdict is against the weight of the evidence and is contrary to law is amplified by statements

that the hostility of the defendant, if any was shown, was against the said auxiliary associations, or some of them. This point we have disposed of.

It is further said that no one named or mentioned any matter or thing that might "incite, promote, or abet hostility or opposition," to the government of the state or the

17. CRIMINAL
LAW: ap-
peal: sub-
stantial
evidence in
support of
verdict.

nation; that no one named any act on the part of the defendant which was directed against any officer or representative or department of the government of the state or of the nation; that no witness for the State testified that, as a matter of fact, the defendant ever attempted to incite, promote, or abet such hostility "as is charged in the indictment;" that very few of the witnesses for the State attempted to even fix the time, much less the venue, of such matters as they related; that some of the witnesses believed defendant to be loyal; and that there was an entire absence of evidence showing criminal intent. We have to say that, on a careful examination of the record as a whole, we find there was substantial evidence in support of the allegations of the indictment, and that, under elementary rules, the evidence in the record is such that we cannot disturb the verdict.

The judgment of the district court must be and it is—
Affirmed.

LADD, C. J., EVANS and PRESTON, J.J., concur.

STATE OF IOWA, Appellant, v. EDWARD JINKENS, Appellee.

WIFE DESERTION: Jury Question. A jury question, on the issue

- 1 whether a husband had deserted his wife, arises on testimony tending to show: (1) That the husband married the wife in bad faith; (2) that he took his wife to a foreign state, and, after a short experience in business, caused her to return to the home of her parents in this state, under an agreement that

he would soon return to the same place and provide for her; and (3) that he did so return, but refused, for a period of some three months, to go to his wife, or to speak to or provide for her.

WIFE DESERTION: Venue. The venue in a prosecution for desertion by the husband of his wife may be laid in the county in this state in which the husband and wife had, at the husband's instigation, mutually agreed to live, and in which they did live, and in which he refused to provide for her; and this is true even though it be conceded that the husband retained a legal residence in a foreign state.

Appeal from Davis District Court.—SENECA CORNELL, Judge.

NOVEMBER 1, 1920.

THE State appeals from order directing verdict for defendant. The facts are stated in the opinion.—*Reversed.*

H. M. Havner, Attorney General, *B. J. Powers*, Assistant Attorney General, and *T. A. Goodson*, County Attorney, for appellant.

Wm. M. Walker, *H. C. Taylor*, and *Buell McCash*, for appellee.

ARTHUR, J.—Defendant was indicted May 7, 1917, under Section 4764 of the Code, charging that defendant “did unlawfully, willfully, and designedly marry one Lottie Burrows, for the purpose of escaping a prosecution for the crime of seduction, committed against the said Lottie Burrows; and while said charge was pending, he married her, the said Lottie Burrows, for the purpose of escaping prosecution for said crime of seduction, and thereafter without good and just cause deserted her.”

1. WIFE DESERTION:
jury question.

On the trial, the State produced evidence tending to show that, on September 7, 1916, information was filed in

justice court, charging defendant with seduction of Lottie Burrows, prosecutrix in this action; that the defendant was arrested, and brought into court the following day; was arraigned; entered plea of not guilty; gave bond for appearance; and the case was set down for hearing four days later. When the case came on for hearing, defendant appeared, with counsel, and hearing was postponed, from time to time, until September 20th. Defendant and prosecutrix were married on September 18th, and the charge of seduction was dismissed. A few days before his arrest, Jinkens went to the Burrows home, and talked with Lottie about her condition and what they should do about it, and also talked with Mrs. Mary Burrows, Lottie's mother. Jinkens and Lottie called Mrs. Burrows into the room where they were, to talk the matter over with them. Jinkens said he had "got Lottie into trouble." Mrs. Jinkens asked him if he was going to marry Lottie, and he said:

"I will never marry her nor live with her. The only thing I will do, I will take her to Ottumwa to a doctor, and she would be operated on."

He did take her to Ottumwa, the evening of the day that he said he would take her, but he was arrested on the seduction charge that same evening, immediately upon their arrival in Ottumwa. In about a week after his arrest, and near the time set for his preliminary hearing on the seduction charge, he again went to the Burrows home, where Lottie and her mother were, and talked about marrying Lottie, and called several times and talked about the same subject, and finally brought his lawyer with him, and secured the written consent of the parents to the marriage, —Lottie being under 18,—and the marriage took place on September 18, 1916. After the marriage, they lived about two weeks with Lottie's parents, and then they went to Luray, Missouri, and ran a small restaurant. for about six weeks. Then he told her that the restaurant was not paying, and that, he had a buyer for it and would sell, and for her to go and stay with her folks, until he sold the restaurant, and that he would get a position in Iowa, and

come after her. They agreed to that arrangement. He gave her money to return to her folks, and, shortly afterwards, shipped their household effects to Milton, Iowa. She arrived at the home of her parents, which is two or three miles out of the little town of Milton, in Davis County, Iowa, on Monday; and, on Thursday of the same week, defendant appeared in Milton, but did not visit his wife. She saw him in Milton, and he saw her; she attempted to have a talk with him, but he avoided her. During the six weeks they were in Missouri, he treated her badly, endeavored to provoke her to leave him, and asked her to leave him. She told him she would not leave him. After returning to Iowa, she remained at the home of her parents, and a child was born there, February 13, 1917. A few days after the baby was born, this action for wife desertion was commenced in justice court, and Jinkens was arrested at Milton, Iowa, on February 18, 1917.

The record is silent as to whether or not defendant remained in Davis County from about November 21, 1916, when prosecutrix saw him in Milton, until his arrest in Milton, on February 18, 1917. Jinkens escaped from the sheriff, and was not found until January, 1918, when he was arrested as a fugitive in Denver, Colorado, and returned to Davis County, Iowa.

When the State had submitted the foregoing facts and rested, the court, on motion of the defendant, directed a verdict in his favor, and he was discharged.

The offense charged is defined in Section 4764 of the Code, and reads:

“Every man who shall marry any woman for the purpose of escaping prosecution for seduction, and shall afterwards desert her without good cause, shall be deemed guilty of a misdemeanor and shall be punished accordingly.”

There is no question but that the facts disclosed by the evidence establish conclusively that defendant married prosecutrix to escape prosecution on the charge of seduction then pending against him. It is evident that he did not enter the marriage ceremony in good faith. He re-

fused to marry her, and proposed an abortion, instead of marriage, and did attempt to carry out his wicked scheme, and was prevented by arrest on the charge of seduction. It was only after his arrest, and when the preliminary hearing was almost reached, that he, in fear of prosecution, concluded to marry her. That element of the charge, that defendant married prosecutrix for the purpose of escaping prosecution for seduction, does not require further consideration.

The trial court evidently concluded that his court was without jurisdiction, because the desertion element of the offense, if desertion was established, occurred, not in Iowa, but in Missouri. And that is the pertinent inquiry in this case.

2. WIFE
DESERTION:
venue.

We think it may be said, from the evidence, that defendant did desert his wife, and that such desertion was without good cause, and in pursuance of a purpose and design to desert her, formed at the time of the marriage. Anyway, it cannot be said, as a matter of law, that he did not so desert her.

Now, where did the desertion occur? The first two weeks after the marriage, defendant and his wife lived at the home of her parents; lived there until he found some place to engage in business,—not an unusual occurrence.

Then they went to Luray, Missouri, and conducted a restaurant. Both worked in the restaurant, and lived in rented rooms. That way of working and living continued about six weeks, and then defendant told his wife that their restaurant business was not paying; and that he would sell it; and that they would return to Iowa; and for her to go to her folks and remain with them until he could close out the business; and that he would join her, and find employment in Iowa; and that he would come and get her; that he thought he would find a place in Keokuk to work; and that they would go there to live. They agreed to that arrangement; she did what he asked her to do, went to the home of her parents, and awaited his coming. In pursuance of such arrangement, he furnished her trans-

portation to go to Iowa, and, later, shipped their household effects to her, and paid the freight on them. Later, in four days, he arrived in Milton, Iowa, as he had agreed with her that he would. Whatever willful design and purpose he may have entertained at the time of the marriage, and harbored all along, during approximately two months, of deserting this woman, up to that time he had not abandoned her, nor left her unprovided for. It can scarcely be said, from any overt acts or omissions of his, that he had deserted her up to the time of his arrival in Davis County, in pursuance of the arrangement between them that she would precede him to Iowa, and that he would follow and join her later, and procure employment in Iowa, and they would be together again. Upon his arrival in Milton, Davis County, she saw him in a barber shop, and he saw her; she sought to meet and talk with him, but he avoided meeting her, and did not come to get her, at her parents' home, as he had promised her he would.

We think the evidence would have supported a finding by the jury that the desertion took place in Davis County, after defendant came out of Missouri up to Milton, as he agreed with his wife to do, and then and there failed to take her to him, and neglected and refused, by his acts of omission, to maintain or provide for his wife.

If material, it was a question of fact for the jury to say whether defendant gained a residence in Missouri, or remained a resident of Iowa, and was only in Missouri temporarily. The evidence, we think, would have sufficiently supported a finding by the jury that defendant did not intend to permanently leave Davis County, and did not intend, in good faith, to take up a residence in Luray, Missouri, and make a home there for himself and wife, and that he remained a resident of Davis County, Iowa. However, we do not think the venue necessarily depends on whether he gained a residence in Missouri or not. Defendant and his wife had agreed upon returning to Davis County, and she did return, and he followed, as they had agreed; but, when he arrived in Davis County, he failed and

refused to proceed further with his agreement to maintain and provide for her. It was defendant's duty to join his wife at the place where she had gone, at his request, and take her to him, and provide for her in Iowa, as he had agreed. Supporting this conclusion, see *State v. Dvoracek*, 140 Iowa 266. In the *Dvoracek* case, this court said:

"The venue is in the county where the duty of providing for the wife and children should be discharged."

The case should have gone to the jury, and the jury should have been permitted to find whether the venue was laid, together with other material matters in the submission of the case.

The defendant has been discharged, and cannot again be brought to trial under this indictment. Our duty ends with this disapproval of the court's ruling.—*Reversed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

STATE OF IOWA, Appellee, v. JIM MCCRAY, Appellant.

BURGLARY: Allegation of "Ownership." A general allegation of
1 ownership in a named person of burglarized premises is sufficiently supported by proof that the named person was simply the tenant of the legal title holder. (Secs. 5286, Code, 1897, 5289, Code Supp., 1913.)

INDICTMENT AND INFORMATION: Accessories Before the Fact.
2 Accessories before the fact are very properly indicted just as though they had actually committed the full criminal act. (Sec. 5299, Code, 1897.)

CRIMINAL LAW: Completing Trial with Substituted Judge. The
3 trial of a felony which is interrupted by the sickness of the trial judge may validly proceed to a final determination before another judge of the same court who familiarizes himself with the record, when the accused (1) asks no continuance, (2) does not ask for the recall of the witnesses already examined, and (3) fully consents through his counsel that the trial shall so proceed.

SALINGER, J., dissents.

BURGLARY: Evidence to Sustain Verdict. Evidence held sufficient to sustain a verdict of guilty.

Appeal from Woodbury District Court.—J. W. ANDERSON
and W. G. SEARS, Judges.

NOVEMBER 1, 1920.

THE appellant was indicted for the crime of breaking and entering. He was tried to a jury, found guilty, and judgment pronounced. He appeals.—*Affirmed.*

C. R. Metcalfe, for appellant.

H. M. Havner, Attorney General, *B. J. Powers*, Assistant Attorney General, *O. T. Naglestad*, County Attorney, and *O. D. Nickle*, Assistant County Attorney, for appellee.

PRESTON, J.—1. The indictment charges that defendant “did then and there, etc., break and enter a building, to wit: a store. * * * The said building then and there being owned by Sam Simonoff, and in which building were then and there kept by the said Sam Simonoff, money, goods, merchandise, and other valuable things, for the use, sale, and deposit of said Sam Simonoff,” etc. The testimony shows that Simonoff was not the owner of the legal title, but that he leased the building, and was in possession, and owned the stock of goods, and operated the store. It is thought by appellant that there was a fatal variance between the allegations in the indictment and the proof, as to the ownership of the building, and that this motion in arrest of judgment should have been sustained. Code Section 5289 specifies what the indictment must show, and Subdivision 6 reads:

“That, when material, the name of the person injured

or attempted to be injured be set forth when known to the grand jury, or, if not known, that it be so stated in the indictment."

In some cases, the exact name is not material, and an erroneous allegation as to the name is not prejudicial. *State v. Leasman*, 137 Iowa 191; *State v. Burns*, 119 Iowa 663.

Appellant cites *State v. Morrissey*, 22 Iowa 158, *State v. McConkey*, 20 Iowa 574, *State v. Jelinek*, 95 Iowa 420, *State v. Wrand*, 108 Iowa 74, and *State v. Wasson*, 126 Iowa 320, as holding that the ownership of the building must be alleged, and in the owner. In the *Morrissey* case, the indictment simply charged defendant with breaking and entering a barn, without giving the name, either of the owner, tenant, or party in possession. In the *McConkey* case, defendant was charged with trespass, and the indictment charged that defendant did commit willful trespass upon the land of another, and not his own, describing the land, without any further description of the owner. In the *Jelinek* case, it was charged that defendant broke into the store of certain persons named, known as the Grange Store. This indictment was held sufficient, and a conviction sustained, where it was shown that the store was known as the Grange Store, though it also appeared that the persons named did not own this store as individuals, but as a corporation. The *Morrissey* case was distinguished. A conviction was sustained in the *Wrand* case, where, in the indictment, the ownership of the building and of the goods is laid in James A. Morrow, and the proof showed that they belonged to and were in possession of John A. Morrow. The opinion states that it has been uniformly held that, in the absence of prejudice, an erroneous allegation of the name of the party injured is immaterial. It is also said that it was unnecessary to allege or prove who owned the goods (citing cases). In the *Wasson* case, the charge was robbery. The indictment charged the defendant with stealing, etc., from the person of one Malone, certain money, but without otherwise alleg-

ing the ownership of the property. The indictment was held insufficient, the court saying, in part, that, to constitute the crime of robbery, there must be larceny from the person, and that the rule in this state is that an indictment charging robbery must allege the ownership of the property. The *Wasson* case was cited in *State v. Clark*, 141 Iowa 297, 302, a false pretense case. We said that the three crimes of robbery, larceny, and obtaining property by false pretenses, have many essential elements in common, and that, in each, the gist of the offense is the felonious taking and conversion of the property of another. In breaking and entering, the gist of the offense is the breaking and entering. It is not necessary that there should be any larceny at all. The State cites Code Section 5286, which provides:

“When an offense involves the commission of or an attempt to commit an injury to person or property, and is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the name of the person injured or attempted to be injured is not material.”

They also cite *State v. Lee*, 95 Iowa 427, *State v. Porter*, 97 Iowa 450, *State v. Semotan*, 85 Iowa 57, *State v. Emmons*, 72 Iowa 265, 267, and *State v. Burns*, 155 Iowa 488, where are cited numbers of others of our cases which hold, we think, that, under the circumstances shown in the instant case, there was no variance. In some of the cases, it is said that burglary is not an offense against the fee title of the realty, but is an offense against the security of its occupancy or habitation, and that, in an indictment for burglary, ownership means any possession which is rightful, as against the burglar. Under many circumstances, the ownership may be laid with equal propriety in one person or in another, in the owner or his tenant, in the master or in the servant occupying under him. The purpose of the allegation of ownership in an indictment for burglary is to specify and identify the offense. On these propositions, see cases cited in the *Burns* case. There was no variance.

2. The court charged, in substance:

“That all persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense, or aided or abetted in its commission, must be indicted, tried, and punished as principals. So, in this case, it is not necessary for the State to show that the defendant, James McCray, actually did the act constituting the offense, if it is shown beyond a reasonable doubt that he was present, aiding and abetting another or others in doing the act, and thereby concerned in committing the offense. It will be for you to say whether he committed the act, or was concerned in its commission by another or others,” etc.

2. INDICTMENT
AND INFOR-
MATION:
accessories
before the
fact.

Appellant contends that, since no conspiracy was charged in the indictment, and there was no charge that another aided or abetted the commission of the offense, the instruction was erroneous. The instruction is in harmony with Code Section 5299, which provides that the distinction between an accessory before the fact and a principal is abrogated, and all persons concerned in the commission of the offense, or who aid and abet its commission, must be indicted as principals, etc.

It is also thought that there is no evidence tending to show that defendant aided and abetted any person, and that it was error to instruct upon an issue not in the case. The evidence which justified the jury in finding that defendant was concerned in the commission of this offense will be referred to later.

3. It appears that the trial was commenced before Judge Anderson, and, as appellant states it, the evidence for the State was introduced, and the defendant gave his testimony, and then the case was taken up, and the trial continued before Judge Sears, another judge of the same district, who finished the trial and instructed the jury. It appears that Judge Anderson was taken sick, and taken to the hospital, and the

3. CRIMINAL
LAW: com-
pleting trial
with sub-
stituted
Judge.

matter of proceeding with the trial was taken up in open court. No objection was made to this procedure, no request for a continuance, or that a new jury be called, or that the witnesses be recalled to testify again; and, in fact, the record clearly shows that defendant expressly consented thereto,—at least his counsel did so in open court, and in the presence of the defendant. True, the record does not show that the defendant in person, by his own words, consented; but he was charged with a felony, and the law requires his presence at all stages of the trial, and, in the absence of any showing to the contrary, it will be presumed that he was present, as the law requires. The matter is first raised in the motion for new trial.

Appellant cites Code Section 241, which provides that judges shall not sit together in the trial of cases, etc. These judges did not sit together. The argument is that, since the statute prohibits them from sitting together, by analogy they could not sit apart, in the actual trial of the same case. They cite 16 Standard Encyc. of Procedure 639, to the effect that, whenever one of the judges has taken cognizance of a case, ordinarily no other judge has the power to interfere in the matter.

It is conceded that there are some acts that different judges may perform in the same case. We assume that the real objection is, as argued, that ordinarily it is necessary, in passing upon the motion for new trial, that the judge should have heard the evidence. The record shows that Judge Sears familiarized himself with the evidence which had been received, before proceeding with the testimony. We are compelled to do that from the record, without seeing the witnesses. But conceding, for the purposes of the case, that ordinarily the rule is as contended, still there was an advantage to the defendant in proceeding with the trial. He was confined in jail, and doubtless desired a speedy trial. As said, he did not ask for a continuance, but desired and consented to proceed. The contention of the State is, in effect, that, defendant having

consented to proceed, he may not speculate upon the chances of an acquittal but take advantage of it if convicted. It is said that, as a general rule, a succeeding judge has authority to hear and determine a motion for new trial, in a case heard by his predecessor, where the latter has ceased to preside, and has departed from the district in which the trial was had, where his term of office has expired, or where he has died. A judge, under such circumstances, must act on the evidence upon which the verdict was founded, which may be ascertained by reference to the notes of the trial judge, or by his affidavit, or that of the counsel in the case, by re-examination of the witnesses, or by any other lawful mode. 23 Cyc. 567. See, also, *Manning v. Mathews*, 66 Iowa 675; *Hull v. Chicago, B. & P. R. Co.*, 65 Iowa 713; *York v. State*, 91 Ark. 582 (121 S. W. 1070). In the last-named case, under a statute authorizing judges to temporarily exchange circuits with the same powers as in their own, it was held no error in judges to exchange, pending a prosecution before one of them in which all the evidence had been adduced, the instructions given, and the opening arguments of counsel made. In that case, the second judge presided during the remainder of the trial, and the arguments were completed, the motion for new trial overruled, and judgment pronounced. In that case, there was an agreement entered of record, in regard to the exchange, but we do not understand that the defendant agreed to the exchange. At any rate, there is no question of his consent discussed or decided. In that case, as here, the proceedings were, at all times, under the direct supervision of a judge fully authorized to control them, since our statute authorizes judges to exchange. Code Section 240. In the *York* case, the court said further:

"We are unable to see that appellant could have been prejudiced by the exchange of the judges unless it be in the decision of questions of evidence. But this could not effect the legality of the exchange, as the witnesses whose testimony may be in question in such cases may be recalled

and required to testify what they had stated in the trial, and go through the same course of examination."

While the cases just cited may not be precisely in point, they are somewhat analogous, and show that, under some circumstances, one judge may partly try a case, and another judge complete it; and the State claims that this is especially so where the defendant consents thereto; and they contend that, in the absence of such consent, one judge of the district court has authority to dispose of all business undisposed of, and that one judge may preside at the trial of a criminal case, and another judge announce the sentence. They cite *State v. Jones*, 115 Iowa 113, 120; *Renner Bros. v. Thornburg*, 111 Iowa 515, 517; *State v. Emmons*, 72 Iowa 265, 268. The State further contends that the error, if there was any, was invited by the defendant, and cannot now be made a ground for reversal. They cite *Proffitt v. United States*, 264 Fed. 299, 303.

In *State v. Wilson*, 166 Iowa 309, 325, a murder case, counsel for defendant, in his presence, admitted, in the opening statement, that the shots fired were the cause of death. The court held that the statement of counsel was presumed to have been with the consent of defendant, and that it was unnecessary to prove the fact admitted. Defendant was not confronted with witnesses against him as to such evidence.

We think it was competent, under the circumstances of this case, to consent to the continuation of the trial before Judge Sears. The record shows:

"Court adjourned until 2 o'clock, January 26, 1920. And now at this time, at 2:00 o'clock P. M., January the 26th, 1920, the following proceedings were had before the Honorable W. G. Sears, judge in and for the fourth judicial district of Iowa:

"Court: Let us make the record on this now.

"Mr. Metcalfe: All right.

"Court: County Attorney, you might proceed and dictate your record. My idea is like this: It ought to be shown that this case has been partly tried before Judge

Anderson, and he was taken sick and could not proceed with the case further, and that the defendant is in jail, and by consent of all parties in open court, that the case proceed before me, and with the same jury.

"Mr. Metcalfe: Yes, that is perfectly satisfactory to the defendant.

"Court: Do you want to add anything else? I was just giving you my suggestion.

"Mr. Nickle: I think that covers it.

"Court: Now let's see, the defendant has started in on his evidence.

"Mr. Metcalfe: Yes, your Honor.

"Court: Next witness for the defendant. It has been suggested that it be further stipulated that Judge Anderson and myself are the judges in this county, Woodbury County, and that Judge Anderson was taken sick and taken to the hospital this morning, and by consent of the defendant, the trial proceed before the Honorable W. G. Sears, legal presiding judge in place of Judge Anderson.

"Mr. Nickle: Better show the court has made himself familiar with the testimony taken in this case before.

"Court: Yes."

Under this record, and under the law, we are of opinion that Judge Sears had a right to conclude the trial,—in any event, there could have been no prejudice to the defendant. There is no error at this point of which appellant can complain.

4. Appellant challenges the sufficiency of the evidence to sustain the conviction. It appears that a witness saw defendant in the store, about 4 o'clock Sunday morning of a day in August. Two others were in the store at the same time, but the other two escaped. The electric light in the store was shining. The store was locked, the night before; and, when the witness discovered the parties in the store, he found the glass broken and scattered on the walk. The police say that, when they arrived, they found

4. BURGLARY:
evidence to
sustain ver-
dict.

a window about four feet square broken out. The witness Wentz, who first saw defendant in the store, says he stooped down outside, so that he would not be seen, and stayed there about three minutes; saw defendant walking from one counter to another, in the store.

"I heard someone talking, and I thought it was defendant, and he said: 'Come on, let's go before we get into trouble, all I wanted was the money;' and there was another voice, sounded like, said: 'Come back here.' He said: 'No, let's go before we get into trouble. All I want is the money. It is getting light outside.' Q. Now, this voice you heard, when he said to him, 'Come on, back here,'—where did it sound like it was? A. Sounded somewhere around in the front part of the store, in that section,—part of the store McCray was in. Q. Well, could you tell from the voice whether it sounded from the back part of the store or the front part? A. Well, it was back of some of the counters some place, behind the stuff that is there. I could not see them. They might have seen me when I came up there: that is probably why they asked defendant to come back there."

When the police came, they asked defendant how he got entrance, and he answered, "Find out." When the police came, the lights were burning, and defendant was just dropping a sack of sugar and picking up a sack of flour and starting to the front end of the store. Five sacks of sugar had been moved up by the door, and some flour by the window; also, a gunny sack, with some tobacco and cigars in it. Defendant was taken to the police station and searched, and he had two oranges and five or six cigars on his person, but no money. The circumstances abundantly show the intent. *State v. Worthen*, 111 Iowa 267; *State v. Fox*, 80 Iowa 312; *State v. Teeter*, 69 Iowa 717; *State v. Mecum*, 95 Iowa 433; *State v. Cook*, 188 Iowa 655.

It is argued by appellant that the evidence does not show that he personally broke into the building. As we understand the argument, it is claimed that it is incumbent

upon the State to show which individual of the three did the breaking. This would be impossible, and is not necessary. The evidence was amply sufficient to justify the jury in finding that the three parties in the store were acting together. It is claimed that defendant was intoxicated, and so much under the influence of liquor as to be incapable of forming an intent. There is evidence tending to show that, the day and evening before this transaction, defendant, with others, had been drinking heavily. Defendant claims to have kept count of the number of drinks and the quantity of whisky consumed, until, as he says, he became so drunk that he did not know what he was doing. But a witness for the State testifies that he saw defendant about 12 o'clock, before he was found in the store, and that he was not intoxicated at that time. He was walking from one counter to the other, when Wentz first saw him in the store; he was carrying heavy sacks of sugar and other things to the door, a thing he could not well do, if he was so much intoxicated as claimed, and a very rational and natural thing to do, if the breaking was for the purpose of larceny; and the police officers say that, when they came, and when he was at the police station, soon after, he was not intoxicated. There was a conflict in the evidence, and this is really about the only conflict in the evidence in the case. It was a question for the jury.

The defendant interposes a unique defense, which may have been regarded by the jury as unusual and somewhat suspicious. The contention is, in brief, that because before that, he had money, which was known to the two other parties, and had none when arrested, he was robbed of it by the other two when he was drunk, and that the other two broke into the store, and took defendant into the store, where the lights were shining, in order to rob him in the store. He says he became acquainted with two men who were working on the same job in July; that he met them a few times, and had a few drinks with them; that, on Saturday evening, August 7th, he met them at a pool hall, and they played some pool, and went out and

played cards for three or four hours. The abstract and evidence show this to have been on August 7th, but the argument is that it was the evening before the burglary. He says he won at cards \$30, and that he had \$75 of his earnings that he had collected prior thereto; that he was ahead of the game, and that, when they quit, he loaned the other two \$5.00 apiece, and gave four others \$1.00 apiece, and paid another party \$2.50; that then they had some drinks, and got into a crap game; that, later in the evening, the two men drank with him, and they all put in together and bought two quarts of whisky. for \$12 a quart, and went into a back lot, in an old dray wagon, and sat down and drank; and that the boys were telling toasts, and taking good shots out of the bottle, and he got too much, and that is all he remembers. He says that, when he was taken to the police station, early Sunday morning, he had been considerably beaten up, and that his clothes were torn, and his money gone. He says he does not know who beat him up; has no remembrance of being in Simonoff's store; does not know how he got into the store. According to the State's witnesses, defendant was not as badly beaten up as he claims to have been. It is thought by defendant that a person would not be likely to be in the store committing a burglary, with the lights shining. Possibly this would not be the usual way; but it might be necessary to have some light, either by a flashlight or otherwise, to sort out the things they wanted, and get them near the door to take away. The very boldness of the thing may have been thought by the defendant and the others to be likely to allay suspicion. It was nearly daylight. It occurs to us that it would be equally or more improbable that the other two would carry defendant into the lighted store room, for the purpose of robbing him, with the lights shining, rather than to take him down a dark alley. But there is no evidence that he was so taken into the store, and there is no evidence that he was robbed of his money. Counsel for defendant argue that the fact he was "beaten up," and the money gone, shows that he was robbed; but,

according to his own story, he had been drinking and gambling, and was giving away his money to several others, and spending it for high-priced whisky. The evidence as to what he said and did, when he was first seen in the store, indicates that he and the other two had broken and entered the store for the purpose of larceny. Clearly, it was a question for the jury, and their verdict has ample support in the testimony. The judgment is—*Affirmed*.

WEAVER, C. J., LADD and EVANS, JJ., concur.

SALINGER, J. (dissenting). Judge Anderson heard part of the evidence. Judge Sears read what Judge Anderson had heard, and heard the rest. The retirement of Judge Anderson was due to illness, and no one is to blame for the conditions that brought Judge Sears into the case. The ordinary course, if judge or juror became too sick to go on with a case partly tried, is to deal with the case as one of mistrial, and to order a new trial, or possibly a continuance. My understanding is that, if defendant had objected to the exchange of judges, and had been overruled, it would be conceded that that would have been error. But here it may well be claimed that defendant consented. If he did this, he waived the objection he now makes, if he could waive it. I dissent because of opinion that he could not consent to the trial of a charge of felony by a judge who had heard part of the evidence only. One argument here is that defendant cannot consent and speculate; that he cannot put himself where he will be satisfied with his agreement if acquitted, and nullify such agreement if convicted. But the same argument can be as well made as to a consent to try a felony charge to a jury of less than 12. And we have held that a jury of 12 cannot be waived, in a felony trial. The reason for such holding is bottomed on public policy. An individual cannot set aside regulations that protect against unjustified conviction of grave crimes. He may not care whether, though innocent, he be convicted. But the State does care. And it will not

permit him to consent to anything which will make it less certain that no one not duly proved guilty will be found guilty. He cannot effectively consent to a jury of less than 12 because the requirement of 12 is a safeguard, or deemed to be a safeguard, against unwarranted conviction. For 6 or 11 might convict, while, on a fuller jury, those 6 or 11 could not obtain a conviction. Suppose 12 jurors heard part of the evidence, and one then became too sick to serve, would we, on conviction, sustain on consent that another who had read the evidence already heard should take the place of the sick juror? Why does not the illustration hold good? The Supreme Court will not interfere with the verdict of conviction where the evidence is in conflict, especially if the trial judge declines to interfere. This refusal is weighty; because the trial judge is a "thirteenth juror," and this court is not a juror at all. This means the trial judge has a power of review greater than that of the appellate court, because he has seen and heard the witnesses. Convictions may be first passed upon by one who has that advantage. If the exchange here is upheld because of consent, we sanction the waiver of a protection against improper convictions—a protection demanded by public policy. And it is no answer that the defendant can appeal. As already indicated, on the appeal he cannot have the review permitted the trial court. And were it not for an express statute, he could not have his evidence certified by either judge; for, neither having heard all the evidence, neither could certify that the transcript contained the total evidence. The very fact that it was found necessary to enact a statute to meet this situation is surely highly significant. So is the fact that universally it has been held there must be a new trial ordered, if the judge die or become incapacitated during the trial, or even if this happens before the evidence has been certified.

If the majority opinion be followed to its logical end, we would be compelled to sustain a conviction if, in disregard of the policy of all English-speaking peoples, the

jury was told, on consent of defendant, that the accused should be found guilty unless he had proved that he was innocent.

For the reasons stated, I would reverse.

STATE OF IOWA, Appellee, v. JOHN MONROE, Appellant, et al.

LARCENY: Value. The amount paid for an article is competent evidence of its value, and the owner is a competent witness to so testify. So held where a new article had been purchased two days prior to the theft.

Appeal from Woodbury District Court.—J. W. ANDERSON,
Judge.

NOVEMBER 1, 1920.

THE defendant John Monroe was indicted jointly with another for grand larceny, in that they jointly stole a suit of clothes, of the value of \$50. The defendant John Monroe has appealed.—*Affirmed.*

C. R. Metcalfe, for appellant.

O. T. Naglestad and *O. D. Nickle*, for appellee.

EVANS, J.—The offense charged was alleged to have been committed at Sioux City. The defendant and another, acting jointly, took and carried away a package from the automobile of another. This package contained a suit of clothes. The act of taking was witnessed by an officer, who pursued the parties and arrested them while the package was in their possession. The defendant was a witness in his own behalf, and admitted the taking of the package. His plea of excuse was that he was hungry, and that he had hoped that the package contained food. He was 17

years of age, and his home was in Kansas City. The main contention made in his behalf was that he had no intention to steal clothing, but to take food only, to satisfy his hunger. Why the defendant should have mistaken a suit of clothes for a means to satisfy his hunger is not explained. Nor is there any attempt to deny an intent to steal, on the part of the defendant. Disappointment in the result is all that is pleaded in his behalf.

One error assigned is that there was no competent evidence that the value of the clothes exceeded \$20. The owner of the suit testified that he had purchased the same two days before, and had paid \$50 therefor, and that he had worn the same one day only. This witness, therefore, fixed the value of the suit at \$50. As against this, the defendant introduced as a witness a secondhand dealer, who testified that a secondhand suit of that kind was worth only \$10 or \$12, this being the amount that he, as a secondhand dealer, would pay therefor. The jury was amply warranted in finding the higher value, as testified to by the owner of the suit. There is no merit in the claim of the appellant that the owner of the suit was not a competent witness of value; nor is there any merit in the claim that the amount paid for the suit is no evidence of the market value thereof. This is the principal contention presented by appellant. We find no error on the part of the court in alleged remarks made by the court in ruling upon evidence.

The defendant was committed to the industrial school at Eldora. This was the appropriate judgment, in view of his age. We find no error in the record, and the judgment is—*Affirmed.*

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

BEATRICE WHALEN, Appellant, v. HYMAN BRODKEY^e et al.,
Appellees.

NEW TRIAL: Reluctance to Reverse Order. An order for a new trial, on the ground that the defeated party has not had a fair trial, will seldom be interfered with by the appellate court.

Appeal from Woodbury District Court.—GEORGE JEPSON,
Judge.

NOVEMBER 1, 1920.

APPEAL from an order granting a new trial.—*Affirmed.*

Shull, Gill, Sammis & Stilwill, for appellant.

Free, Goltz & Pickus, for appellees.

EVANS, J.—The plaintiff brought her action for damages for alleged conversion of a diamond ring. The defendants were pawnbrokers, and purchased a diamond ring from one Schommer. The plaintiff alleged that the ring was stolen from her by Slattery, alias Schommer. The disputed points in the evidence were the identity of Schommer, the identity of the ring, and the value thereof. There was a verdict for the plaintiff. Thereafter, the trial court sustained a motion for a new trial, on the ground that the defendants had not had a fair trial. This appeal by plaintiff is from such order. It is urged that the action of the trial court was an abuse of discretion. We are at all times reluctant to reverse an order granting a new trial. The boundary line of discretion of the lower court is not very distinctly marked. The evidence in this case was circumstantial. Some evidence of doubtful competency was

received. The verdict of the jury was equal in amount to the maximum guess of value. It was double the amount of the original cost of plaintiff's ring, and three times the amount received by defendant therefor. This fact was by no means controlling on the question of a new trial, but was entitled to consideration by the trial court, in connection with all the circumstances of the trial. The appellant urges upon our attention certain alleged facts outside of the record, to the effect that the trial court considered information received by him after the verdict. The record discloses nothing of such kind. Needless to say that we can give no consideration to such alleged fact. Nor are we able to say upon this record that there was an abuse of discretion. The order granting a new trial is, therefore, —*Affirmed.*

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

IRA W. BLOUGH, Administrator, Appellant, v. CHICAGO GREAT WESTERN RAILROAD COMPANY et al., Appellees.

NUISANCE: Nonattractive Nuisance—Artificial Pond. An *ordinary* pond of water, unguarded and unfenced, within the corporate limits of a city, and entirely within a railway right of way, and formed by natural drainage from surrounding land, which settled into a barrow pit, and around which children habitually played, is not an attractive nuisance, in such sense as to render the railway company liable in damages because an immature child met death by falling therein.

Appeal from Black Hawk District Court.—GEORGE W. DUNHAM, Judge.

NOVEMBER 16, 1920.

ACTION for damages consequent upon the drowning of Velma Leona Gregson, resulted in a directed verdict for

defendant and judgment thereon. Plaintiff appeals.—*Affirmed.*

J. C. Beem, and H. E. Tullar, for appellant.

Carr, Carr & Cox, and James G. Clark, for appellees.

LADD, J.—Shortly after 2 o'clock in the afternoon of March 29, 1919, Velma Leona Gregson, aged 5 years, wandered from home, and was drowned in a pond or barrow pit situated entirely in the right of way of the Chicago Great Western Railroad Company, and within the corporate limits of the city of Waterloo. This pond is said by witnesses called by plaintiff to have been from 200 to 300 feet long, 3 to 4 feet deep, and 9 to 12 feet wide, with steep banks on the side opposite the railroad. A ten-inch tile drains about 40 or 50 acres of land, including a cemetery, down the hillside into the west end of this pond. A considerably traveled pathway extends from this drain around the end onto the railroad. The surrounding land is low. There is a natural drainage from the pond under the railroad bridge close to it, and on to Black Hawk Creek, about 75 yards distant, through a ditch about a foot wide and a few inches deep. Another company had built a dam in this creek. The surface water of the pond is about 8 inches higher than that of the creek, and, but for the tile drain, the water might be carried from the pond within a few inches of the bottom. According to an engineer, the bottom of the pond was but 5 or 6 inches below the outlet, and the fall from the bottom of the barrow pit to the bridge, 6 inches, and a foot from there to the bottom of the creek. The nearest city street is about 65 feet from the mouth of the drain, and it is three blocks distant from the paving. There was no fence or other guard about the pond. Children habitually played about the pond. At the time in question, the water overran the path.

Such were the facts on which the trial court based its

denial of recovery. The doctrine of the so-called turntable cases is relied on to reverse this ruling. See *Edgington v. Burlington, C. R. & N. R. Co.*, 116 Iowa 410. We do not regard it as applicable. It may be conceded that the pond was attractive to children. So are all bodies of water. The trouble with the case is that there was nothing about this pond to render it more attractive or to enhance the danger over the attractions or dangers of natural bodies or streams of water, such lakes, ponds, and streams being scattered over the country nearly everywhere. Counsel have not cited, nor have we been able to find, any authority for adjudging a landowner responsible for loss of the life of a child from drowning in a natural pond, lake, or stream situated on his lot or tract of land, or in an artificial pond or stream therein existing, like those created in the course of nature. In *Price v. Atchison Water Co.*, 58 Kan. 551 (62 Am. St. 625), the defendant company maintained two water reservoirs on its premises in the immediate proximity of the residence part of the city of Atchison, one having a capacity of 1,100,000 gallons, and the other about 3,000,000 gallons. The smaller one was used as a settling basin into which the water was pumped, and from which it was discharged into the larger reservoir through a pipe. The opening of this pipe into the larger basin was covered with an apron made of lumber, and designed to protect the walls of the reservoir. It was partially buoyed by the water, and rose and fell as the water supply increased or diminished. For 4 feet from the top, the walls of the smaller reservoir were perpendicular, and thence slanted to the bottom, its basin being about 10 feet in depth at the deepest part. The walls of the larger reservoir slanted at an angle of about 45 degrees, and its basin had a depth, at its lowest part, of about 15 feet. It would have been difficult, if not impossible, for a person falling into the larger basin to get out unaided, on account of the steepness of the walls. These reservoirs were shown to have been attractive to children, for the purpose of fishing and other sports. Though the ground was fenced, the children

gained ready access over the stiles, as they were permitted to do. One of the sons of plaintiff, 11 years of age, ventured upon the apron above described, for the purpose of crossing from one part of the reservoir wall to another. The end which projected out upon the water sank, precipitating him into the basin, and he was drowned. Plaintiffs were adjudged entitled to recover, and rightly so, because of the entirely artificial character of the receptacle; with the apron and its motion rendering the place peculiarly attractive. In *City of Kansas City v. Siese*, 71 Kan. 283 (80 Pac. 626), a pond had been formed by placing a fill in the street across a deep ravine. An alley of the city crossed this pond. A sewer was placed in the alley by the city, and a sewer was built over and across the pond, resting in a trough, supported by piling. This sort of viaduct was attractive and alluring to boys, who for a long time had resorted to the place, and climbing along this pipe and trough, jumped into the water below. The artificial structure built over the pond was the most attractive feature of the place, and recovery was approved; though one of the judges dissented. These cases, as explained by Johnson, C. J., in *Tavis v. City of Kansas City*, 89 Kan. 547, are not out of harmony with the rule as applied to natural bodies of water. In *City of Pekin v. McMahon*, 154 Ill. 141 (45 Am. St. 114), it appears that the city owned 4 lots in a certain block, bounded on the west and south by public streets, and on the north by an alley. These lots were in a thickly settled part of the city. Gravel had been excavated therefrom, about 200 feet long and 100 feet wide, leaving the banks steep; and there was a triangular tract to the north. Water had accumulated to the depth of 14 feet. The fence around the property was out of repair, and was open for 30 feet at one place and 40 feet at another, through which teams were driven. Numerous logs and planks were floating on the water, on which the boys had been in the habit of playing, as the defendant well knew. The decedent, a boy of 8 years, so playing, stepped upon a log in the water, and it rolled over, and threw him into the pond, in con-

sequence of which he lost his life. The court, in upholding recovery, observed that:

"The place where he was seen playing in the water was only a few feet from this opening on the public alley. The love of motion, which attracts a child to play upon a revolving turntable, will also attract him to experiment with a floating plank or log which he finds in a pond within his easy reach."

In *Brinkley Car Co. v. Cooper*, 60 Ark. 545 (46 Am. St. 216), boiling water was let from a boiler into a pit, forming a pool on its premises about 60 feet distant from its mill, and 300 feet from the nearest street, and in it defendant deposited pieces of bark from logs or timber brought to its yards, and these congregated and floated on the water so thickly that persons approaching or passing could not see the top of the boiling water; and, of course, defendant was held responsible for the dangerous trap set in its premises.

These decisions are frequently pointed out as being in conflict with the general current of authority denying liability for injuries suffered by children from playing about ordinary ponds or streams. An analysis of them indicates very plainly that in each there was some artificial feature other than the mere water and its location, rendering the place peculiarly dangerous to children,—the floating apron in the reservoir, in *Price v. Atchison Water Co.*, supra; the sewer trough on piles, in *City of Kansas City v. Siese*, supra; the floating logs and planks, in *City of Pekin v. McMahon*, supra; and the bark concealing the water, in *Brinkley Car Co. v. Cooper*, supra. In the absence of anything indicating something done by the landowner, calculated to render the pond attractive to children,—something more than of water in its natural state, or more alluring to danger than ordinarily attends playing in its vicinity,—the doctrine of the turntable cases has never been, and ought not to be, applied. In the leading case of *Peters v. Bowman*, 115 Cal. 345 (56 Am. St. 106), the grading of a street prevented the flow of surface water from defendant's lot in San Francisco, and this water, being stopped, formed a pond

in the rainy season, and during the dry season, the water would disappear. Boys were attracted by the water; and decedent, about 11 years of age, while floating with another boy on a rudely constructed raft of railway ties, ran along the ties, fell off, and was drowned. In the course of his opinion, McFarland, J., observing the contention of appellant that the reasoning and philosophy of the turntable cases applied, declared that:

"The same reasoning does not apply to both sets of cases. A body of water, either standing, as in ponds and lakes, or running, as in rivers and creeks, or ebbing and flowing, as on the shores of seas and bays, is a natural object, incident to all countries which are not deserts. Such a body of water may be found in or close to nearly every city or town in the land; the danger of drowning in it is an apparent, open danger, the knowledge of which is common to all; and there is no just view, consistent with recognized rights of property owners, which would compel one owning land upon which such water, or part of it, stands or flows, to fill it up, or surround it with an impenetrable wall."

Recovery was denied. In overruling a petition for rehearing, the court, speaking through Beatty, C. J., handed down a very illuminating opinion, from which we quote:

"A turntable is not only a danger specially created by the act of the owner, but it is a danger of a different kind to those which exist in the order of nature. A pond, although artificially created, is in no wise different from those natural ponds and streams which exist everywhere, and which involve the same dangers and present the same appearance and the same attractions to children. A turntable can be rendered absolutely safe, without destroying or materially impairing its usefulness, by simply locking it. A pond cannot be rendered inaccessible to boys by any ordinary means. Certainly, no ordinary fence around the lot upon which a pond is situated would answer the purpose; and, therefore, to make it safe, it must either be filled or drained, or, in other words, destroyed. But ponds

are always useful, and often necessary, and, where they do not exist naturally, must be created, in order to store water for stock, and for domestic purposes, irrigation, etc. Are we to hold that every owner of a pond or reservoir is liable in damages for any child that comes uninvited upon his premises and happens to fall in the water and drown? If so, then, upon the same principle, must the owner of a fruit tree be held liable for the death or injury of a child who, attracted by the fruit, climbs into the branches and falls out. But this, we imagine, is an absurdity, for which no one would contend, and it proves that the rule of the turntable cases does not rest upon a principle so broad and of such rigid application as counsel supposes. The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common or artificial and uncommon, to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing, and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions. As to common dangers, existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care. But, with respect to dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different; and such is the rule of the turntable cases, of the lumber-pile cases, and others of a similar character."

This decision is quite generally cited with approval, and is in accordance with the authorities generally. *Charvoz v. Salt Lake City*, 42 Utah 455 (45 L. R. A. [N. S.] 652); *Thompson v. Illinois Cent. R. Co.*, 105 Miss. 636 (47 L. R. A. [N. S.] 1101), where the court observed that:

"Scattered over the length and breadth of the land are innumerable ponds and lakes, artificial and natural; and

occasionally a boy or man loses his life while wading or bathing in such body of water. If, as a matter of law, the owners of fish ponds, mill ponds, gin ponds, and other artificial bodies, wherein it is possible that boys may be drowned, can be held guilty of actionable negligence unless they inclose or guard same, few will be able to maintain these utilities, and to our minds an intolerable condition will be created."

See *Gillespie v. McGowan*, 100 Pa. St. 144 (45 Am. R. 365); *Sullivan v. Huidekoper*, 27 App. D. C. 154 (5 L. R. A. [N. S.] 263); *Stendal v. Boyd*, 73 Minn. 53 (72 Am. St. 597, 42 L. R. A. 288); *Klix v. Nieman*, 68 Wis. 271 (60 Am. R. 854); *Richards v. Connell*, 45 Neb. 467; and *Barnhart v. Chicago, M. & St. P. R. Co.*, 89 Wash. 304 (154 Pac. 441), where the court said in the course of its opinion:

"The question here presented is not whether the owner of property may be liable: (a) By reason of a trap or pitfall upon his property which may produce the death or injury; (b) a hidden or concealed danger; or (c) a dangerous agency in close proximity or so near a highway that in the use of the highway an accident may occur,—but is whether a pond of water is a dangerous agency, such as will subject the owner of the property to liability for damages for the death of a child of tender years, attracted to the pond for the purpose of play. The turntable doctrine makes the owner liable because the dangerous agency was attractive to children of tender years. and in playing about or with such agency, accident or injury would probably result. That a pond of water is attractive to boys for the purposes of play, swimming, and fishing, no one will deny. But its being an attractive agency is not sufficient to subject the owner to liability. It must be an agency such as is likely to or will probably result in injury to those attracted to it. That many boys every year lose their lives by drowning is a matter of common knowledge. But the number of deaths in comparison to the total number of boys that visit ponds, lakes, or streams for purposes of play, swimming, and fishing, is comparatively small. It

would be extending the doctrine too far to hold that a pond of water is an attractive nuisance, and therefore comes within the turntable cases."

Most of the decisions are collected in notes to the above cases, and many will be found in a note to *Wheeling & L. E. R. Co. v. Harvey*, 19 L. R. A. (N. S.), beginning at page 1143. As the pond was not other than a mere barrow pit, common wherever railroads have been constructed, without characteristics different from natural collections of water in small ponds, and without additional attraction or enhancement of danger, the court rightly denied recovery.—*Affirmed*.

WEAVER, C. J., STEVENS and ARTHUR, JJ., concur.

BOWERS & KING, Appellees, v. F. A. ROTH, Appellant.

BROKERS: Commission from Both Parties. A broker (other than a mere middleman to bring two parties together) who is the agent of both vendor and vendee, may not recover compensation of *either* party unless it is made to appear that, at the time of the transaction, *both* principals had full knowledge of the broker's dual relation.

Appeal from Poweshiek District Court.—H. F. WAGNER, Judge.

NOVEMBER 16, 1920.

ORIGINAL action upon a promissory note in justice of the peace court. Judgment for plaintiff, and defendant appealed to the district court, where a trial was had to a jury, resulting in a verdict and second judgment in favor of plaintiff. Defendant appeals.—*Reversed*.

Frank Bechly and *M. W. Hyland*, for appellant.

Boyd & Boyd, for appellee.

STEVENS, J.—It is conceded that the consideration of the note was services rendered to defendant in a real estate transaction with one George Owens. It is further admitted that plaintiff was the agent of both the defendant and Owens, and that the latter paid the agreed commission. Defendant alleged, in his answer to plaintiff's petition, filed in justice of the peace court, that plaintiff represented Owens without his knowledge, and also that neither party knew that plaintiff was representing the other. Owens was called as a witness on behalf of defendant, and was asked to state whether he paid plaintiff a commission in the transaction in question. Objections to this and other questions seeking to show that plaintiff represented Owens were sustained. The defendant then offered to prove by the witness that plaintiff acted as agent for him (witness), and that, at the time of the transaction, and when the note in suit was executed, he had no knowledge that plaintiff was receiving a commission from the defendant. Objection that this testimony was incompetent, immaterial, and irrelevant, and did not tend to support any issue in the case, was sustained by the court. Defendant filed a motion for new trial, upon the ground, among others, that the verdict of the jury was not sustained by the evidence, and that the court committed error in excluding the testimony of Owens.

Contracts by which real estate and other agents agree and seek to represent and receive a commission from both the buyer and seller, are quite uniformly held to be contrary to public policy and good morals, and a recovery will be permitted thereon only when both principals are shown to have had knowledge thereof. *Rasmussen v. Hansen*, 176 Iowa 26; *Rodenkirch v. Layton*, 189 Iowa 430; *Murphy v. Albany P. Dev. Co.*, 169 Iowa 551; *Lindt v. Schlitz Brewing Co.*, 113 Iowa 200; *Glenn v. Rice*, 174 Cal. 269 (162 Pac. 1020); *Hoffhines v. Thorson*, 92 Kan. 605 (141 Pac. 253); *Dennison v. Gault*, 132 Mo. App. 301 (111 S. W. 844); *Bell v. McConnell*, 37 Ohio St. 396 (41 Am. Rep. 528); *Friar v.*

Smith, 120 Mich. 411 (79 N. W. 633); *Sullivan v. Tufts*, 203 Mass. 155 (89 N. E. 239); *Rice v. Wood*, 113 Mass. 133 (18 Am. Rep. 459); *Howard v. Murphy*, 70 N. J. L. 141 (56 Atl. 143); *Campbell v. Baxter*, 41 Neb. 729 (60 N. W. 90); *Green v. Southern States Lbr. Co.*, 141 Ala. 680 (37 So. 670); *Chapman v. Currie*, 51 Mo. App. 40.

If, therefore, only one of the parties knows of the dual agency, no recovery can be had from either. *Glenn v. Rice*, and other cases cited, supra. It is not sufficient if the proof shows only that the defendant knew of and consented to the arrangement by which the agent is employed to represent both parties. As was said by the Supreme Court of California in *Glenn v. Rice*, supra:

"The authorities, with practical unanimity, declare that, if an agent is engaged by both parties to effect a sale of property from one to the other, or an exchange between them, not as a mere middleman to bring them together, but actively, in inducing each to make the trade, he cannot recover compensation from either party, unless both parties knew of the double agency at the time of the transaction. The reason for the rule is that he thereby puts himself in a position where his duty to one conflicts with his duty to the other, where his own interests tempt him to be unfaithful to both principals, a position which is against sound public policy and good morals. His contract for compensation being thus tainted, the law will not permit him to enforce it against either party. It is no answer to this objection to say that he did, in the particular case, act fairly and honorably to both. The infirmity of his contract does not arise from his actual conduct in the given case, but from the policy of the law, which will not allow a man to gain anything from a relation so conducive to bad faith and double-dealing. And the fact that the party whom he sues was aware of the double agency and of the payment, or agreement to pay, compensation by the other party, and consented thereto, does not entitle him to recover. He must show knowledge by both parties. One party might willingly consent, believing that the advantage would ac-

crue to him, to the detriment of the other. The law will not tolerate such an arrangement, except with the knowledge and consent of both, and will enter into no inquiry to determine whether or not the particular negotiation was fairly conducted by the agent. It leaves him as it finds him, affording him no relief."

In numerous decisions of this court, we have emphatically declared that such contracts are void, unless both parties have knowledge thereof, and in *Rasmussen v. Hansen*, supra, we said:

"The rule that the defendant invokes is that it is *prima facie* contrary to public policy for a broker to act as agent for both vendor and purchaser in the sale of property, and that, when such double employment is shown, the agent is not entitled to recover compensation from either of his principals, without proof that both of them knew of the dual capacity in which he acted, and consented thereto. * * * *Meyer v. Hanchett*, 43 Wis. 246; *Scribner v. Collar*, 40 Mich. 375 (29 Am. Rep. 541); *Leathers v. Canfield*, 117 Mich. 277 (45 L. R. A. 33); *Hobart v. Sherburne*, 66 Minn. 171 (68 N. W. 841); *Young v. Trainor*, 158 Ill. 428 (42 N. E. 139); *Hannan v. Prentis*, 124 Mich. 417 (83 N. W. 102). The burden was on the defendant to show this double employment. The burden, then, would be on the plaintiff to show that both parties knew, and consented to it. We think that the defendant has not carried his burden to a successful issue. At least, there was a question for the jury, under this record, touching the fact relied upon to defeat plaintiff in his recovery."

Counsel for appellee cite and rely upon *Morey v. Laird*, 108 Iowa 670; *Redmond Bros. v. Henke*, 137 Iowa 228; *Lindt v. Schlitz Brewing Co.*, supra. The question now before us was not involved or discussed in any of the above cases, all of which, so far as the subject is given consideration, recognize the general rules stated above. Without reference to who had the burden of proof, it was competent for defendant to show that plaintiff was the agent of Owens, as well as himself, and that the employment by the latter

was unknown to the former. The court, therefore, should have permitted the witness to answer the questions propounded, and to introduce the offered testimony. It follows that the judgment of the court below must be and is—*Reversed.*

WEAVER, C. J., LADD and ARTHUR, JJ., concur.

MARGARET DIXON, Appellee, v. NORTHWESTERN NATIONAL
LIFE INSURANCE COMPANY, Appellant.

INSURANCE: Failure to Attach Copy of Application. A misrepresentation by insured of his age is *not provable*, when neither the application (which contains the misrepresentation) nor a copy thereof is attached to the policy, whether the policy be issued by a domestic or a foreign company, and whether the action in which such proof is sought to be made is at law or in equity. (Secs. 1741, 1819, Code, 1897.)

CORPORATIONS: Right of Foreign Corporation. Principle reaffirmed that a foreign insurance corporation may not transact business in this state unless with the consent of the state, and unless compliance is had with the laws of this state.

CORPORATIONS: Foreign Corporations—“Doing Business in this State.” The act of a foreign corporation in soliciting insurance in this state, of a citizen of this state, and delivering the policy in this state, constitutes a “doing (of) business in this state.” (Secs. 1741, 1819, Code, 1897.)

INSURANCE: Failure to Attach Copy of Application. Failure to attach an application for insurance, or a copy thereof, to the policy, works no invalidation of the policy, but simply prevents the insurer from pleading, proving, or disproving such application or any part thereof, when the same bears on the validity of the policy.

INSURANCE: Understating Age—Amount Recoverable. The provision of Sec. 1813, Code, 1897, as amended by Ch. 348, Sec. 11, 38 G. A. (1919), providing that, in case the insured has *understated* his age, recovery shall be limited to the amount which

the premium paid would have purchased at the correct age, has application only to those cases wherein the fact of *understating the age* is legally provable by the insurer. In other words, if the copy of the application containing such "understating" of age, or a copy thereof, be not attached to the policy, then the fact of such "understating" of age is not legally provable, and Sec. 1813 has no application.

Appeal from Story District Court.—E. M. McCALL, Judge.

NOVEMBER 16, 1920.

THE opinion states the case.—*Affirmed.*

Nourse & Nourse and Harry Langland, for appellant.

Lee & Garfield and C. H. Pasley, for appellee.

WEAVER, C. J.—That the appellant's case may be fairly stated, we quote the same at length from its brief filed in this court, as follows:

1. INSURANCE: membership issued by a mutual aid association to plaintiff's husband, and payable to plaintiff as beneficiary.
- failure to attach copy of application.

"The petition alleges that, on the 21st day of November, 1885, the Northwestern Aid Association of Minneapolis, Minnesota, issued to J. H. Dixon a certificate of membership, promising, upon the death of insured in good standing, to pay to his wife, the plaintiff in this suit, 75 per centum of the net proceeds of one full assessment at schedule rates, upon all of the certificate holders in good standing in the association at the date of the death of insured, not, however, to exceed \$2,000. That the insured paid all assessments due upon said certificate. That the assured died on the 10th day of August, 1918. That the defendant (Northwestern National Life Insurance Company), under some arrangement, the exact details of which are unknown to the plaintiff, had taken over the

insurance of the Northwestern Aid Association, and assumed and agreed to pay the full sum of \$2,000 upon the certificate of that association. That plaintiff duly notified defendant of the death of insured and made proof thereof, but that defendant had refused to pay the said certificate. The petition prayed judgment in the sum of \$2,000 and costs.

"The answer is in two divisions or counts, the first of which admits the issuance of the certificate of membership by the Northwestern Aid Association, agreeing to pay 75 per centum of the net proceeds of one full assessment, not, however, exceeding \$2,000; that James H. Dixon, the insured, died on the 10th day of August, 1918, having paid all dues required by the certificate of membership; and that defendant was notified thereof: but denies that satisfactory proof of death was furnished, and denies all other allegations of the petition.

"The second division of the answer alleges the issuance of the certificate of membership by the Northwestern Aid Association, and avers that, at the time of its issuance, the insured, James H. Dixon, in his application for said certificate, in order to procure said insurance, represented that he was 43 years of age at his nearest birthday, when, in truth and in fact, he was 50 years of age, instead of 43. That said representation was not only made in the application, but also by the acts of the insured during all the time the certificate was in force, in that he (insured) received the contract of insurance and paid the premiums thereon to defendant and accepted receipts therefor, well knowing at the time that the contract of insurance was issued at the age of 43 years, and that the rate of premium was based upon that age, when, in truth and in fact, insured knew that he was then 50 years of age, and that the premiums at said age were much higher; that defendant was, during all of said time, ignorant of the said misrepresentation of insured as to his age. That, because of said mistake or misstatement of age, the premium charged and collected upon said certificate during all the time it was in force was

only the premium required, charged, and collected from persons 43 years of age, a premium far less than the premium required, charged, and collected from persons 50 years of age. That the Northwestern Aid Association and the defendant were both corporations organized under the laws of the state of Minnesota, with their principal places of business at Minneapolis in said state, and that said certificate of membership was issued at and from the office of the Northwestern Mutual Aid Association in Minneapolis, and was intended to be performed and, in so far as performed, it was performed in the city of Minneapolis in the state of Minnesota, and was to all intents and purposes, a Minnesota contract. That neither the application in which said misrepresentation was made nor a copy thereof was attached to the certificate of membership, and that there was no requirement of the laws of Minnesota that such application or a copy thereof should be so attached, in order to be available in a suit upon the certificate. That it is provided in the said certificate that all statements made in the application for membership are warranties, and, upon a failure thereof, the certificate of membership shall be void. That, since the death of insured and the discovery of the mistake, defendant, notwithstanding the provisions of the contract of insurance and its avoidance under said warranty, has offered to pay to the plaintiff or the person or persons rightfully entitled thereto, and is now and at all times has been ready and willing to pay the amount of insurance the premium actually paid by insured would buy at his correct age, which amount could not be determined without a reformation of the contract of insurance as to the insured's age at the time of the issuance of the certificate, and an accounting as to the amount of insurance the premium actually paid would purchase at such true age of insured.

"Upon said second count, defendant prays the court to determine the date of the birth of insured, his true age at the time the certificate of membership was issued to him, and that said certificate of membership be reformed in that

respect, and that an accounting be had of the amount of insurance that the premiums actually paid by insured would purchase at his true age, and for general equitable relief.

"Upon the filing of this answer, defendant moved to transfer the case to equity for the trial of the equitable issues so raised, which motion was, by consent, sustained. Whereupon, the plaintiff filed a general equitable demurrer to the second division of defendant's answer, based upon the ground that the facts stated in said second division of defendant's answer do not entitle defendant to the relief demanded.

"This demurrer, upon its hearing, was sustained by the court, to which defendant duly excepted, and elected to stand upon the second count or division of its answer, and brought this appeal."

Further statement is unnecessary, except to say that the certificate issued to the insured, upon which this action is brought, makes reference to an alleged application therefor, in words as follows:

"The application made by the holder hereof, and on faith of which this certificate is issued, constitute the basis of the contract between the parties hereto; the answers to the question therein are warranties; and said application and every part thereof is hereby made a part of this certificate. to the same extent and with the same effect as though it were set out herein; and, on failure of any of the warranties therein contained, this certificate shall be void."

The propositions upon which the appellant asks a reversal of the trial court's ruling on the demurrer, though stated in various forms, are readily reducible to two. First: That the contract evidenced by the policy sued upon is a Minnesota contract, and is, therefore, not subject to the provisions of the Iowa statute, Code Sections 1741 and 1819, which provide that all insurance companies organized or doing business in the state shall, upon the issue of any policy, attach to such policy or indorse thereon a true copy

of application or representations of the assured which, by the terms of the policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy; and that any company or association failing so to do shall be forever precluded from pleading, alleging, or proving such application or representations, or any part thereof, in any action upon said policy. Second: That the trial court erred in holding that such statutory provision has the effect to deprive the insurer of the right to prove the fraudulent representations of an applicant for insurance in an equitable demand for reformation of the insurance contract sued upon, or to prove the same in an equitable defense to an action brought to recover insurance so fraudulently procured.

I. Does the fact that the insurance company is organized and has its home office in another state relieve it in any degree from the restrictions imposed by the Iowa

2. CORPORATIONS:
right of
foreign corporation.

statute, when sued upon a policy solicited and procured by its agents in Iowa, and delivered by it to the insured person at his home in Iowa? The Iowa statute, Code Section 1819, is, by its express words, made to apply to "all life insurance companies organized or doing business in this state." No foreign insurance company or association can lawfully do business in Iowa, except with the consent of the latter; and, when doing business here, such company or association is bound by the same rules and limitations which our laws prescribe for home companies and associations engaged in like or similar business. *Weiditschka v. Supreme Tent*, 188 Iowa 183; *Nelson v. Nederland L. Ins. Co.*, 110 Iowa 600, 604; *Stanhilber v. Mutual M. Ins. Co.*, 76 Wis. 285 (45 N. W. 221); *American Fid. Co. v. Bleakley*, 157 Iowa 442; Code of Iowa, Section 1639. This rule is too well settled by statute and by precedent to justify further consideration at this time.

In soliciting this insurance in Iowa from a resident of Iowa, and in delivering its policy to the insured at his home

in Iowa, it was doing business here, within the meaning of the statute, and its failure to attach a copy of the application to such policy exposes it, when sued in Iowa, to the same restrictions in pleading and proving its defenses which would be applicable were the insurer an Iowa corporation.

3. CORPORATIONS:
foreign corporations:
"doing business in this state."

With this question settled at the outset, we next inquire what these restrictions are. Counsel have cited us to precedents from other states, few, if any, of which are really in point. Most of them are decisions under statutes differing very materially from our own. Indeed, none of those statutes is as broad or sweeping in its terms as is ours. What our statute provides is, as we have already noted, that an insurer who neglects to comply with this provision for a copy of the application, "shall forever be precluded from pleading, alleging, or proving such application or representations, or any part thereof, or the falsity thereof, or any part thereof, in any action upon such policy."

The appellant seeks, by its answer and so-called counterclaim, to avoid every restriction found in this statute, and proposes, notwithstanding the law forbidding it, not only to allege, plead, and prove the existence of such application, but to allege, plead, and prove its falsity, and because thereof, to escape performance of its contract. We are not concerned, at this point, with the wisdom or abstract justice of the provision. Its validity is unquestionable. As has been said by this court on other occasions:

"Foreign insurance companies are not compelled to do business in this state. If they voluntarily choose to do so, however, they must submit to such conditions and restrictions as the legislature may see fit to impose." *Nelson v. Nederland L. Ins. Co.*, 110 Iowa 604.

The requirement that their policies shall have copies of the applications therefor attached or indorsed thereon is not a burdensome one; and, if they fail to observe such

simple regulation, they cannot justly complain of the consequences which the statute attaches to such neglect. Indeed, if we understand their argument, counsel for appellant do not seriously contest this conclusion, so long as the action upon the policy is at law, but they advance the theory that, by the expedient of raising an equitable issue, the statutory provision is no longer applicable. To that theory of the law we now turn our attention.

II. We are cited to no statute or precedent sustaining the idea that an insurer which is being sued upon a policy to which it has neglected to attach a copy of the application, may plead and prove fraud or misrepresentation in such application in spite of the statutory prohibition thereof, if only it couples with such defense a prayer for equitable relief by reformation of the contract. Under our statute, the insurer is forever precluded from alleging, pleading, or proving such claimed fraud or misrepresentation in *any* suit upon the policy. Surely, this is an "action upon the policy," and none the less such whether the issue joined be legal or equitable. This very obvious suggestion is sought to be avoided by saying that the so-called equitable issue is raised by the second division of the answer, which is in the nature of a counter petition, and should be treated as an independent action, and therefore not within the effect of the statute. The distinction thus drawn is too unsubstantial to justify our approval. The suit was brought upon the policy, and its character as such is in no manner changed by the defendant's pleading. That pleading has no other purpose than to defeat the action on the policy, and to accomplish this by alleging, pleading, and proving the contents of the application, and the alleged falsity of its statements. Its character and purpose are not changed by attaching thereto a prayer for equitable relief. Indeed, it needs but a glance to demonstrate that the second division of defendant's answer states no case for equitable consideration or equitable relief. Assuming, for the purposes of this opinion, that the claim put forth by appellant is literally true, and that the application falsely states

Dixon's age at 43 years, when, in truth, he was 50 years old, what is there in it all which calls for a reformation of the contract? In such case, the appellant had only to obey the statute, and attach a copy of the application to the policy, to have a complete and perfect defense to plaintiff's action at law on the policy; or if, as counsel seem to concede, the defense would be partial only, the issue would still be legal, and not equitable, and the facts from which the recoverable amount could be ascertained would be competent and admissible evidence, without resort to equity. But the insurer elected to withhold the required copy of the application, or, to say the least, it neglected to comply with the statute, and thus, by its own act, made itself and its defense subject to the resulting statutory restriction, which precludes it from "alleging, pleading, or proving" any fraud or misrepresentation in such application. After it has voluntarily placed itself in that position, equity cannot relieve it from the effect of the statute which it disregarded.

III. Counsel on either side have given considerable attention to the question whether the statute relating to the effect of an insurer's failure to attach a copy of the application to its policy pertains solely to matters of remedy, or to the existence or validity of the contract. The answer to this inquiry would seem to be found in the statute itself, which expressly provides that the omission to attach the application to the policy "shall not render the contract void;" but that, if any company or association does fail in this respect, "it shall be forever precluded from pleading, alleging, or proving such application or representations, or any part thereof, or the falsity thereof, or any part thereof, in any action upon such policy." In other words, the statute expressly limits its effect to matters of pleading and proof. It was so held by us in *Nelson v. Nederland L. Ins. Co.*, 110 Iowa 604, where we said of another section of the same statute that the rule there provided "so evidently relates to procedure that discussion of the point is not required."

4. INSURANCE:
failure to
attach copy
of applica-
tion.

In the case of *Rauen v. Prudential Ins. Co.*, 129 Iowa 725, 734, we considered at some length the nature and effect of this statute. We there said:

"It may be admitted, for the purposes of this case, that the fraud pleaded was sufficient to avoid the policy, if the appellant had put itself in position to make use of the defense; but, failing to attach a copy of the application to the policy, it waived its right to take issue upon the application or any part of it. * * * As we have already suggested, it is within the power of the legislature, not only to impose conditions upon the right of insurance corporations to do business in the state, but to regulate the form and substance of all insurance contracts, and prescribe what conditions may or may not be imposed upon the insured. When, therefore, it is enacted that all representations and warranties upon which the company proposes to rely or insist shall be attached to or embodied in the policy, the state is not exceeding its recognized authority; and the company failing to comply with the provision must be conclusively held to have elected to rely upon the contract as contained in such policy, without reference to any representation or warranty not contained in that instrument. The denial of the right to plead or prove such extrinsic matter is not, in any proper sense, a 'penalty' for failing to comply with the statute; for the company has a perfect right to waive or forego any advantage it could derive from an embodiment of the application in the policy."

Such, also, is the view expressed by the Wisconsin court in *Stanhilber v. Mutual M. Ins. Co.*, 76 Wis. 285 (45 N. W. 221), and by the Minnesota court in *Wheelock v. Home Life Ins. Co.*, 115 Minn. 177 (131 N. W. 1081), where, in reference to a statute requiring the application to be attached to or indorsed upon the policy, the opinion says:

"The provision is clearly remedial, designed to prevent technical defenses. As we have construed it, the law will have the effect designed, and works no hardship on the insurer. Compliance with the provision is very simple, and gives the insurer full protection against fraudulent state-

ments of material facts made by the insured to the agent or to the examining physician. All that is necessary is to have such statements in the application, and attach a copy of the application to the policy. We do not hold that this provision is applicable where an insurance company is induced by fraud to issue a policy, where such fraud consists of acts or representations on the part of the insured that are not of a nature that are properly or usually in the form of statements in a written application. We do hold that statements by the applicant as to his history, habits, and health, such as are ordinarily asked by the examining physician, and questions and answers reduced to writing, signed by the applicant, whether such statements are made 'in the absence of fraud' or not, must, in order to avoid the policy, be contained in a written 'application, and such application must be attached to or indorsed on the policy.'

IV. Appellant cites and relies upon Section 11 of Chapter 348 of the Acts of the Thirty-eighth General Assembly, reading as follows:

5. INSURANCE: "In all cases where it shall appear that
understating the age of the person insured has been un-
age: amount derstated in the proposal, declaration or
recoverable. other instrument upon which a policy of life
insurance has been founded or issued, then the amount payable under the policy shall be such as the premium paid would have purchased at the correct age."

This act does not expressly, or by implication, repeal the statute which we have been discussing. By its terms it applies to cases where *it shall appear* that the age of the person insured has been misstated in the proposal, declaration, or other instrument on which the policy has been granted. In other words, where such misstatement of age is made to appear by proper plea and proof, the recovery shall be limited to the amount of insurance which the premium paid would have purchased at the correct age. It does not attempt, however, to prescribe under what circumstances such defense may be pleaded or proved, or how it may be waived or lost. This had already been done by

Code Section 1819, which, as we have seen, permits such defense only where the insurer has attached to its policy a true copy of any application or representation made by the insured which, by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which "may in any manner affect the validity of the policy." The later statute does no more than to fix the measure of the plaintiff's recovery in cases where the defense of misrepresentation of the age of the insured is duly pleaded and proved; and it can be duly pleaded and proved only when the insurer has preserved the right so to do, by attaching to its policy a copy of the application or representation.

What we have said sufficiently disposes of all pertinent questions raised by the appeal. We find no reversible error in the record, and the ruling of the trial court is—*Affirmed*.

LADD, STEVENS, and ARTHUR, JJ., concur.

GEORGE W. GRAESER, Appellee, v. SAM GORDON et al.,
Appellants.

FRAUDS, STATUTE OF: Agreement to Procure Easement. An agreement to *procure* an easement is not within the statute of frauds. Evidence reviewed, and held to show that such was the contract.

Appeal from Polk District Court.—THOMAS J. GUTHRIE,
Judge.

NOVEMBER 16, 1920.

ACTION for services rendered, resulted in judgment as prayed. The defendants appeal.—*Affirmed*.

Stipp, Perry, Bannister & Starzinger, and Guy S. Calkins, for appellants.

Fred F. Keithley, for appellee.

LADD, J.—The petition alleges that defendants employed plaintiff to obtain an easement over “the south thirty feet of Holcomb Avenue west across Outlot A, lying between Home Park Addition and the east bank of the Des Moines River, now included in the city of Des Moines, Iowa,” to be used in conveying ice from the river to icehouses, and that, for services so rendered, defendants promised to pay plaintiff the sum of \$300; that plaintiff procured the said easement for defendants on conditions approved by them, and demanded judgment accordingly. Defendants interposed a general denial, and pleaded that the contract, if any, was “for the creation, transfer, and conveyance of an interest in real estate,” and that the contract was not in writing, and may not be proven orally.

The only issue raised on this appeal is whether the alleged agreement was for services to be rendered, or for the creation or transfer of an interest in land. Appellant contends that the evidence established the latter, while appellee insists that, at most, the evidence was in conflict and the issue was rightly submitted to the jury. Plaintiff owned a right of way easement from the Des Moines River near Sixth Avenue in Des Moines back to some lots. The city had condemned this for city purposes in 1915, and plaintiff had appealed to the district court. He had contemplated its use for harvesting and storing ice, and, pending appeal, had entered negotiations through the city attorney, who had suggested giving him another outlet or right of way to the river. Thereupon, plaintiff approached defendants concerning the purchase of their lots, and, being unable to acquire these, told Gordon “what I wanted the lots for; I told him I could get a right of way for them, for the ice business. The termination of our negotiations was that he was to pay me \$300 to procure for them this right of way for icehouse purposes. At that time, I told Gordon I would have to get the easement, and that I could get it at that place.”

Thereupon, he arranged with the city attorney that the city should convey an easement from the river to defendant's lots, and Gordon referred him to the late Roy Cubbage, as representing him. On cross-examination, the witness testified:

"I had something coming from the city, and I wanted to turn that to him. I could get certain concessions from the city in settlement of my condemnation suit, and I would get it for him. I told him what I had in prospect. I told him I had a right of way to the river to sell, and that I could get it through their lots. Gordon agreed to pay me \$300 if I could get it."

A deed conveying the easement from the city to plaintiff, prepared by Cubbage at Gordon's instance, was executed in behalf of the city in April, 1916, and plaintiff dismissed his appeal from the condemnation proceedings. Thereupon, plaintiff told Gordon that the former had the deed, "and had prepared a deed from me, transferring my right that I had from the city, and that I was ready to close the deal." Gordon replied that a long time had passed since negotiations had begun, and that they did not believe they wanted it now, as the saloons had gone out of business, and there was no longer a market for river ice; and later, he said that he would be willing to go through, but Levitt would not, for the reason stated, and that he did not feel like doing so alone. Plaintiff's deed of the easement from himself to defendants had been prepared, save acknowledging, but was not delivered. On recross-examination, plaintiff was asked:

"Isn't this what you agreed to do, to obtain for him from the city of Des Moines an easement? A. Yes, sir, getting him something he couldn't get himself, that was due to me. Q. That is true, isn't it? A. Yes, sir. Q. What you contracted with him was, as you claim, to obtain for him from the city of Des Moines an easement? A. Not specifically from the city of Des Moines. Q. You say so in your petition, and you swore to that, didn't you? A. Possibly."

Cubbage not only prepared the conveyance for Gordon,

but, at his instance, did what he could to procure its execution, or, as Cubbage testified:

"Gordon asked me to take it up myself with the city council, and get through the best deed I could. * * *

Q. The sum and substance of it is that Exhibit 1 represents the result of your efforts to find out definitely the unequivocal position of the city of Des Moines as to what they were willing to do? A. This represents the sum total of what I could get out of them, and I worked hard at it."

Gordon denied having any conversation with plaintiff in 1915, concerning procuring an easement for defendants, and said that he had not seen the city's deed to plaintiff until the morning of the trial, but had seen a copy, a few days before; that he had also seen a paper covering everything, previously prepared by Cubbage, which the city rejected, and showed it to plaintiff; that, thereafter, he told him Levitt was determined to have a general easement, covering everything, including the pumping of gravel, putting up boathouses, fishing, and the like; and that the supposition was that the city was to convey such an easement; and that, on inquiry by plaintiff as to why they did not go through with the proposition, he had answered that "it didn't cover all the conveniences we expected." But this witness had made an affidavit:

"That defendants were desirous of securing from the city of Des Moines the right to go upon and over the strip of ground described in plaintiff's petition, from certain premises adjoining said strip which they jointly owned, to the Des Moines River, for the purpose of harvesting ice, and for the purpose of taking sand and gravel from said river, and for any and all purposes whatsoever, and that the right to have access to said river for obtaining sand and gravel therefrom was the principal and most important right that defendants wished to obtain; that defendants orally agreed with plaintiff that they would pay him \$300 if he would secure for them from said city an unlimited right of access to said river across said strip of ground for any and all purposes whatsoever, and especially for obtain-

ing sand and gravel; that plaintiff never has secured said rights from the city of Des Moines, and is unable to do so, and has never offered same to the defendants or either of them; that the defendants nor either of them ever offered or agreed to pay plaintiff any sum whatsoever for obtaining for them from said city the right only to convey ice across said strip of ground, and never employed plaintiff to obtain for them such right."

In considering this evidence, it is to be borne in mind that the city only could grant the easement proposed to be acquired. The plaintiff had no interest therein, nor was he in a situation to create or transfer any. He did not retain that formerly belonging to him, which had been condemned. The only right he retained was the enhancement of damages, assessed as the value of the property appropriated for the public use. If he is to be believed, he did not undertake to create or transfer any interest in the realty of the city. All he undertook was to procure the easement from the city for defendants; and this is precisely what Gordon might have been found, from his affidavit, to have understood he was to do. True, he negotiated with the city attorney, and in pursuance thereof dismissed his appeal; but the course he should pursue in obtaining the easement was not prescribed by Gordon, nor was it inconsistent with the rendition of services that, in the interest of defendants, their attorney had the conveyance made to plaintiff, instead of direct to them. This did not necessarily make him grantee for his own benefit, but, under agreement alleged, he would thereby become a trustee of a resulting trust, and hold the title for defendants. Gordon admits in his affidavit "that defendants agreed with plaintiff that they would pay him \$300 if he would secure for them from the city access to said river across said strip of ground for any and all purposes whatsoever, and especially for obtaining sand and gravel," but denies any agreement in his testimony; while plaintiff says he undertook to obtain only a right of way for the ice. In either event, the contract might have been found to have been for services,

and not for the creation or transfer of an interest in land. An agreement to procure a conveyance is not within the statute of frauds. *Bannon v. Bean*, 9 Iowa 395; *Cooley v. Osborne*, 50 Iowa 526. The jury might well have found the contract to have been for services such as were rendered, and not for the purchase of an easement. See *Miller v. Davis*, 187 Iowa 1148.—*Affirmed*.

WEAVER, C. J., STEVENS and ARTHUR, JJ., concur.

KEOTA PRODUCE COMPANY, Appellee, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

CARRIERS: Profits In Re Shipment to Wrong Place. A shipper who orders a carrier to divert a pending shipment from the original point of destination to a new point of destination, in order to avoid a low market at said original point, and to enable the shipper to put the goods in "short-held storage" at said new point, may not, in case his orders are not complied with, recover the profits which he would have made at some time in the future, had his orders been complied with, and had he put the goods in storage at the new point of destination.

Appeal from Mahaska District Court.—CHAS. A. DEWEY, Judge.

NOVEMBER 16, 1920.

ACTION for damages consequent on carrying goods to the wrong destination and delivering to a person other than consignee, resulted in judgment as prayed. The defendant appeals.—*Reversed*.

J. G. Gamble, A. B. Howland, and Burrell & Devitt, for appellant.

Maxwell A. O'Brien, for appellee.

LADD, J.—The cause was submitted on an agreed statement of fact. Therefrom it appears that plaintiff delivered to defendant company, June 13, 1917, at Oskaloosa, for transportation to Egbert & Case, New York City, New York, 119 cases of eggs, each case containing 30 dozen. After the eggs had left Oskaloosa, and were in course of transportation, plaintiff's agent "called upon the defendant's agent in Oskaloosa, Iowa, and advised the defendant's agent that plaintiff desired to divert said shipment or car, and informed such agent for the defendant at that time that the egg market was off in New York, and that plaintiff wanted the car consigned to itself in Chicago, Illinois, for short-held storage." Thereupon, plaintiff surrendered the bill of lading previously issued, and received from defendant another bill of lading, with plaintiff as consignee, and the destination Chicago, Illinois. Through mistake, for which defendant is responsible, the shipment was not stopped at Chicago, but went on to New York City, and the eggs were delivered to Egbert & Case. This firm sold the eggs, June 21, 1917, at 31 cents per dozen, or in the aggregate for \$1,106.70, and remitted the same, less freight, cartage, etc., in the sum of \$72.88, leaving \$1,033.82 as the net proceeds. The shipment reached Chicago June 15, 1917, and on that day the market price of eggs was 29½ cents per dozen. As their weight was 6,307 pounds, and the freight rate on the same from Oskaloosa to Chicago was 46 cents a hundred pounds, as compared with \$1.0999 per hundred pounds to New York City, plaintiff would have realized no more for them on the Chicago market than he received from New York City. The eggs cost the plaintiff, on the day of shipment, 33 5/6 cents per dozen, or \$1,207.85. The plaintiff, in changing the destination, intended to place the eggs "in short-held storage" at Chicago, the same being a common and usual trade practice with merchants engaged in buying and selling eggs upon the market, as was the plaintiff. If he had done so, and so kept them for five weeks, he might have sold them at 36 cents a dozen, and have received for the entire consignment the sum of \$1,285.20, and would

have received, as is claimed, \$145.02 more than he did. For this sum claim was presented to the company, and declined, and thereupon suit was brought. Carrying the eggs to the wrong destination and delivering them to another than the consignee named in the last bill of lading, constituted a conversion of the property. *Brunswick & Co. v. United States Exp. Co.*, 46 Iowa 677; *Angle v. Mississippi & M. R. Co.*, 18 Iowa 555; *Furman v. Union Pac. R. Co.*, 106 N. Y. 579 (13 N. E. 587); 6 Cyc. 472, and cases collected; 10 Corpus Juris 262. As, notwithstanding the conversion, plaintiff received more than the market value of the eggs from the firm other than consignee, to which the goods were delivered, we have only to ascertain whether plaintiff may recover the difference between the amount actually received and what probably would have been received, had the eggs been delivered to it and stored in Chicago during the five succeeding weeks. The measure of damages for the conversion of goods is the same as though lost: that is, their market value at the place of destination named in the bill of lading, with interest, less the cost of transportation. Where delivered to the wrong person, and he subsequently pays the owner, this fact may be shown in mitigation. *Robinson Bros. v. Merchants' D. T. Co.*, 45 Iowa 470; *Jellett v. St. Paul, M. & M. R. Co.*, 30 Minn. 265; *Baltimore & O. R. Co. v. O'Donnell*, 49 Ohio St. 489 (34 Am. St. 579, 21 L. R. A. 117). And, of course, deduction of the amount actually received should be made.

The court seems to have entertained the opinion that, inasmuch as defendant "had defeated the purpose and intention of the shipper, and deprived him of a right which was within the contemplation of both parties, to wit, to store the eggs in Chicago for a reasonable time, to see if the market would react, so that he could sell them for a profit," plaintiff should be allowed, as an element of damages, the profit it would have realized, had the eggs been delivered to the consignee in Chicago and stored five weeks, and then sold on the market. The defendant had notice that plaintiff intended to put the eggs in "short-held stor-

age," owing to the fact that prices were off in New York, but further than this, was not advised. See 3 Hutchinson on Carriers (3d Ed.) 1621. No contract for such storage had been entered into, nor does there appear to have been any design as to the period of storage, and no contract of sale had been made. Surely, it cannot be said, from the mere suggestion to defendant's agent of a purpose to put in "short-held storage," that the parties must have had in contemplation the storage of the eggs for any specified time, or until any specific price might be obtained, or that sale would be made at such price. If so, why not make the time of storage ten days or weeks, or six months even, as well as five weeks? Why select five weeks, save that the price of eggs was up at that particular time? All the carrier was advised of was the purpose of storage. Whether this would be continued a week, five weeks, or six months, was purely a matter of conjecture, as was also the price at which ultimate sale might be made. See *Howard v. Brown*, 168 Iowa 410; *Morgan & Wright v. Sutlive Bros.*, 148 Iowa 318. As viewed from the date of the breach of contract to carry, the element of profits was entirely speculative and uncertain; and for this reason, there can be no recovery, as only prospective profits are claimed, even though it subsequently developed that, had the shipper pursued a particular course,—and he might have pursued several others,—there would have been a profit.

Judgment should have been entered for defendant.—*Reversed.*

WEAVER, C. J., STEVENS and ARTHUR, J.J., concur.

JAMES MASSINGHAM, Administrator, Appellant, v. ILLINOIS
CENTRAL RAILROAD COMPANY et al., Appellees.

NEGLIGENCE: Nonattractive Nuisances. A plank shelf along the side of a cofferdam, adjacent to a bridge abutment which was securely inclosed by a substantial barbed wire fence, located in the open country and fairly removed from habitation, is not an "attractive nuisance" in such sense as to render the owner responsible for the death of an immature child, who, as a mere licensee, at the best, went upon the shelf and fell therefrom into the water.

Appeal from Buchanan District Court.—E. B. STILES,
Judge.

NOVEMBER 16, 1920.

ACTION in the name of James Massingham, as administrator, against the Illinois Central Railroad Company and Walker D. Hines, director general of railroads, for damages. The defendant Illinois Central Railroad Company appeared specially, and moved to dismiss plaintiff's cause of action against it, on the grounds that the agent upon whom the original notice was served, was not the agent of the railroad company, but of the director general of the United States railroad administration, and that the railroad company was not, at the time of the injury complained of, engaged in the operation of a railroad. This motion was sustained. At the conclusion of plaintiff's testimony, a motion to direct a verdict for the other defendant was sustained by the court. Judgment was entered against plaintiff for costs, and he appeals.—*Affirmed.*

M. A. Smith and Cook & Cook, for appellant.

Helsell & Helsell and Hasner & Cherny, for appellees.

STEVENS, J.—About 1913, the Illinois Central Railroad Company, which owned and operated a line of railway extending east and west through the city of Independence, constructed a cofferdam, a few feet distant from and around a concrete abutment on the west side of the Wapsipinicon River, a short distance west of the city, on which one end of a steel girder bridge rested. The cofferdam was semi-circular in shape, and extended from the embankment west of the abutment on the north side of the bridge, around the same to the embankment on the south side thereof. As we understand the record, the cofferdam was constructed of piles and heavy planks driven into the ground, or attached to framework extending a short distance above and into the water, making a complete and continuous inclosure. The space between the abutment and the cofferdam was filled with water, several feet deep, which was very foul with oil and petroleum settlings. Inside of the cofferdam and about one foot from the water there was a beam, or plank, firmly attached to and extending the full length of the structure.

On May 23, 1919, Leonard Massingham, about 8 years of age, and Leonard Ritchie, a companion somewhat older, crossed the river on the railroad bridge, crawled through the right of way fence on the north side of the track, which extended to within a foot or 18 inches of the concrete abutment, and played for a time upon a pile of rock, north or northwest of and near the cofferdam. After throwing some rocks into the river, Leonard Massingham, who had on rubber boots and rubbers over them, attempted to go around the cofferdam, on the beam above referred to, facing the abutment, and walking sidewise. Before he had proceeded far, he fell forward into the water and was drowned. His body was removed in about 20 minutes, but, notwithstanding the heroic efforts of a physician, with the aid of a pulmotor, he was not revived.

The plaintiff charges negligence in the construction and maintenance of the cofferdam, which, he alleges, was of a character to naturally attract children, and to appeal to

their youthful instincts, without warning guard or protection of any kind; and that the agents and servants of defendant should have known and anticipated that children would assemble in the vicinity of the bridge along the river, to fish and for other purposes, and that they were liable to be attracted by the peculiar character of the structure, and lured to a place of danger.

As our conclusion is based upon the merits, the cause of action against each of the defendants being based upon the same facts, it is unnecessary to consider or decide the question raised by the motion of the defendant railroad company to dismiss the cause of action against it. If the ruling was erroneous, it was without prejudice. The record reveals that the railroad bridge crossing the Wapsipinicon River is located near the city of Independence, but outside of the corporate limits thereof; that there is a wagon bridge about one-half mile south, but no bridge north thereof for several miles; that the nearest dwelling house on the north side of the track is about one-half mile distant, and on the south side, about 600 or 700 feet distant; that fishermen frequently gathered along the bank of the river to fish; that on each side of the railroad track was a substantial barbed wire fence, extending within a foot or 18 inches of the abutment; that a path had been worn from the track down the north embankment to the end of the cofferdam; that children were occasionally seen in the vicinity of the bridge; and that deceased, his companion on the day of the accident, and other children, had previously, though it does not appear frequently, played around the bridge. One or two boys testified that, upon one occasion, when they were near the cofferdam, they saw some men working upon the track, one of whom may have been the section foreman. Neither the elevation of the bridge above the water nor the height of the abutment is shown.

The attractive nuisance doctrine, as applied in the turntable cases, was adopted in this state in *Edgington v. Burlington, C. R. & N. R. Co.*, 116 Iowa 410, and has been the subject of discussion in numerous later cases (*Gregory v.*

Woodworth, 93 Iowa 246, *Connell v. Keokuk Electric P. & R. Co.*, 131 Iowa 622, *Brown v. Rockwell City Canning Co.*, 132 Iowa 631, *Anderson v. Fort Dodge, D. M. & S. R. Co.*, 150 Iowa 465, *Hart v. Mason City Brick & Tile Co.*, 154 Iowa 741, *Wilmes v. Chicago, G. W. R. Co.*, 175 Iowa 101), the more recent of which are *Davis v. Malvern Light & Power Co.*, 186 Iowa 884, and *Graves v. Interstate Power Co.*, 189 Iowa 227.

The sole question in the case before us is whether the structure complained of was of a character and so located as to come within the definition of an attractive nuisance. It was manifestly not inherently dangerous. No machinery of any kind was connected therewith. The only way a child could be injured thereby would be to fall therefrom into the water and be drowned. The structure was not in itself dangerous. It is true that children might be tempted to gratify a spirit of adventure and go upon the dam and do what deceased was doing at the time of the accident, but it is not the law that property owners having lawful structures thereon, not in their nature dangerous or capable of inflicting injury upon children of tender years, are bound to guard the same against the possibility that someone may be injured while upon or about the same. As was well stated by Mr. Justice Weaver, in *Anderson v. Fort Dodge, D. M. & S. R. Co.*, 150 Iowa 465:

"To climb trees is as natural to the average boy as to a squirrel. Such sport is always attended with danger that the climber may lose his hold or break a branch and fall, to his severe injury. Not infrequently it may bring him to an elevation where he is exposed to contact with wires carrying electric currents, of greater or less intensity. If he falls and breaks his bones, or if he receives a stunning shock of electricity, ought the owner of the tree to be held liable in damages because he did not guard it against the approach of the lad, or because he did not give notice or warning in some way of the dangers to be apprehended in climbing it? No court has ever gone to such an extent,

and the establishment of such rule would render the ownership of real estate a very undesirable investment."

An adventuresome boy might attempt to walk across a railroad bridge upon top of a steel girder; and if he did so, and fell therefrom into the river, and was drowned, could it be said that the owner of the bridge was guilty of negligence in failing to provide guards at each end and along the girder, sufficient to prevent boys from going thereon? Certainly not. The structure complained of was located wholly upon defendant's right of way, and in reaching same, deceased crawled through a substantial barbed wire fence. It was across the river from the city, in the open country, and more or less remote from any dwelling house or place where children were accustomed to congregate. The evidence does not show that children were in the habit of frequently gathering about the structure to play, or that any agent or servant in the employ of defendant, unless upon the occasion referred to, ever saw them there. Deceased did not go upon the premises upon the invitation of the defendant, express or implied. He was, at best, a mere licensee. We are of the opinion that the doctrine contended for is not applicable to the facts in this case. This conclusion is not only in harmony with the prior decisions of this court, but in harmony with that of courts in other jurisdictions. *Coon v. Kentucky & I. T. R. Co.*, 163 Ky. 223 (173 S. W. 325); *Hageage v. District of Columbia*, 42 App. D. C. 109; *Gillespie v. McGowan*, 100 Pa. 144 (45 Am. Rep. 365); *Schmidt v. Kansas City Distilling Co.*, 90 Mo. 284. The motion to direct a verdict was properly sustained.—*Affirmed.*

WEAVER, C. J., LADD and ARTHUR, JJ., concur.

OVERLAND SIOUX CITY COMPANY, Appellant, v. R. J.
CLEMENS, Appellee (two cases).

F. H. CLARK, Appellant, v. ASHTON CLEMENS, Appellee
(two cases).

APPEAL AND ERROR: Scope of Review—Improper Demurrer. A
1 general equitable demurrer, that the facts pleaded do not entitle the pleader to the relief prayed, is wholly unallowable in a *law* action; yet, when no objections are made at any stage of the proceedings to the form or propriety of such demurrer, the appellate court will overlook such error, and review the cause on the properly assigned errors.

CORPORATIONS: Transfer of Shares—Recovery Because of Un-
2 **anticipated Event.** He who buys corporate shares of stock, and pays a sum therefor which includes the then owner's estimated interest in the corporation's undivided surplus, may not recover of the seller such estimated interest because, subsequent to the sale, the Federal government enacted a *retroactive* tax law, under which the corporation was compelled to pay a *retroactive* tax which wholly dissipated the corporation's undivided surplus.

CORPORATIONS: Transfer of Shares—Mistake of Law and Fact.
3 A plea of mistake of law and fact may not be based on unanticipated matters, occurring subsequent to the transaction in question. So held in the transfer of corporate stock.

CORPORATIONS: Recovery of Dividend Because of Unanticipated
4 **Event.** A corporate dividend, duly declared and distributed, is not rendered illegal by the fact that, subsequent to the declaration and distribution of the dividend, the Federal government unexpectedly enacted a retroactive tax law, under which the corporation was compelled to pay (generally, and not out of any particular fund) a tax on its income for a part of its fiscal year in which the income accumulated on which the dividend was declared. It follows that the corporation may not, after paying said tax, recover any part of said dividend from the stockholder, on the theory that the declared dividend was excessive in view of subsequent events.

Appeal from Polk District Court.—HUBERT UTTERBACK,
Judge.

NOVEMBER 16, 1920.

ACTION at law by the Overland Sioux City Company, Incorporated, against R. J. Clemens; and another action at law by the same company against Ashton Clemens was begun, and later consolidated. A demurrer on the ground that the facts stated in each division of each petition did not entitle plaintiff to the relief prayed, was sustained, and, as the plaintiff refused to plead over, judgment was entered, dismissing the petition; and plaintiff appeals.

F. H. Clark began an action at law against Ashton Clemens, and another against R. J. Clemens, and these actions were, on motion, consolidated. A demurrer, such as stated above, was filed, and like ruling and judgment entered. The plaintiff in these actions also appeals. By agreement, the causes are submitted together.—*Affirmed.*

Sears, Snyder & Gleysteen, for appellants.

Sargent & Gamble, for appellees.

LADD, J.—The plaintiff was organized as a corporation, July 1, 1914, with capital stock of \$25,000, divided into 250 shares, of the par value of \$100 each. To each of the defendants was issued a certificate for 50 of these shares, and the remaining stock went to R. W. Schutt and F. H. Clark. These four became directors and officers of the company. Its fiscal year ended July 1st of each year, and the revenue department of the government permitted it to make annual reports for the assessment of taxes to that day of each year. On July 1, 1917, the company had on hand, as net earnings, \$17,084.73, and a surplus of \$881.33, or altogether, \$17,966.06. A dividend of 60 per cent was then declared, or \$15,000, so that, after paying this, but \$2,966.06 of the net

earnings and surplus remained. Clark purchased of the defendants the 100 shares of stock held by them, July 27th following, paying therefor to each one fifth of the earnings and surplus then on hand, or \$593.21, and, in addition thereto, \$150 per share for the stock held by each, or \$7,500. All Federal taxes had been provided for when the dividend was declared. But, on October 3d following, an act of Congress (40 Stat. at L. 300) to provide a revenue to defray war expenses and for other purposes was approved. This act is said to have been retroactive, and the taxes to be assessed upon the income of every corporation during the year of 1917: that is, from January 1, 1917. Section 200 of that act in part provides that:

"If a corporation or partnership, prior to March first, nineteen hundred and eighteen, makes a return covering its own fiscal year, and includes therein the income received during that part of the fiscal year falling within the calendar year nineteen hundred and sixteen, the tax for such taxable year shall be that proportion of the tax computed upon the net income during such full fiscal year which the time from January first, nineteen hundred and seventeen, to the end of such fiscal year bears to the full fiscal year."

In other words, the tax on the net income, under the act of Congress mentioned, for the year 1917 would be ascertained, and, as the fiscal year in plaintiff's business ended July 1, 1917, one half of the said taxes would be added to those assessed under the preceding acts of Congress for the fiscal year of its business terminating on that day. This amounted to \$8,513.49. None of the parties to these actions had any knowledge or intimation that the act of Congress approved October 3, 1917, was contemplated, nor did any of them anticipate the same, and no provision with reference thereto was made, in declaring and distributing the dividend. Thereafter, and prior to April 1, 1918, plaintiff was required, under the law, to make a return of its income from July 1, 1916, to July 1, 1917, and to include its statement of the amount of taxes author-

ized by the act of October 3, 1917, and was compelled to and did pay the sum of \$8,513.49 as war profits tax to the revenue department of the government. In each of the suits by the Overland Sioux City Company, Incorporated, it demands judgment against each defendant for the proportion of this amount, less the earnings and surplus on hand, that his shares of stock bear to the entire number of shares issued by the company, or one-fifth of \$8,513.49 less \$2,966.06, or \$1,109.48. Plaintiff bases this demand on two grounds: (1) That, by reason of the retroactive effect of the act of Congress approved October 3, 1917, the parties hereto, by mutual mistake of law and fact, declared a dividend on the stock for \$5,547.42 more than it should have done, and, owing to such mutual mistake, plaintiff paid to each defendant \$1,109.48 in excess of the amount which might have been legally paid as a dividend on said stock; and that the mutual mistake of law and fact was of the officers, in omitting to take into consideration said act in computing the net earnings and surplus of the company; and (2) that \$1,109.48 was paid each defendant, contrary to the provisions of the company's articles of incorporation and by-laws. Clark, in the actions brought by him, claims that \$593.21, or one fifth of the surplus and earnings on hand, was paid to each of the defendants for his stock more than he was legally entitled to, through mutual mistake of law and fact, and also that he was paid \$1,109.48 for his stock in excess of the amount which he should have received from said stock; and because of this mutual mistake of law and fact, he prays recovery for these amounts.

I. The demurrer interposed in each action was general, and, as the suits are at law, might well have been overruled. Section 3562 of the Code; *Timken Carriage Co. v.*

1. APPEAL AND
ERROR: scope
of review:
improper de-
murrer.

Smith & Co., 123 Iowa 555; *Jones v. Brunskill*, 18 Iowa 129; *Davenport Gas L. & C. Co. v. City of Davenport*, 15 Iowa 6; and other decisions, too numerous for citation.

That such a demurrer is not permissible in a law action, does not appear to have been suggested in the

trial, and error on this ground has not been assigned. But error in sustaining the demurrer is assigned by appellant on other grounds. Will the assignment of other grounds or reasons for overruling the demurrer obviate considering that which, in itself, renders the ruling conclusively erroneous? In *Updegraff v. Edwards*, 45 Iowa 513, this court rules that a party, after recognizing the sufficiency of a general demurrer, might not take advantage of the defect. Raising no objection thereto in either court, as we think, was tantamount to an agreement that the issues at law should be presented in this irregular manner; and, as the precise objections to the petitions and amendments must be pointed out in assigning errors, or appear in the brief points, we are inclined to limit the review to the error assigned to the court's ruling on the demurrer.

II. In the sale of the stock by the respective defendants to Clark, there was no mistake of fact or law. Each was aware of everything then known concerning the com-

pany's business and its property. None of the parties appears to have been possessed of prophetic powers. If, in negotiating for the sale of the stock, the earnings and surplus on hand were taken into account, this

does not appear to have been on the theory that defendants, as shareholders, had any legal claim or interest therein. The company retained title thereto; for neither earnings nor surplus pass to shareholders until this is done through the declaration of dividends or distributed from the company's assets. That earnings on hand and surplus, in the absence of anything appearing to the contrary, belong to the corporation, and are to be considered as tending to enhance the value of the several shares of stock, will not be questioned. Undoubtedly, the purchaser took these matters into account, as he did the past earnings of the company, in ascertaining the value of the shares of stock purchased. What might happen to the company in the future was not a matter of negotiation. On that score, the purchaser took his chances quite as fully on any change

2. CORPORATIONS: transfer of shares: recovery because of unanticipated event.

in the laws or enactment of new laws relating thereto as he did on its continued prosperity. The parties acted in good faith; and, as there existed no restrictions on the transfer of the stock, the respective defendants parted with, and Clark acquired, absolute title thereto. *Farmers' & Merchants' Bank v. Wasson*, 48 Iowa 336. Though the act of Congress, approved October 3, 1917, was, in a sense, retroactive, in that it assessed the war excess profits tax on the net income of the entire year 1917, such taxes were not payable by the shareholders, nor does it appear that Clark advanced or paid out any money on that account. Such taxes are made payable by the corporation, as appears from Section 14 of the act of Congress, approved September 8, 1916, which, in this respect, governs the act of Congress approved October 3, 1917. Even if there were a mutual mistake of fact or law then, it does not appear to have occasioned any loss to Clark, the plaintiff, in the actions brought by him. Moreover, the facts alleged do not constitute a mistake, mutual or otherwise. Neither party was

3. CORPORATIONS: transfer of shares: mistake of law and fact.

in error as to any existing fact, nor concerning the law as it then existed; and the enactment of a law subsequently will not be construed as manufacturing a mistake when none existed. The demurrers to the petitions filed by Clark, but for their form, were rightly sustained.

III. If the company paid out the dividend or any part of it illegally, it may be conceded that the portions so advanced to the shareholders might be recovered by the com-

4. CORPORATIONS: recovery of dividend because of unanticipated event.

pany, as of money had and received. But was the dividend or any part illegal? No one will so pretend, unless it was rendered so by the act of Congress, approved October 3, 1917. That act did not undertake to undo anything which had gone before. It did not require the payment of the excess profits war tax exacted from any specified fund, or income of any particular period. The only feature of the act in any sense retroactive

is the portion declaring the net income for the entire year 1917 the unit on which the tax levy should be made. This tax, not the income, is to be apportioned, where the taxable year is not the calendar year, but the fiscal year of the corporation. This appears from Section 200 of the act:

"The first taxable year shall be the year ending December thirty-first, nineteen hundred and seventeen, except that in the case of a corporation or partnership which has fixed its own fiscal year, it shall be the fiscal year ending during the calendar year nineteen hundred and seventeen. If a corporation or partnership, prior to March first, nineteen hundred and eighteen, makes a return covering its own fiscal year, and includes therein the income received during that part of the fiscal year falling within the calendar year nineteen hundred and sixteen, the tax for such taxable year shall be that proportion of the tax computed upon the net income during such full fiscal year which the time from January first, nineteen hundred and seventeen, to the end of such fiscal year bears to the full fiscal year."

The inclusion of proportion of the tax in the report of the period ending July 1, 1917, is purely administrative, having solely to do with the levy and collection of the tax long after the approval of the act. How, then, can it be said that the enactment of this act had any bearing or effect on the dividend declared, or transfer of the stock? Counsel have argued as though the tax must have been paid from the earnings of the company prior to July 1, 1917. The act contains no such requirement, and, as the tax was not payable until nearly a year later, there would seem to be no ground for such an inference. Nor is there any basis in the record for the suggestion that, to discharge the tax, the company must have encroached on its capital. The record warrants no such deduction. For all that appears, the company's earning capacity may have continued as before, and have been ample out of which to have discharged the tax long before it became payable. As indicated, the act was not retrospective, save as including the net income of the calendar year prior to October 3, 1917, with that

of the portion of the year following, in making up the net income on which taxes were to be collected and levied, and cannot be construed to have affected in any manner the legality of dividends paid, or the sale of stock. Indeed, for all that is alleged, there may have been no income during the first half of 1917. The exaction of taxes was prospective, and not such as was likely to impair the company's capital,—at least, it was not so alleged. What we have said disposes of the other error assigned.

The trial court's ruling, that none of the several petitions stated a cause of action, is—*Affirmed*.

WEAVER, C. J., STEVENS and ARTHUR, JJ., concur.

FRANK RICHEY, Appellee, v. CLIFTON RICHEY et al., Appellees; J. L. WITMER, Intervener, Appellant.

ASSIGNMENTS: **Expectancy—Inadequate Consideration.** An assignment by a prospective heir of his expectancy (which was a practical certainty) for 14½ per cent of its then value, is against equity and good conscience, and voidable.

Appeal from Jasper District Court.—D. W. HAMILTON, Judge.

NOVEMBER 16, 1920.

ACTION to partition real estate. The facts are stated in the opinion. Trial was had upon the issues presented by appellant and intervener. Decree adverse to his contention, and he appeals.—*Affirmed*.

E. J. Salmon and J. L. Witmer, for appellant.

C. O. McLain, for appellees.

STEVENS, J.—Caroline Richey, a resident of Newton,

Jasper County, Iowa, died February 3, 1917, intestate, seized of the following named real estate, to wit: the south half of the southeast quarter of Section 26; the northwest quarter of the northeast quarter of Section 35, and the north 15 acres of the northeast quarter of the northeast quarter of Section 35, all in Township 80 north, Range 21 west of the 5th P. M. Shortly thereafter, a suit was commenced in equity for the partition thereof. Upon hearing, the court found that Clifton Richey, a son, and appellee herein, was the owner of an undivided one-fourth interest therein, subject to certain claims of creditors and of J. L. Witmer, appellant and intervener herein. Referees were appointed, and the land sold. The case comes to this court upon the issues presented by the petition in intervention, in which intervener alleged that, on March 30, 1906, Clifton Richey, by an instrument in writing, sold, assigned, and conveyed all his future interest as heir at law in the property, real and personal, of Caroline Richey. This instrument, omitting the formal acknowledgment, is as follows:

"Know all men by these presents that I, Clifford Richey, unmarried, of Fort Collins, Larimer County, Colorado, in consideration of four hundred thirty-five and no-100 dollars, in hand paid by J. L. Witmer of Des Moines, Polk County, Iowa, the receipt of which is hereby acknowledged, do hereby sell, assign, transfer, convey and set over to said J. L. Witmer, his heirs or assigns, all my right, title and interest in and to the estate of Caroline Richey, as an heir at law of said Caroline Richey, whether it be real, personal or mixed, hereby covenanting with the said J. L. Witmer, his heirs or assigns, that I have not heretofore sold, assigned or transferred or in any manner incumbered, or placed liens upon said estate. And I hereby authorize the executor or administrator of the estate of said Caroline Richey, whoever he may be, to deliver and turn over to said J. L. Witmer, his heirs or assigns, any and all property, whether it be real, personal or mixed, which may be coming to him as an heir at law of said Caroline Richey, taking a receipt therefor, which said receipt shall have the

same force and effect, both at law and equity, as though I had signed it with my own hand. I hereby certify that I am an unmarried man. Witness my hand this 30th day of March, A. D., 1906."

The petition alleged that said assignment was fairly made upon a valid consideration, and that, by virtue thereof, he became and is the owner of an undivided one-fourth interest in said property, and, therefore, asked that his said interest be established and confirmed by the court. Clifton Richey, for answer to the petition of intervention, admitted the execution of the above-written instrument, but alleged that, at the time he executed the same, he was in straitened financial circumstances; that this was known to the intervener; that the land, at the time, was worth between \$3,000 and \$4,000, and, at the time of the trial of the partition suit, \$8,000; and that the consideration paid, which was \$435, was inadequate, oppressive, and unconscionable. He further alleged that the said written instrument was intended as a mortgage, to secure an indebtedness for the amount named, and not as an assignment of his expectancy as heir at law in the estate of Mrs. Richey; and that same was barred by the statute of limitations. At the time of the execution of the assignment set out above, intervener executed and delivered to Richey another instrument, granting him an option to repurchase his interest in the estate for \$435, with interest at 8 per cent from March 29, 1906, at any time on or prior to December 29, 1906, making time the essence thereof. The court found that the alleged assignment was, in effect, a mortgage, and not an absolute conveyance, and that there should be deducted from Richey's share of the proceeds of the sale of the land the sum of \$435, with interest thereon at 8 per cent from March 29, 1906, amounting to \$913.50, and that same be paid to intervener in full of his interest therein. Clifton Richey has not appealed. Therefore, except in so far as the decree adjudging that the alleged assignment was, in effect, a mortgage is inconsistent with the claim of intervener, it is not involved herein.

The rule in this state is that an assignment of a naked possibility or expectancy of an heir to an estate, if in good faith and for an adequate consideration, is valid, and will be upheld in equity. *Mally v. Mally*, 121 Iowa 169; *Jones v. Jones*, 46 Iowa 466; *Richey v. Rowland*, 130 Iowa 523, 525; *Betts v. Harding*, 133 Iowa 7; *Edler v. Frazier*, 174 Iowa 47.

It is stipulated by the parties that the market value of an undivided one-fourth interest in the land in controversy at the time of the execution of the alleged written assignment was \$3,000, and it appears from the evidence that, at the time of the trial of the partition suit, it was about \$7,000. No evidence of actual fraud on the part of the intervener appears in the record. The assignment was made at the solicitation of a brother, and there is a suggestion in the record that Clifton Richey was in financial distress, and in great need of money; but no proof to this effect was introduced. The consideration paid by intervener was but 14.5 per cent of the agreed market value of the land. Mrs. Richey was, at the time, insane, and her property was being managed by a guardian. It must, therefore, have been quite apparent to intervener that she would not be able to dispose of the land by will, and that about the only hazard involved was that Mrs. Richey might survive for many years, and that some part of the property would be required for her support. She lived 11 years. The record does not show whether she was possessed of personal property or not, or whether the income from the real estate was used for her maintenance. If the rule stated in 2 Pomeroy on Equity Jurisprudence (4th Ed.), Section 953, that, in transactions of this character, the fair market value of the property, and not the value as shown by the life tables, is to be considered, the consideration paid was clearly inadequate, so much so as to be unconscionable. The assignment was not void, but voidable. Agreements whereby prospective heirs seek to dispose of their expectancy or future interest in property are not favored, and will always be scrutinized with care. The value of the

property was wholly out of proportion to the consideration paid. The contract is in itself unfair. As stated, the court below decreed that the original consideration, with interest, be deducted from the proceeds of the sale belonging to Clifton Richey, and paid to intervener. This is in harmony with the general rule in such cases; is fair, just, and equitable; and should be and is—*Affirmed*.

WEAVER, C. J., LADD and ARTHUR, JJ., concur.

STATE OF IOWA, Appellee, v. MRS. CLAUD STONER, Appellant.

HUSBAND AND WIFE: Crimes—Presumption In Re Coercion.

Slight circumstances are sufficient to carry to the jury the issue whether a wife, in the commission of a crime, exercised her own free volition, or was coerced by the will of her husband. Evidence held sufficient.

Appeal from Polk District Court.—JOSEPH E. MEYER,
Judge.

NOVEMBER 16, 1920.

THE accused was convicted of having owned or kept intoxicating liquors, with intent to sell the same in Polk County. She appeals.—*Affirmed*.

Joseph D. Laws, for appellant.

H. M. Havner, Attorney General, *F. C. Davidson*, and *Shelby M. Cullison*, for appellee.

LADD, J.—The only issue to be decided is whether the evidence is sufficient to sustain the verdict, appellant contending that it conclusively appeared that defendant was acting under the coercion of her husband. On her way home from St. Joseph, Missouri, over the Chicago Great

Western Railroad Company's railway, the accused was accompanied by her husband and little daughter. Upon her arrival at Des Moines, she carried a dark colored handbag from the train toward the waiting room. Before reaching that room, she was accosted by an officer, whom she told, on inquiry, that the handbag did not belong to her, and explained that, as a stranger was about to leave the train, he had said, "You take this suit case and set it in the waiting room, and I will give you a dollar;" that she at first refused, but, upon being told by her husband to "pick it up and carry it," she obeyed him. She testified to this, and that, but for what her husband said, she would not have carried the handbag. Her husband, who was standing near, then stepped up to the officer, and told him that the woman had nothing to do with the bag; whereupon both were arrested. She described the stranger as a big fellow with a mustache, accompanied by a young fellow, and swore she never saw either before. Her husband identified him as Jack Blades, whereupon she hit him on the chest with her fist, and told him to "shut up." Her explanation was that her little girl became hungry on the way, and the stranger procured for her a sandwich, and that that was the way she became acquainted with him. But a special officer appears to have boarded the train at Lamoni, and observed the accused with her husband and daughter in one of the coaches, and that near them were certain suit cases; and he notified the sheriff's office at Des Moines. A special officer of the railroad company, upon boarding the train at Lorimer, noticed appellant with her husband and daughter in the chair car, and near them several suit cases, subsequently found to contain intoxicating liquors; and, upon arriving at the Union Station, observed the accused, accompanied by her husband, alight from the train with her handbag, as previously stated. They were sitting in the car, she on one side of the aisle and her husband on the other. On the way, he moved one or two of the suit cases near where she sat. The witness swore that defendant remained in her seat, and that her husband finally sat with

her, but stood in the end of a car, in approaching the city; that he did not see her talk with any man other than her husband, and did see them leave the train with a heavy-laden handbag; that Blades was not sitting near the defendant and her husband; and that he did not see him talking to them. Two deputy sheriffs testified that they boarded the train in the suburbs of the city, went into the chair car, and noticed defendant, with her little girl, seated near the middle of the car; that they noticed a grip, handbag, and suit case in the seat where she and her daughter were riding; that, upon inquiry, they denied knowledge of whom they belonged to.

Such, in substance, is the evidence, and it is said that, upon the perpetration by the wife of an offense such as charged, in the presence of her husband, the former is presumed to be acting under the latter's coercion. *State v. Fitzgerald*, 49 Iowa 260; *State v. Harvey*, 130 Iowa 394. This presumption is rebuttable. It is merely *prima facie*, and the wife may be convicted, if it be proven that she acted on her own volition. See *Bibb v. State*, 94 Ala. 31 (33 Am. St. 88), and note; *State v. Nargashian*, 26 R. I. 299 (106 Am. St. 715), and note. Moreover, but slight circumstances are essential to meet the presumption, and to carry to the jury the issue as to the exercise of the wife's volition. *State v. Cleaves*, 59 Me. 298; *Morton v. State*, 144 Tenn. 357 (4 A. L. R. 264). Her conduct in the husband's presence may be such as to overcome the presumption of coercion otherwise to be presumed. *Commonwealth v. Adams*, 186 Mass. 101 (71 N. E. 78); *People v. Wright*, 38 Mich. 744 (31 Am. Rep. 331); *Seiler v. People*, 77 N. Y. 411. Each case is governed by its own facts. Here, the jury might have found that the story of the stranger was hatched up; for the officers, with opportunity to see, swore that they observed no one, between Lorimer and the Union Station, conversing with her, and that she accompanied her husband from the train. Moreover, the story is of doubtful credibility. She swore that the handbag belonged to neither her nor her husband; and, if no stranger told her

to carry it, as the jury might have found, her husband could not have heard him, and the claim that her husband bade her, upon her refusing the stranger to carry it, fails, and she must have been acting on her own motion. We are of opinion that the jury might well have rejected her entire story as a falsehood, and have found that she was acting on her own volition. On what other theory had she cautioned her husband to "shut up," and struck him on the chest when her spouse told the officers that Jack Blades was the stranger who had handed her the handbag? The court did not err in submitting the issue to the jury.—*Affirmed.*

WEAVER, C. J., STEVENS and ARTHUR, JJ., concur.

C. E. BLAIR et al., Appellees, v. R. F. FITCH, Appellant.

CONTRACTS: Public Policy—Property in Custodia Legis. It is
1 not violative of public policy for the president of a corporation which has levied on a restaurant stock and fixtures to contract, without the authority of the court, with an employee of the restaurant owner (and while the sheriff is holding the property) to operate the restaurant and preserve it as a going concern, it appearing that the sheriff was not to receive any compensation under said contract, that all parties impliedly consented thereto, and that the property was properly preserved.

CONTRACTS: Consideration—Assumption of Obligation by Unin-
2 **terested Party.** Inducing one to render services and incur expense on a subject-matter as to which the promisor has no *personal* interest, furnishes adequate consideration for a promise to pay for such services and expense.

Appeal from Mahaska District Court.—D. W. HAMILTON,
Judge.

NOVEMBER 20, 1920.

ACTION to recover for the value of services claimed to have been rendered under an alleged oral contract. There

was a verdict and judgment in the court below for plaintiff, and defendant appeals.—*Affirmed*

Burrell & Devitt and McCoy & McCoy, for appellant.

Malcolm & True, for appellees.

STEVENS, J.—I. Plaintiffs, who are husband and wife, alleged in their petition that they entered into an oral agreement with the defendant on or about September 18, 1916, by the terms of which they agreed to render

1. CONTRACTS : joint services in the care, management, and
public policy : conduct of a restaurant known as the Savoy
property in Cafe, in the city of Oskaloosa; that, while
custodia legis. in the custody and having the management of said business, they were to render semi-monthly reports of the receipts and disbursements to the defendant or to the sheriff of Mahaska County; that the defendant agreed to reimburse them for any sums expended by them for labor, merchandise, and other necessary expenses incurred in the conduct of said business in excess of the income therefrom; that, in pursuance of said oral agreement, they entered upon the discharge of their duties on September 18th, and continued thereunder until December 13, 1916; that the disbursements of said business exceeded the income therefrom in the sum of \$164.68; that the fair and reasonable value of their services was \$353.25; and that they made full, itemized semi-monthly reports to the sheriff, as agreed. They demand judgment for \$517.93. The defendant, for answer to plaintiffs' petition, denied the alleged oral agreement, and averred that, on September 18th, the sheriff of Mahaska County took possession of said restaurant and all the furniture, fixtures, and utensils connected therewith, under a landlord's writ of attachment, issued in a suit brought by the Downing Hotel Company against W. C. Murdy and others; that Murdy was the owner of said restaurant, furniture, utensils, etc., and that, on and prior to said 18th day of September, he was in possession, as the tenant of

the hotel company, and carried on the business thereof; that, if an oral contract was entered into by plaintiffs with the defendant or any other person, as alleged, such contract was illegal, contrary to public policy, and void, and that same was without a valid consideration.

The evidence without dispute shows that judgment was, on March 19, 1917, rendered in the district court of Mahaska County against W. C. Murdy and in favor of the Downing Hotel Company for \$1,125, costs, and attorney fees, amounting to \$110, and that a landlord's lien was established against the property levied upon. It further appears from the record that the writ of attachment was levied on September 18th, the day it is claimed the oral contract was entered into. As indicated, plaintiffs were in possession of the restaurant with the knowledge and acquiescence, if not with the consent, of the sheriff. That services were rendered by plaintiffs, substantially as claimed, is not denied in the evidence, nor is it claimed that they failed to make semi-monthly reports, as they claim to have agreed, or that the disbursements did not exceed the income in the amount stated; but it is contended by defendant that the value of the services rendered was much less than alleged. The general rule that contracts in violation of statute, as well as certain other contracts, are void, as against public policy, as stated in the numerous cases cited, is a familiar one. *Guenther v. Dewien*, 11 Iowa 133; *Pike v. King*, 16 Iowa 49; *Dillon & Palmer v. Allen*, 46 Iowa 299; *Dodson v. McCurrin*, 178 Iowa 1211; *Kinney v. McDermot*, 55 Iowa 674; *Pangborn v. Westlake*, 36 Iowa 546; *Steever v. Illinois Cent. R. Co.*, 62 Iowa 371; *Koepke v. Peper*, 155 Iowa 687. Perhaps the language of the court most favorable to appellant is found in *Dodson v. McCurrin*, *supra*, as follows:

“In other words, its validity is determined by its general tendency at the time it is made, and, if this is opposed to the interests of the public, it will be invalid, even though the intent of the parties was good and no injury to the public would result in the particular case. The test is the

evil tendency of the contract, and not its actual injury to the public in a particular instance. * * * The law looks to the general tendency of such agreement, and it closes the door to temptation by refusing them recognition in any of its courts.' ”

The defendant was president of the Downing Hotel Company, but, so far as disclosed by the record, was not in actual charge of the business thereof. If the oral agreement in question is void and unenforcible because the same is illegal, or in contravention of public policy, it must be because of its relation to the property, which, as stated, was in the custody of the sheriff under a landlord's writ of attachment, or because the sheriff was a party thereto.

For a short time prior to September 18th, plaintiff C. E. Blair was employed in the restaurant by Murdy. According to the testimony of Blair, defendant desired the restaurant kept open because he thought it would sell to better advantage as a going concern. Except as light is thrown thereon by the fact that the attachment suit was prosecuted to judgment, and the property sold under execution, there is nothing in the record tending to show that Murdy did not consent to the arrangement between plaintiffs and defendant. There is no affirmative evidence that he did consent. He made no appearance in the attachment suit, and judgment against him was entered by default. Plaintiff does not seek to recover upon a contract with the sheriff. According to Blair's testimony, the defendant requested that he make reports to himself or to the sheriff, stating that, if same were made to the latter, he would get them from him. It is true that the sheriff testified that he made arrangements with plaintiff Blair to go into the restaurant, and upon the advice of an attorney that it would be better to do so, for him to keep it open. This testimony was denied by plaintiff. Doubtless, Murdy abandoned the property taken under the attachment, as soon as the writ was levied. It is not claimed that the sheriff was to receive any compensation from either of the parties to the contract, or that the property was not properly preserved and cared for.

It is true that no order or direction for the conduct of the restaurant was asked or obtained from the district court. Manifestly, contracts having for their object the corruption of a public officer, or contracts the tendency of which is to tempt such officer from the proper performance of his official duties, are contrary to public policy and unenforceable. We may assume that it was apparent to all parties concerned that their interests would be advanced by continuing the business of the restaurant, pending the attachment proceedings. Surely, the defendants in the attachment suit were not injured thereby. The property was purchased by the hotel company at the sheriff's sale. We perceive no theory upon which the contract was violative of the welfare of the public, or tended either to corrupt a public officer or to tempt him from the performance of his duty. In our opinion, the contract relied upon is not contrary to public policy.

II. The evidence as to the value of plaintiffs' services was conflicting, but the verdict is not without support therein. There is nothing in the record to indicate that the jury was influenced by passion or prejudice. We cannot, therefore, hold that defendant's motion for a new trial should have been sustained upon this ground.

Some claim is made by appellant that the oral agreement was without consideration, because defendant had no personal interest whatever in the matter. According to the testimony of plaintiffs, he came to the restaurant on the 18th of September, and requested plaintiffs to continue the business of the restaurant, paying the expenses from the receipts derived therefrom, so far as they were sufficient for that purpose, and, if it were necessary to do so, to advance their own funds; and said that he would personally pay them for the services rendered, and reimburse them for all sums expended in excess of the income from the business. While plaintiffs knew that a writ of attachment had been levied upon the property at the suit of the hotel company, defendant was competent to

2. CONTRACTS :
consideration :
assumption
of obligation
by uninter-
ested party.

contract, and the jury may well have found from the evidence that he personally entered into and assumed the obligations of the oral contract. It is true that the record does not affirmatively show that he had permission from the owner to put plaintiffs in charge of the business, but the owner appears to have acquiesced in the arrangement; at any rate, no objections on his part are shown, and, as stated, he did not contest the attachment suit. As we find no error in the record, the judgment of the court below is—*Affirmed*.

WEAVER, C. J., LADD and ARTHUR, JJ., concur.

FARMERS' AND MERCHANTS' BANK OF AURORA, Appellee, v.
WELLS & POTTER et al., Appellees; ARTHUR T. BARLAS,
Intervener, Appellant.

ATTACHMENT: Failure to Note Bond on Appearance Docket.
Failure to enter, on the appearance docket, a notation of the filing of an attachment bond, in no wise invalidates the attachment. (See Secs. 291, 3557, 3885, Code, 1897.)

Appeal from Buchanan District Court.—H. B. BOIES,
Judge.

NOVEMBER 20, 1920.

ACTION on certain promissory notes, aided by issuance and levy of writ of attachment. Memorandum of filing of bond was not entered in appearance docket, and on that ground intervener prayed in his petition that the attachment be dissolved, and moved that the levy thereof be discharged. On hearing, the court dismissed the petition of intervention, and overruled the motion to discharge the levy. The intervener appeals.—*Affirmed*.

Cook & Cook and Rubovits & Hirsch, for appellant.

R. J. O'Brien, for appellee.

LADD, J.—The plaintiff sued on two notes for \$1,120 each, and caused a writ of attachment to be issued and levied on certain personal property, mostly creamery fixtures and machinery. Thereafter, intervener, in an action commenced August 6, 1919, against the same defendants, caused a writ of attachment to be issued and levied on the same property. By petition of intervention, as well as motion to discharge, intervener prayed that the writ issued in plaintiff's suit be dissolved, and the levy discharged. It appears that a bond, in amount and sureties qualified as required by statute, was presented to the deputy clerk of court, and by him indorsed on the back, "Filed, examined, and approved, May 9, 1919. D. C. Hood, by Wilbur T. Ryan, Deputy." The deputy then placed the bond in the safe, and not with or among the papers of the case. No entry was made on the appearance docket until September 22d, after intervener's petition and motion had been entered on the appearance docket. Such petition and motion, however, had been marked thereon before the deputy clerk had noted on the appearance docket, "May 9, 1919, bond," and opposite thereon, "This entry made September 22, 1919." Attachment bonds customarily were kept in the safe in the clerk's office. On the appearance docket appeared entries of filing of petition, order for publication, May 9, 1919, writ of attachment, May 12th of same year, original notice, filed June 9, 1919. Subsequently, the intervener's motion was overruled, and petition of intervention dismissed, judgment *in rem* was entered, as prayed, and levy of attachment confirmed, and special execution directed.

We are of opinion that the ruling of the trial court should be sustained. Section 3885 of the Code requires that, before a writ of attachment issue, "plaintiff must file with the clerk a bond for the use of the defendant." Section 291 of the Code exacts that:

"The clerk shall, immediately upon the filing thereof,

make in the appearance docket a memorandum of the date of the filing of all petitions, demurrers, answers, motions, or papers of any other description in the cause; and no pleading of any description shall be considered as filed in the cause, or taken from the clerk's office, until the said memorandum is made."

It will be observed that, although a memorandum of papers in the case is to be made in the appearance docket, pleadings only are not to be considered filed until the memorandum is made. Impliedly, then, entry in the appearance docket of the memorandum of pleadings is mandatory. We have so held as to pleadings in *Johnson v. Berdo*, 131 Iowa 524, and other cases cited. The rule has been regarded otherwise, where affidavit of publication was marked filed, but no memorandum entered in the appearance docket (*Simmons v. Simmons*, 91 Iowa 408); and the same rule obtains where no such entry of the filing of deposition was made (*Byington v. Moore*, 62 Iowa 470); and the same as to the filing of bill of exceptions (*Royer v. Foster*, 62 Iowa 321); the filing of official reporter's shorthand notes of evidence (*Small v. Wakefield*, 84 Iowa 533); and as to filing of minutes of testimony before grand jury (*State v. Craig*, 78 Iowa 637). Section 3557 of the Code defines pleadings by saying that:

"Pleadings are the written statements by the parties of their respective claims and defenses and are:

- "1. The petition of the plaintiff;
- "2. The motion, demurrer or answer of the defendant;
- "3. The motion, demurrer or reply of the plaintiff;
- "4. The motion or demurrer of the defendant.

"The filing of a pleading or motion in the clerk's office during a term, and a memorandum of such filing made in the appearance docket within the time allowed, shall be equivalent to filing the same in open court. * * *"

Manifestly, an attachment bond is an obligation, and not a pleading, and for that reason is excluded, as such, from the above enumeration of statutory pleadings, and a memorandum on the appearance docket is not required,

though, in the orderly transaction of business in the clerk's office, it may well be made. Other entries therein plainly indicated that a writ of attachment had issued and been levied, and thereby put other litigants on inquiry as to the existence of a bond, and inquiry at the clerk's office would have elicited information that such bond had been filed, and was in the vault for safe-keeping. Plaintiff, in procuring the bond to be approved, and delivering to the clerk's deputy, did all that was required of him; and whether he should enter a memorandum of its filing was purely directory, and the omission of the clerk therein did not obviate its sufficiency as a bond such as required for the issuance of a writ of attachment. The chapter of the Code on attachments is to be liberally construed. Section 3933 of the Code. No prejudice resulted from the clerk's omission. The rulings of the trial court in denying the motion to discharge the levy and dismissing the intervener's petition to dissolve the writ of attachment are—*Affirmed*.

WEAVER, C. J., STEVENS and ARTHUR, JJ., concur.

CARL H. WRIGHT, Appellant, v. INTERURBAN RAILWAY COMPANY, Appellee.

CARRIERS: Interstate Commerce—Dismantling and Reconstructing Equipment. A workman, even though employed by an interstate common carrier, is not engaged in interstate commerce while employed in dismantling and reconstructing a room or station and the electrical equipment therein, when the room and equipment are not employed during the period of said work as an instrument of commerce. This is true even though said work is being done with the purpose in view of using the reconstructed room and equipment, immediately on the completion thereof, as an instrument of commerce.

Appeal from Polk District Court.—HUBERT UTTERBACK, Judge.

NOVEMBER 20, 1920.

THE plaintiff brings this action at law under the Federal Employers' Liability Act, to recover damages for personal injuries alleged to have been suffered by him by reason of the defendant's negligence. On trial to a jury, there was a directed verdict and judgment for the defendant, and the plaintiff appeals.—*Affirmed.*

Samuel A. Anderson and J. E. Holmes, for appellant.

W. H. McHenry, A. B. Howland, C. R. Bennett, and C. Woodbridge, for appellee.

WEAVER, C. J.—The defendant owns and operates an interurban electric railway extending from the city of Des Moines to the city of Colfax. At the intermediate town of Mitchellville, it maintains a station building, one room or distinct part of which is usually occupied by what is spoken of in the record as a "substation." In the substation, when in use, are electric wires, transformers, and other items of equipment employed in operating the road. The two main or primary wires so used enter the room at a point about 16 feet above the floor. In June, 1918, defendant undertook to reconstruct or make quite extensive changes in the substation. To accommodate that work, a portable substation was arranged in a car located on the railway track wholly outside of the building; the primary wires were cut off at or near the point where they entered the room, and provided with a disconnecting switch, which, when open, arrested the current, and enabled the employee to work with safety in all parts of the room. During all the period from June, 1918, until plaintiff was injured, in February, 1919, the substation room remained dismantled of its electrical equipment, and no use was made therein of the current. It appears, however, to have been the custom of the foreman to open the switch after the day's work was ended, and to disconnect it again each morning before work was resumed. During all the time this work of reconstruction was in progress, no part of the work of operating

the railway or controlling the movement of cars or trains therein was carried in or through said substation, but all work and business of that nature was done and carried on in and through the temporary or portable substation alone, by employees other than plaintiff. For a year or more, plaintiff had been employed by the defendant at other places on its line, when, early in February, 1919, he was sent by defendant to Mitchellville, to help in the completion of the work being done on the substation. A few days later, he was assisting in putting up an iron "pipe rack," bolting it to the inner wall of the building, at or near the place of the disconnecting switch above mentioned. It was yet early in the morning, and it so happened that the foreman, contrary to his custom, had failed to disconnect the switch, and plaintiff, not noticing the failure, undertook to climb to his place of work on the pipe rack, thus coming in contact with some wire or other conductor heavily charged with electricity, and was very severely injured.

In this action, plaintiff charges the defendant with negligence in failing to open the switch in the morning in question, and in ordering or directing him to work while the current was on, and without any warning to plaintiff of the fact. Plaintiff further alleges that, at the time of his injury, the railway company was engaged in the business of interstate commerce, and that the work in which he was employed by the defendant was a part of such business of interstate commerce, and that he is, therefore, entitled to maintain this action under the Federal Employers' Liability Act (U. S. Comp. St. Secs. 8657-8665):

The defendant denies any negligence on its part: denies that plaintiff was employed in any work or service of interstate commerce; and pleads contributory negligence and assumption of risk.

I. Was plaintiff, at the time of his injury, engaged in work of interstate commerce? It is stated in the record that the defendant is a common carrier of freights and passengers on its line between Des Moines and Colfax, and at times receives freights at its stations consigned to points

outside of the state of Iowa, and freights brought into the state by other carriers and delivered to it for carriage to stations on its own line; and that, in rare instances, it has sold passenger tickets to points outside of the state; but that it neither owns nor operates cars or trains outside of or beyond the boundaries of the state of Iowa.

Upon the question whether a given act or employment partakes of the character of interstate commerce, the Supreme Court of the United States is the court of last resort. It has dealt with this subject on several occasions, and has declared that the test is to be found in the answer to the question:

“Was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?” *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 559.

Without attempting to enlarge upon this definition, can it be said that, *at the time* when this plaintiff was injured, he was engaged in a work so closely related to interstate commerce as to be practically a part of it?

Upon both principle and precedent we are of the opinion that this inquiry must be answered in the negative. It is doubtless true that this statute is intended for the protection and benefit of laborers in a hazardous employment of the highest importance to the public, and as such, it should be liberally construed by the courts, to promote its beneficent purpose. The Federal court has, in fact, so construed it, and the test which it applies in the above quotation from the *Shanks* case is evidence of a purpose to make the statute as effective as its terms will warrant.

In the record now before us, it cannot fairly be said that, when injured, plaintiff was engaged in work having any close or immediate relation to interstate commerce, or even to commerce of an intrastate character. The substation in which plaintiff was then at work was not being used for any purpose in connection with the work of commerce, interstate or intrastate. It had been closed for the purpose of installing new transformers, and perhaps making other

changes in its equipment; and, for the time being, the electrical machinery and equipment in actual use at that station were admittedly located in a box car or portable station outside of the building. It is true that the work being done in the building, and in which plaintiff was employed, was for the purpose of fitting the room to be reoccupied as a substation, and the transformers and other equipment which the employees were putting in place were intended to be used by the company in its business of operating its line of railroad as a carrier of freight and passengers; but, to repeat, *at that time* it was not in such use, and the room and its contents were not instruments of commerce, nor was the work being done therein so closely related to interstate commerce as to be practically a part of it.

Quite in point, as recognizing this distinction, is the case of *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, above cited. There, the plaintiff was employed in the company's shop, in which its locomotives used in both interstate and intrastate commerce were repaired. At the time of his injury, he was engaged solely in taking down and putting in a new location an overhead countershaft, through which power was transmitted to machinery used in the repair work; and it was held that he did not come within the protection of the statute. The court, having stated the test as we have before quoted it, proceeds to say that:

"Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, car, or other instrument then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines, some of which were used in such transportation."

To the same general purport is the case of *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439; *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353; *Illinois Cent. R. Co. v. Cousins*, 241 U. S. 641. See, also, discussion by this court

in *Smith v. Interurban R. Co.*, 186 Iowa 1045.

Not all servants and employees of common carriers are necessarily or at all times engaged in interstate commerce. The statute imposing liability in cases of this kind limits it to damages to "any person suffering injury *while he is employed by such carrier in such commerce*" (Comp. Stat. 1918, Section 8657); and, in giving this provision practical effect, by making it broadly applicable to all cases where the employee "*at the time of his injury* was engaged in interstate transportation, or in work so closely related to it as to be practically a part of it," the courts have gone as far as is reasonably possible, to extend its benefits to all who, by any fair interpretation, can be brought within the scope of the expressed legislative intention.

At the time the appellant in this case was injured, he was not engaged in work having any immediate connection with transportation of articles of commerce. True, the room in which he worked had formerly been occupied as a substation on the defendant's road, and had contained an equipment of machinery and electrical devices of various kinds, which was used in the operation of the road. But this use of the room and equipment ceased or was suspended in June, 1918, and from then until plaintiff was injured, a period of 8 or 9 months, it was occupied and used by the plaintiff and other mechanics or workmen who were employed in a reconstruction of the place and installment of new transformers, with the intention of restoring it to use as a substation when the work was completed. During this period, the practical operation of the road was conducted entirely through the portable station, in the management, control, and operation of which plaintiff had no part. It was under such conditions that the accident occurred, in a manner already sufficiently described. It is the theory of the appellant that his case comes within the rule applied in *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146; *Philadelphia, B. & W. R. Co. v. Smith*, 250 U. S. 101; *Ross v. Sheldon*, 176 Iowa 618; and others of the class of which these are representative. None of these is quite in point,

and none at all inconsistent with the decisions in *Shanks v. Delaware, L. & W. R. Co.*, *supra*; *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439; *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353; *Illinois Cent. R. Co. v. Behrens*, 233 U. S. 473; and other similar holdings.

In all the cases where the carrier has been held liable, the fact has been emphasized that, *at the time* of the employee's injury, he was admittedly engaged in work of interstate transportation, or in work so intimately and directly connected therewith as to be practically a part of it; while in cases where a recovery has been disallowed, such intimate relation does not appear. Had the plaintiff in this case been employed to shingle the defendant's passenger station, or to mend a window in the substation, and in so doing had come in contact with a live electric wire, and thereby had been injured, whatever remedy he might have had, his counsel would hardly contend that the injured man could recover damages under the Federal statute, on the theory that the service in which he was employed at the time of his hurt was in the nature of interstate commerce, even though it be true that suitable stations and substations are conveniences or instrumentalities which have a proper place in the business of transporting articles of commerce. Or, to use a somewhat more pertinent illustration, let us suppose that defendant, being the owner of an interurban line between Des Moines and Colfax, and finding its business outgrowing its capacity to handle it, lays a new track between its terminals, and erects a new substation at Mitchellville; but, before the new line has been fully completed or opened for business, the plaintiff, being employed in equipping the new substation, is injured, substantially as shown in this action. In such case, the new line, while intended for use in the transportation of articles of commerce, has not been so employed, and not until it has been thus utilized does its owner become charged with the duties or exposed to the liabilities of a carrier of commerce.

When plaintiff was injured, and for months prior thereto, the substation room at Mitchellville had been practically

eliminated from the defendant's railway system. It had no part or share in the railway business, and the men employed therein were mechanics and laborers, without even remote connection with interstate commerce. In our judgment, the trial court did not err in ruling that plaintiff failed to show any right of action under the Federal Employers' Liability Statute.

Plaintiff having asserted no claim for a recovery except under the Federal statute, it is unnecessary for us to consider or decide whether, upon any other theory of the case, the defendant would have been entitled to a directed verdict. For the reasons stated, the judgment below is—*Affirmed.*

LADD, STEVENS, and ARTHUR, JJ., concur.

HUGH BURRIS, Appellee, v. F. C. TITZELL, Appellant.

NEGLIGENCE: Specification of Acts—Pleading. Pleadings re-
1, 7 viewed, and, though somewhat indefinite, held to charge that
defendant, knowing that a surgical drainage tube was loose,
and liable to slip into plaintiff's body, negligently failed to
again fasten said tube to plaintiff's body.

EVIDENCE: Duty of Nurse. One who is familiar with the duties
2 of a nurse in a hospital is competent to say what those duties
are.

PHYSICIANS AND SURGEONS: Responsibility for Negligence of
3 Nurse. A physician may not be held responsible for the neg-
ligence of a nurse over whom he has no control.

NEGLIGENCE: Inapplicable Instructions. Instructions relative to
4 the responsibility of a physician for negligently allowing a
nurse to dress a wound, *without any allegation of negligence*
on the part of the physician, constitute prejudicial error.

PHYSICIANS AND SURGEONS: Improper Operation from Non-
5 expert Testimony. An operation on the human body by a sur-
geon may be so grossly in excess of what was reasonably nec-
essary that a jury may find such fact, without the aid of

expert testimony that such operation was improper. So held on the issue whether a surgeon unreasonably operated through the patient's back, in order to remove an obstruction near the right nipple.

EVIDENCE: Competency—Subsequent Condition as Proving Prior Condition. Evidence that a patient was able at a certain time to take an anæsthetic is not competent on the issue whether he was able to take an anæsthetic at a time a year prior thereto.

Appeal from Johnson District Court.—R. G. POPHAM, Judge.

MAY 15, 1920.

SUPPLEMENTAL OPINION ON REHEARING, NOVEMBER 23, 1920

ACTION to recover damages for malpractice. Opinion states the facts. Judgment and verdict for the plaintiff. Defendant appeals.—*Reversed*.

Dutcher, Davis & Hambrecht, for appellant.

W. J. McDonald and Cook & Balluff, for appellee.

GAYNOR, J.—This action is to recover damages for alleged malpractice. The plaintiff divides his petition into two counts. In each count, he undertakes to set out a distinct cause of action, upon which he predicates a right to damages.

1. NEGLIGENCE:
specification
of acts:
pleading.

The first count centers around the escape of a drainage tube into the pleural cavity of the plaintiff on the 6th day of March, 1915. It is the claim of the plaintiff that the defendant was negligent in permitting the drainage tube to escape into the said cavity. The second count centers around an operation performed in an attempt to remove the tube. Before stating the grounds upon which plaintiff predicates his right to recover, we

may properly state some of the facts which led up to and made it necessary that the plaintiff be operated upon at all. It appears that, on and prior to the 6th day of January, 1915, plaintiff was a resident of Cherokee County, and while there, was taken sick with pleurisy and pneumonia, some time in January, 1915, and was treated by a local doctor for these troubles until the 20th day of February, 1915, when he was brought to the Homeopathic Hospital at Iowa City. The local doctor testifies that, before plaintiff was taken to Iowa City, he performed a surgical operation on the plaintiff with an aspirating needle. The purpose was to relieve the pus in the pleural cavity. He testified:

"I secured one quart of pus from the pleural cavity. This operation was performed on the 19th day of February. The ailment with which plaintiff was suffering was a serious disease. It is difficult to treat, and more so with a history of alcohol, booze, back of it,—it is very hard. After I found out there was pus in this cavity, and it would be a long-protracted case, I concluded to send the plaintiff to Iowa City."

He was accordingly taken there on the date aforesaid. The plaintiff was brought to this hospital as a county patient, by one of the trustees of the township in Cherokee County in which he resided. The defendant occupied the chair of surgery in the State University, and plaintiff was turned over to him for treatment. The defendant's connection with this Homeopathic Medical College at Iowa City consisted of teaching, and also doing general surgery, such as was found necessary in the hospital. We take it that he was employed by the state at a fixed salary, and received no compensation for the treatment given patients in the hospital, other than he received from the state. The nurses and medical staff of this hospital were employed by the board of education of the state, and were subject to discharge by them. The defendant's relationship to the hospital gave him no authority to employ or discharge internes or nurses. The nurses were assigned to take care of patients operated upon. The defendant attended the plain-

tiff for the first time on February 22, 1915; or, at least, that is the first time he saw him. He diagnosed his case, and found him suffering from empyema; found him in a badly run-down condition; as a result of his previous illness. On the 24th, the doctor inserted a needle in the chest of plaintiff, for the purpose of ascertaining whether he had pus, or just an ordinary effusion. He found pus in the cavity, and that it was necessary to remove it, in order to effect a cure. Thereupon, the doctor made an incision about two inches long into the cavity, between the seventh and eighth ribs, and inserted a tube, for the purpose of draining the pus from the cavity. The tube, after being inserted, was fastened in the body of the patient by suture: that is, a needle threaded with silkworm gut was passed through the skin and through the tube, and then out through the skin on the other side, and tied. All doctors agree that this was one of the usual and approved methods of inserting and fastening such a tube, at the time the operation was performed. Thereafter, the doctor saw the patient twice a day. In the meantime, it was the practice of the hospital and the duty of the nurses and internes to dress the wound; and this was done. On the 6th day of March, it was discovered by one of the nurses that the tube had disappeared. A search was made for it in the bed and clothing, and in the dressing that had been removed from the wound, and it could not be found.

On the 22d day of June following, it seemed that the wound had closed, so that there was not sufficient drainage, and plaintiff's temperature was rising. An effort was made then to enlarge the opening for better drainage, and an attempt made to administer an anæsthetic; but the patient was unable to take the anæsthetic, his heart stopped, he quit breathing, and the attendant had to use artificial respiration to bring him back; and further operation was suspended,—at least the defendant so claimed.

The escape of the tube from its moorings into the pleural cavity, and the consequences that followed its presence there, serve as a basis for the cause of action alleged by

the plaintiff in the first count of his petition. In stating his cause of action in this count, he says:

"The defendant, in *placing* or *inserting* said drainage tube, undertook to secure the same; so as to prevent it from slipping or sliding into the cavity, by making a stitch with a needle, which the plaintiff believes to have been a silk thread through said tube and the flesh or skin of the plaintiff; that the defendant, not regarding his duty to the plaintiff, so *carelessly*, *negligently*, and *unskillfully* placed the tube in plaintiff's person, and so negligently failed to properly and safely secure it against slipping, falling, or working into the pleural cavity; that the tube did escape or work loose from the insecure fastenings, and did slip or work into the person of plaintiff and into the pleural cavity, and remained there until the same was removed, on the 1st day of January, 1916."

The negligence upon which plaintiff predicates his right to recover in this count is stated in these words:

"1st. That the defendant failed and neglected to use reasonable and proper means of *securing* said drainage tube to the person of plaintiff, or otherwise, so as to prevent same from slipping or working into the cavity in which it was inserted for drainage purposes.

"2d. That he failed to *secure* or *fasten* the tube, to prevent it from slipping or working into the cavity.

"3d. That, knowing the tendency of the tube to slip or work into the cavity, he failed and neglected to take any means whatsoever to *prevent* the same from working or slipping into the cavity.

"4th. That he failed to use any of the means known to the profession generally to *prevent* the tube from slipping or working into the cavity."

He alleges that, by reason of this negligence, the tube slipped or worked into the cavity, producing injurious consequences, both in health and loss of time, etc., and expenses incurred. On the allegations of this count, he claims \$15,000.

The second count of the petition is predicated on the

alleged negligence of the defendant in *attempting* to remove the tube from plaintiff's person on the 1st day of January, 1916; and it is alleged that, on that day, defendant, for the purpose of recovering or removing the tube, performed a surgical operation upon the plaintiff. The negligence charged in this operation is:

(1) That the defendant negligently and carelessly failed to locate, by means of an X-ray, or otherwise, the exact and precise location of the tube in the person of the plaintiff before attempting the operation.

(2) That the defendant, knowing or having means of knowing the location of said drainage tube in the person of the plaintiff, proceeded to operate upon the plaintiff, without locating or having located the said tube in the person of the plaintiff.

(3) That the defendant was negligent in making a cut or incision in the plaintiff's back, and through the nerves, muscles, and flesh of his back, when he knew, or should have known, by the exercise of reasonable care, the extent and size of the cavity into which the aforesaid drainage tube had escaped, and was then located; and was negligent in not ascertaining and knowing that the cavity did not extend around plaintiff's right side and into his back; that defendant was negligent in making a cut or incision into plaintiff's back, and in severing the nerves, muscles, and cords leading to his right arm, which are involved in the motion of his right arm, when he knew, or should have known, that the drainage tube which he was seeking to recover was located at or about and under the right nipple, and that the cavity did not extend into the right side or back of the plaintiff, beyond a point drawn directly downward from the shoulder blade of the plaintiff on the right side; that, in the operation, the defendant did not locate the drainage tube.

For the consequences that flowed from this alleged negligence, the plaintiff claims \$30,000 damages.

It will be noticed that the plaintiff claims to recover for two distinct acts of negligence, one occurring in February,

1915, and the other on January 1, 1916. Each act complained of as negligence serves in the pleading as a basis for a separate cause of action, and the right to recover on either cause of action rests upon the proof offered to establish it. The court submitted each count as separate and distinct causes of action, on which damages could be predicated, if the facts alleged therein had support in the evidence.

Analyzing the first count, for the purpose of ascertaining what the basic facts are, as therein alleged, upon which plaintiff seeks to recover, we find it charged, as a basis for recovery, simply that the defendant negligently, carelessly, and unskillfully inserted the tube, in such a way and with such fastenings that, as a result of the negligence of the defendant in fastening the same, it escaped into the pleural cavity of the plaintiff, and caused him serious injury. It is not claimed that the insertion of the tube was not necessary, or that it was not a proper method to be employed in treating the trouble from which plaintiff was then suffering. The claim is that the treatment, though necessary and proper to be done, was done in an unskillful way; not that the incision was not proper and necessary; not that it was not made at the proper place; not that the tube was an improper tube to insert; not that it was not inserted at the proper place; but simply that the defendant failed to exercise reasonable care to secure it. It is said that the defendant carelessly, negligently, and unskillfully failed to properly and safely secure it against slipping or falling into the cavity, and that the fact that it did slip loose and escape into the body of the plaintiff was due to the negligent manner in which the defendant had secured it. Damages to the person of the plaintiff, it is claimed, followed from its slipping in. The question for the court and the jury was whether or not the defendant was negligent in not securing it to the person of plaintiff so as to avoid its slipping in. This is the basic fact in the first count, which, if proved, might justify recovery. It must be shown, therefore, that the defendant was, in fact, negligent in the man-

ner in which he secured this tube, after he had inserted it, and that his failure to fasten it was the proximate cause of its slipping in, and of the injuries consequent thereupon. It requires no argument to demonstrate that, unless the substantive negligence upon which this cause of action in the first count rests, is proven, the defendant is not answerable for the consequences that follow the slipping of the tube into the pleural cavity. In this count, plaintiff seeks to make the defendant liable for all consequences that follow that act. Among these, he alleges that it became necessary subsequently to perform an operation to remove the tube, and that this operation was not only painful, but very injurious to the plaintiff, and caused him sickness and damage. The subsequent operation could only be considered in determining the *damages* which the plaintiff is entitled to recover on account of the substantive negligence charged; and it must affirmatively appear that the defendant was guilty of that negligence, before he can be charged with the consequences that follow the act charged to be negligent. It will be borne in mind, in considering this first count, that the operation was necessary and proper, in an effort to bring about a cure of the troubles under which the plaintiff was laboring. It will be borne in mind that no complaint is made of the fact that this defendant performed this operation to remove the pus from the pleural cavity. There is no complaint as to the character of the operation, or the manner in which the operation was performed. There is no complaint made of the method employed by the defendant to bring about the results sought to be attained by the operation. The incision was made, so far as this record shows, just where it should have been made; the tube employed was just such a tube as should have been used; it was inserted in a wound made at the proper place, and for the proper purposes; and the thread used to fasten it was such thread as is proper to be used in an operation of that kind. The plaintiff charges it to be a silk thread, which might easily have been absorbed; but the proof shows that a thread was used that would not

easily absorb, rot, or give way. The evidence shows that the thread was fastened by the use of a needle, to the body of the plaintiff, and that this was the usual way and a proper way. The only evidence we have that tends in any way to negative this is that it did not remain where it was fastened, but did escape into the body of the plaintiff. This escape, however, did not occur until some ten days after the operation. In the meantime, the wound made by the incision was dressed by nurses, over whom the defendant had no control, who were furnished by the hospital to care for patients placed there and operated upon; and these wounds were dressed at intervals by these nurses. It appears that, some time after the operation, the stitches made in sewing the wound were removed; but the evidence shows, and the plaintiff testifies, that the stitches were taken out of the incision seven or eight days after the operation. The stitches that held the tube were not taken out. However that may be, there is no direct evidence that the stitches or thread placed there to hold the tube in place, ever came loose; that they were ever discovered to be loose by anyone, before the tube itself was found to have escaped. How it escaped is not shown. To lay a foundation for liability under the issue tendered, it must affirmatively appear, and there must be evidence in the record, that would justify the jury in saying that the escape was due to the negligent manner in which it was fastened to the body at the time of the operation. If it be thought that it was the duty of the defendant, after the operation, to watch and see that the stitches did not become loose, or loosen, it should have been so alleged; but it is not so charged upon him as a duty, and no negligence is predicated on this thought in the petition. The charge of negligence is bottomed only on the manner or sufficiency of the fastenings. The doctor saw the patient about twice a day, after the operation. In the meantime, plaintiff was in the hands of the nurses placed there to care for him by the hospital authorities. It does not appear that the dressing of the wound was had in the presence of the doctor, or that these nurses were not skilled in doing the

work which they were required to do in the dressing of the wound. The patient sustained a somewhat different relationship to this doctor, so far as nurses were concerned, than he would sustain if he were a private patient under the charge of the doctor and of nurses selected and placed in charge by the doctor.

However that may be, the defendant undertook to show that it was the duty of the nurses to see that the tube was in, and that the stitches were in place, at the time they dressed the wound, and this question

2. EVIDENCE: was asked:
duty of
nurse.

“You stated to counsel on the other side, on cross-examination, that it was a part of your duty to see that the tube was in, and that the stitches were in place there, at the time you dressed the wound?
A. Yes. Q. That is a part of the duty of the nurses at the hospital, and was at the time, is that true? (Objection sustained.)”

It appears that more than one nurse had charge of this plaintiff after the operation, and more than one nurse in the hospital dressed his wound, and it appears that other nurses were on duty before this nurse went on duty. This is a pertinent inquiry. One who is familiar with the duties of a nurse in a hospital is competent to say what those duties are. This witness was shown to be qualified to testify, and there was error in the court in not permitting her to answer this question. It is not sufficient to say that she was asked to state her opinion as to the duty of others in respect to the matter inquired about. It was a substantive fact, which could be known by experience and observation, and testified to by one who, having experience and observation, was capable of giving the jury information as to the fact. It was important because of the fact that it was put before the jury to say, if the matter ultimately came to the jury, whose duty it was to look after these tubes, and to see that the stitches were in place there when the wound was dressed, and that they were not interfered with in the dressing.

The theory of the plaintiff rests on the assumption that the tube became loose and slipped into the body through the negligence of the defendant in the manner of the fast-

3. PHYSICIANS
AND SUR-
GEONS: re-
sponsibility
for negligence
of nurse.

ening. If it was the duty of these nurses, over whom defendant had no control, in his absence to see at all times that the tube was in, and that the stitches were in place when the wound was dressed, a failure to exercise that duty, or a dressing of the wound when stitches were loose from any cause whatsoever, might be substantive negligence on the part of the nurse. The court, in its ninth instruction, said to the jury on this point:

"The evidence in this case discloses the fact that the wounds in plaintiff's right side which were caused by the operations in question were sometimes dressed by nurses and internes of the Homeopathic College of Medicine of the State University of Iowa. You are instructed that, unless you find that the defendant was negligent in permitting said nurses and internes to dress said wounds, taking into account all of the evidence, facts, and circumstances in the case, he is not responsible for their acts, except in so far as his duty exacted proper treatment of the plaintiff by them."

The inference which the jury could well draw from this instruction is that they were justified in finding actionable negligence on the part of the defendant in permitting the nurses to dress the wound, and that he is responsible for their acts in dressing the wound, if he permitted them to dress it. The jury might well find that the defendant properly fastened the tube, and was guilty of no negligence in the manner in which he fastened it, but that the internes or nurses, whose duty it was to dress the wounds, were negligent and careless in the dressing, and because of this, the tube became loosened from its moorings and slipped into the body.

The petition charges no negligence against this defendant in permitting the nurses and internes to dress the

wound. It is not charged that he was negligent in permitting the nurses and internes to dress the

4. NEGLIGENCE: inapplicable instructions. wound. He is not charged with any negligence of these nurses in dressing the wound.

It is left to the jury to assume that defendant's duty might exact of him proper treatment by these nurses, and that any improper treatment by them would create a liability on the part of the defendant, if it resulted in injury to the plaintiff, such as is charged. No basis is laid in the pleadings for this instruction, and no basis is laid in the pleading that would justify the jury in charging the defendant with negligence in permitting the nurses and internes to dress the wound, or for their negligence in the manner of dressing. We think the court erred in giving this instruction. It is hornbook law that the negligence charged is the only negligence which a jury can consider, in determining the liability of the party charged; and, even though other acts of negligence are proven, they do not lay a basis for recovery, unless charged as a basis for recovery. To hold the defendant liable upon this first count, we must enter the field of speculation with no proof of any substantial fact involving him in negligence. We are satisfied that the court erred in the manner of submitting this first count to the jury.

Some evidence was introduced on the trial tending to show that, in June and July following the discovery of the fact that the tube was missing, and was in the body of the plaintiff, the defendant undertook to operate upon the plaintiff, for the purpose of removing the tube, and that these operations were unsuccessful, and were undoubtedly attended by considerable pain. No negligence is predicated on any act of the defendant's in connection with these operations. The defendant asked the court to instruct the jury that there is no claim on the part of the plaintiff of any negligence on the part of the defendant in either the June or the July operation; and this the court refused to give. We think this, too, was error. The jury should have been confined to the charge made. There was no charge of negli-

gence touching the conduct of the defendant at the June and July operations. The jury should have been affirmatively told that they could not predicate any liability upon any act done by the defendant at that time, and in that effort to remove the tube.

We are satisfied that plaintiff has not made a case under this first count.

This brings us to a consideration of the second count, and the errors relied upon for reversal in the matter of the submission of this count to the jury. We might say here that the evidence took a wider range than is justified by the issues presented.

The substance of the second count has been hereinbefore set out. The court, in its instructions to the jury, took from the jury the claim that the defendant was negligent in failing to locate the tube in the pleural cavity before beginning the operation charged to have been undertaken by him on the 1st day of January. It refused to take away the second ground of negligence alleged. When the court took away the first ground of negligence, it impliedly assumed that there was no negligence on the part of defendant in failing to locate the tube before beginning the operation. It impliedly said to the jury that the defendant did know the location of the tube before commencing the operation. The fact is that an X-ray was taken in December preceding the operation, and this X-ray picture showed the tube and its location. This is not disputed; yet the court submitted to the jury the second ground of negligence: that is, that the defendant proceeded to operate upon the plaintiff without locating or having located the tube in the person of the plaintiff. Why the court should have taken away this first ground of negligence and have submitted the second ground of negligence is not made plain in this record. The first ground of negligence was withdrawn clearly on the ground that the defendant did know the precise location of the tube in the person of the plaintiff before attempting the operation. Why, then, leave it to the jury to say that he did not know, or to find that he did not know? Yet this

is the situation here. It was left to the jury as a ground of negligence that the defendant failed to locate the tube before beginning the operation. This was error, and prejudicial error. It left it to the jury to say that this charge of negligence served as a basis for the finding of negligence, when the court, following the evidence, had already told the jury that it would not serve as a basis for that purpose.

It is claimed that the manner of the operation was not shown to be negligent. Plaintiff called no expert witnesses to testify to whether the manner of operation of this last

5. PHYSICIANS
AND SUR-
GEONS: im-
proper opera-
tion from
non-expert
testimony.

operation was approved by the medical profession or not. It is the contention of the defendant that, in the absence of expert witnesses, the jury was turned loose to speculate upon a scientific question, without the knowledge essential to a proper solu-

tion of it. It is true that, in many cases, a proper determination of the controversy requires that laymen be informed, by those expert in the matter, as to what is correct or incorrect practice. It is true that, in matters of science, and in other matters of which laymen can have no knowledge, opinions of experts are essential to a correct conclusion by the jury on the disputed matters. Some cases hold that the testimony of experts is conclusive upon the jury. See *Moratzky v. Wirth*, 74 Minn. 146 (76 N. W. 1032). But cases do arise where physical facts and the natural laws that govern physical life are so well known that a jury, from the facts before it, is able to determine, and correctly, whether the treatment was proper or not. As bearing upon this question, see the late case of *Moehlenbrock v. Parke, Davis & Co.*, (Minn.) 176 N. W. 169. We think the instant case comes within the exception to the rule requiring expert testimony.

Assuming, now, that the defendant had the X-ray before him, knew exactly where this tube was located in the body of the plaintiff, and, in an effort to remove it, cut the body of the plaintiff at such point as would clearly suggest to the mind of the ordinary layman that the wound inflicted

was grossly in excess of what was reasonably necessary to reach the point where the tube was located, the jury might well find the defendant guilty of negligence. We will not enter into a discussion of this branch of the case at this time, since the case must be retried, but simply say that we think this is a case where liability may rest and be shown without the testimony of expert witnesses.

The plaintiff has assigned 26 errors. Many of these are well taken, but will not occur upon the trial again, undoubtedly. Many are captious and without merit.

Why either party introduced evidence touching the operations in June and July, we are not able to discover in this record, except only as tending to show the amount

of damage which the plaintiff sustained by reason of the original wrong charged against the defendant in the first count. It certainly furnished no basis for liability.

6. EVIDENCE : competency : subsequent condition as proving prior condition.
The evidence touching these operations in June and July shows that they were unsuccessful. Defendant claimed that this was so because of the physical condition of the plaintiff at that time; that he was unable to take an anæsthetic. The operations were not denied. The suffering incident to the operations was not denied. That the effort was made to remove the tube by these operations was not denied. That these operations were reasonably made necessary by the presence of the tube in the body was not denied. If the tube in the body was there through the negligence of the defendant, that evidence would be competent; but if the tube was not there through the negligence of the defendant, it was wholly immaterial, and certainly was irrelevant, for want of an issue on that point. Yet, the plaintiff, for the purpose of negating, we take it, the claim of the defendant that the plaintiff was not able to take an anæsthetic, introduced evidence that, in July, a year later, the tube was removed by one Dr. Littig, and that, at that time, the plaintiff was able to and did submit to an anæsthetic, without suffering any ill effects therefrom.

It is a general rule that a condition shown to exist is

presumed to continue until negatived, but this rule applies only to permanent and continuing conditions. The fact that the wind blows from the east today is not evidence that it was blowing from the east on the same day of the week previous. Conditions had changed in the meantime, and the evidence did not tend to negative the claim of the defendant that, a year preceding the operation by Littig, the plaintiff was not in a condition to take an anæsthetic, or to submit to a proper operation to have the tube removed. We say this in view of a new trial.

The law that governs the rights of the parties in this suit is too well settled to require a review at this time. For the errors pointed out, the case is—*Reversed*.

WEAVER, C. J., LADD and STEVENS, JJ., concur.

Supplemental Opinion.

PER CURIAM.—Plaintiff and defendant have each filed a petition for rehearing. Upon a careful reconsideration of the record, we reach the conclusion that the issues tendered in the first count of plaintiff's petition should have been submitted to the jury. In our former opinion, we reached the conclusion that the allegations of Count 1 of plaintiff's petition went no further than to charge negligence in the method of securing the attachment of the rubber tube to the body of plaintiff, at the time the first operation was performed. Evidence was introduced from which the jury might have found that, notwithstanding the fact that the tube may have been properly secured in the first instance, the defendant later knew that it had broken loose, and that he failed to again secure it. The allegations of this count of plaintiff's petition are not as clear and explicit as they might well have been made, but we think them sufficient to charge the defendant with negligence in failing and neglecting to again securely attach the tube to plaintiff's body, after he discovered that it was loose. The con-

7. NEGLIGENCE:
specification
of acts:
pleading.

struction heretofore put upon the pleading is somewhat narrow and technical. In so far, therefore, as we held in our former opinion that the plaintiff was not entitled to have the issues joined upon the first count of his petition submitted to the jury, the opinion is modified and disapproved, and plaintiff's petition is sustained upon this point, and this issue will be for submission to the jury; otherwise, the petition for rehearing is overruled. Defendant's petition for rehearing is overruled.

FRANKIE FREDERICK, Appellee, v. WESTERN UNION TELEGRAPH COMPANY, Appellant.

TELEGRAPHS AND TELEPHONES: Unrepeated Death Message—

- 1 **Recovery.** A contract provision in an unrepeated interstate telegraph message, duly approved by the interstate commerce commission, limiting recovery for delay or failure to deliver, to the amount paid for transmission, is reasonable and enforceable, and *applies to a death message.*

TELEGRAPHS AND TELEPHONES: Contract Limitation on Re-

- 2 **covery.** A contract provision in an unrepeated interstate telegraph message, limiting recovery for delay or failure to deliver (1) to the amount paid for sending the message, and (2) to an amount not, in any event, to exceed \$50, permits a recovery up to \$50, if the delay or failure to deliver was the result of *gross negligence* on the part of the telegraph company.

TELEGRAPHS AND TELEPHONES: Damages for Mental Pain and

- 3 **Anguish.** The rule of the Federal courts that recovery for mental pain and anguish which is independent of any other injury, may not be had in an action for delay or failure to deliver an interstate telegraph message, is binding on the state courts in like actions.

Appeal from Floyd District Court.—C. H. KELLEY, Judge.

NOVEMBER 23, 1920.

THE appellee, the sendee of an interstate telegraph message, obtained verdict and judgment for \$250 on account

of alleged negligence in failing to deliver said telegram. The appellant contends that permitting this recovery was violative of valid contract limitations, under which there was no right to recover beyond a return of the amount paid for transmitting said message, and, in any event, no right to recover more than \$50.—*Reversed and remanded.*

Francis R. Stark, Smith & Rinard, and Miller, Kelly, Shuttleworth & Seeburger, for appellant.

H. J. Fitzgerald, for appellee.

SALINGER, J.—I. An interstate message, addressed to appellee, was of such character as that it advised the defendant mental pain and anguish might be suffered if said message was not delivered at all, or delivered too late. While the fact is challenged by appellee, the record establishes that a contract between the parties was put in evidence. It is a contract that has many times had the consideration of the courts. So far as it is material to this controversy, it is an agreement that, as to unrepeatd messages, there shall be no recovery for delay in delivery or failure to deliver, beyond the amount paid for transmission, and that, at all events, so far as unrepeatd messages are concerned, the recovery for such failure to deliver, or delay in delivery, shall not exceed \$50. As said, the verdict was for a sum greater than \$50. It is absolutely settled that a contract limiting recovery in the case of unrepeatd messages to the price paid for transmission is reasonable and enforceable—semble, one limiting recovery to \$50; settled that it cannot be urged collaterally that such provisions are unreasonable, and that such attack must be done by direct proceedings before the interstate commerce commission.

There can be a valid contract that not more than was charged for sending an unrepeatd interstate telegram shall be recovered for negligence in handling such mes-

1. TELEGRAPHS
AND TELE-
PHONES:
unrepeatd
death mes-
sage: re-
covery.

sage. *Primrose v. Western Union Tel. Co.*, 154 U. S. 1 (14 Sup. Ct. Rep. 1098); *Postal Tel.-Cable Co. v. Warren-Godwin Lbr. Co.*, 251 U. S. 27 (40 Sup. Ct. Rep. 69); *Western Union Tel. Co. v. Bank*, 53 Okla. 398 (156 Pac. 1175); *Boyce v. Western Union Tel. Co.*, 119 Va. 14 (89 S. E. 106); *Williams & Sons v. Postal Tel.-Cable Co.*, 122 Va. 675 (95 S. E. 436); *Western Union Tel. Co. v. Lee*, 174 Ky. 210 (192 S. W. 70); *Meadows v. Postal Tel. & Cable Co.*, 173 N. C. 240 (91 S. E. 1009); *Haskell I. & S. Co. v. Postal Tel.-Cable Co.*, 114 Me. 277 (96 Atl. 219); *Williams v. Western Union Tel. Co.*, 203 Fed. 140; *Gardner v. Western Union Tel. Co.*, 231 Fed. 405.

It is true that in none of these cases was the message involved a so-called death message. But, since the ground upon which the validity of such an agreement is affirmed rests on affirming that such a limitation is upheld by the controlling Federal law, unless the interstate commerce commission holds it to be unreasonable, it is, of course, immaterial whether the contract is made as to a message not a death message, or as to a death message. See *Klotz v. Western Union Tel. Co.*, 187 Iowa 1355.

II. Is it settled, because this proposition is established, that a clause in the same contract limiting liability to \$50 is to be given no effect? It is true that gross negli-

2. TELEGRAPHS AND TELEPHONES: contract limitation on recovery. gence is not a distinct cause of action, and is but a degree of negligence, and that negligence without reference to degree is the basis of the right to recover. *Williams v. Western Union Tel. Co.*, 203 Fed. 140; *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489; and see *Denny v. Chicago, R. I. & P. R. Co.*, 150 Iowa 460, at 464, and *Railroad Co. v. Lockwood*, 17 Wall. (U. S.) 357. And we may concede the holding of the *Williams* case that, even where there is gross negligence, a contract which deals with un-

repeated messages may limit recovery to the price charged for transmission. But it does not follow that, where the contract has a limitation to said price, and, as well, another that recovery shall not exceed \$50, that the last pro-

vision has no effect. We think that, under familiar rules, it is our duty to construe these two provisions together. The trial court proceeded on the theory that more than the price received for sending the message could be recovered, if the handling of such message as the one before us was grossly negligent. We shall consider later whether such negligence will sustain recovery of more than \$50. At present, we shall proceed as if the dispute were whether gross negligence in dealing with a "death message" will permit recovery beyond the price paid for transmission, and up to \$50. On the question whether, in any event, more could be recovered if there were gross negligence, appellant first presents that the evidence is insufficient to show gross negligence.

It is undisputed that the message on its face showed that, unless it was delivered with reasonable promptness, the addressee might be caused mental pain and suffering, by being prevented from seeing her mother while still alive. The jury could find that the message was sent in care of one well known in the comparatively small town to which the message was addressed; that the agent of the defendant at that point met the addressee on the day on which the message should have been delivered, had reasonable care been used, and did not advise her that such a message existed. We are not saying that this constitutes gross negligence, as matter of law, but do say that a jury could find such negligence therefrom. To state the rule that there shall be no liability unless there be gross negligence, is one thing; to take from the jury the right to find whether there is sufficient evidence of gross negligence, is quite another. We have time and again declared that, though evidence must meet certain standards, it is primarily for the jury to say whether they have been met. This brings us to the effect of a finding of gross negligence. As said, the contract provision limiting recovery to the sum paid for sending must be construed in connection with that other part of the contract which does make a recovery up to \$50 possible, even though the price for sending the mes-

sage is less than \$50. We hold the correct construction of this contract as a whole to be that, where the telegraph company is grossly negligent, it may be made to respond for such negligence beyond the price paid for sending the telegram, but not to exceed \$50. And we cannot construe the \$50 limitation to be operative only where the message is a repeated one, because the contract provides that, as to such messages, up to 50 times the amount paid for transmission may be recovered; and it is, of course, manifest that 50 times the price paid for sending a telegram might be more than \$50. We repeat, then, that, where there is gross negligence, the damages cannot, under the contract in this case, be limited to recovering back what was paid to forward the message, and that, if there be gross negligence, the company must, in addition, respond for damages sustained, up to \$50. See *Durre v. Western Union Tel. Co.*, 165 Wis. 190 (161 N. W. 755); *Western Union Tel. Co. v. Johnson*, 115 Ark. 564 (171 S. W. 859). It is clear, then, that, so far as the verdict at bar exceeds \$50, it cannot stand.

III. The question that remains is whether a verdict of \$50 can be sustained. That question, stated in different terms, is whether the evidence discloses any fact that

3. TELEGRAPHS
AND TELE-
PHONES :
damages for
mental pain
and anguish.

entitles the plaintiff to recover more than the 50 cents that was paid for sending her this telegram. She claims no injury except that, because of gross negligence, she has suffered mental pain and anguish.

If she may recover for mental pain and anguish, dissociated from any other injury, a verdict for \$50 is justified. This court and other courts of last resort have held that there can be a recovery based on nothing but mental anguish. Other courts of last resort have held to the contrary. But whatever the states may say on the question, it seems to be settled now that the state rule cannot govern, where the mental anguish sued for is the result of negligence in handling an interstate message. In Arkansas, recovery is permitted for mental anguish, standing

alone. But after the decision in *Western Union Tel. Co. v. Brown*, 234 U. S. 542 (34 Sup. Ct. Rep. 955), *Southern Exp. Co. v. Byers*, 240 U. S. 612 (36 Sup. Ct. Rep. 410), and others of like import, the Supreme Court of Arkansas held that, notwithstanding the said rule prevailing in Arkansas, it could not be applied where an interstate message was involved. Courts of last resort have universally held that, since the Federal courts declare mental anguish alone cannot be recovered for because the element of damage is too vague and uncertain (see *Brown's* case, 234 U. S. 542 [34 Sup. Ct. Rep. 955]; *Byers'* case, 240 U. S. 612 [36 Sup. Ct. Rep. 410]), no recovery can be had for mental anguish suffered through the negligent handling of an interstate message, no matter what the state rule has been and is as to intrastate telegrams,—held that this attitude on part of the Federal courts is controlling. See *Hall v. Western Union Tel. Co.*, 108 S. C. 502 (94 S. E. 870); *Norris v. Western Union Tel. Co.*, 174 N. C. 92 (93 S. E. 465); *Durre v. Western Union Tel. Co.*, 165 Wis. 190 (161 N. W. 755); *Western Union Tel. Co. v. Simpson*, 117 Ark. 156 (174 S. W. 232); *Western Union Tel. Co. v. Hawkins*, 198 Ala. 682 (73 So. 973); *Western Union Tel. Co. v. Lee*, 174 Ky. 210 (192 S. W. 70), in which last-named case many of the authorities for this proposition are cited. And see *Western Union Tel. Co. v. Johnson*, 115 Ark. 564 (171 S. W. 859); *Klotz v. Western Union Tel. Co.*, 187 Iowa 1355.

It follows that our own state rule must yield here, and we must hold it was error to allow a recovery for mental pain and suffering. This being an interstate message, and the contract provision aforesaid being valid and effective, and there being here no claim for any injury except the loss of the 50 cents paid for sending the message, and mental pain, suffering, and anguish, we are constrained to hold that here nothing can be recovered beyond the price paid for sending said message. Accordingly, the judgment appealed from should be reversed.

IV. We are not minded to hold that the Federal rule cannot be applied here merely because the defendant has

denied the existence of the message in question.

V. Both the sender and the sendee are bound by the contract. *Gardner v. Western Union Tel. Co.*, 231 Fed. 405; *Findlay v. Western Union Tel. Co.*, 64 Fed. 459; *Western Union Tel. Co. v. Bank*, 53 Okla. 398 (156 Pac. 1175); *Klotz v. Western Union Tel. Co.*, 187 Iowa 1355.—*Reversed and remanded.*

WEAVER, C. J., EVANS and PRESTON, JJ., concur.

CLARENCE A. FRONSDAHL, Appellee, v. CIVIL SERVICE COMMISSION OF DES MOINES et al., Appellants.

MUNICIPAL CORPORATIONS: Civil Service Procedure and Cer-

1 **tiorari.** The discharge of public officers who are subject to civil service regulations, and appeals by the discharged officer to the civil service commission, are governed by the following general principles:

1. The discharging officer may and should act on credible information of misconduct, even though the misconduct does not constitute a crime.

2. On appeal by the discharged officer to the civil service commission, the discharging officer may (and perhaps should) disclose the grounds on which he acted.

3. The civil service commission, on the trial of the appeal, may receive *hearsay* evidence.

4. The discharged officer, on appeal to the civil service commission, may not reserve his defensive and explanatory testimony, and thereafter employ it for the first time on hearing on certiorari.

MUNICIPAL CORPORATIONS: Civil Service Regulations—Intoxi-

2 **cation.** Intoxication of an officer subject to civil service regulations is ample ground for his discharge.

CERTIORARI: Scope of Writ and Evidence Receivable. On cer-

3 **tiorari** to review the action of a civil service commission in affirming the discharge of an officer subject to its jurisdiction, no evidence is receivable unless it bears on the one narrow

issue whether the commission acted illegally, or beyond its jurisdiction. It follows that the accused officer may not withhold his exculpatory evidence from the commission and introduce it for the first time on hearing on certiorari.

Appeal from Polk District Court.—J. D. WALLINGFORD, Judge.

NOVEMBER 23, 1920.

THIS is an appeal from the judgment of the district court in a certiorari proceeding, whereby an order of the civil service commission of the city of Des Moines, confirming the discharge of a policeman, was annulled. From the judgment, the defendants have appealed.—*Reversed and remanded.*

C. W. Lyon, E. J. Frisk, C. A. Weaver, and Russell Jordan, for appellants.

Parsons & Mills, for appellee.

EVANS, J.—The plaintiff was a policeman in the city of Des Moines. On February 2, 1920, the chief of police charged him with conduct unbecoming an officer, and discharged him as a policeman. On February 4th, such discharge was approved by the superintendent of the department of public safety. Thereupon, the plaintiff appealed to the civil service commission. In support of his action in discharging the plaintiff, the chief of police filed with the civil service commission the following specifications:

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civil service procedure and
certiorari.

“Clarence A. Fronsdaahl was discharged from this department as the result of an investigation which conclusively convinced the public safety officials that he was guilty of the unlawful entering of buildings on his patrol beat, and taking and carrying away, with intent to steal the same, goods and merchandise.

"The information which led to this investigation was furnished by Mrs. M. I. Black, the wife of Earl Black, at that time a police officer, and acquaintance and intimate of Clarence A. Fronsdaahl.

"Mrs. Black reported to the Federal authorities that her husband was bringing home various articles of merchandise which he claimed were given him, and at other times would give no satisfactory explanation as to how said goods were obtained.

"Mrs. Black further testified concerning conversations which she had heard between her husband and Fronsdaahl, all of which tended to confirm her suspicions.

"Following this statement of facts by Mrs. Black before the Federal authorities, and after the case had been laid before the Des Moines police department, Black and Fronsdaahl were both placed under arrest. The homes of both men were searched, and quantities of goods and merchandise, consisting of candy, cigars, cigarettes, shoes, and barber shop supplies, were taken therefrom, and are now in the hands of the police department.

"On the day of February, 1920, Earl Black committed suicide, by shooting himself in the head in his own home. This occurred before opportunity was afforded to give Black a hearing.

"Upon this record, I discharged Clarence A. Fronsdaahl from the department, and my action was approved by Ben Woolgar, superintendent of public safety, on February 4, 1920.

"In the latter part of the year 1919, Clarence A. Fronsdaahl was suspended for a period of 30 days for drunkenness.

"It is upon this record that my action is based, in causing the discharge of this man from the force.

"As to the truth of these allegations, I challenge the fullest possible investigation at the hands of the civil service commission."

After a hearing had upon these specifications, the civil service commission sustained the order of discharge, on

the ground that, from the entire record of the plaintiff, "he is not a suitable man to be a police officer." Plaintiff sued out a writ of certiorari, attacking the jurisdiction of the civil service commission to make its finding. This writ was sustained on hearing, and the proceedings were annulled.

In support of such order of annulment, the appellee contends here that the order of the civil service commission had no support in any competent evidence, and that all the evidence that was heard by the civil service commission was hearsay only.

Whether it could be competent in any case for a civil service commission to sustain a discharge wholly upon hearsay evidence, we shall have no occasion to determine. Nor do we have any doubt that hearsay evidence may be admissible before such commission. The tribunal is an administrative one. In an appeal to the commission from an order of discharge by the chief of police, it is permissible to, if not incumbent upon, the chief of police to disclose the grounds upon which he acted. This would ordinarily involve information received by him. Credible information received by the chief of police, implicating members of the force in improper conduct, imposes upon the chief the duty of investigation and of action. It is not requisite that he should have before him competent evidence, in a technical sense, of the criminal guilt of a policeman, in order to justify an order of removal. The good of the public service is the criterion, and this may be seriously impaired by conduct less than crime, and such conduct may be proved by evidence insufficient to convict of crime. In the investigation made by the chief of police, involving Fronsdaahl and Black, the first information came to the chief of police from a special agent of the Federal government. The sources of this information were the wife and the father-in-law of Policeman Black. A search warrant was issued, and the homes of both policemen were searched. Neither policeman was at home, at the time of such search. The goods described in the specifications

above quoted were found in both homes. Both policemen were then arrested. A few hours later, Black committed suicide. There was evidence tending to show co-operation or conspiracy between the two policemen in the use of a bunch of keys. Mrs. Black was called as a witness before the commission. She was a very reluctant witness at that time. She refused or failed to answer many important questions. Much that she had told the police officer previously was left unsaid upon the witness stand. Her widowhood in its tragic setting commanded the tenderest consideration of the commission, and no pressure of compulsion was attempted. The testimony of the father-in-law was abundant to implicate Black. Mrs. Black did testify as follows:

"Q. Do you remember the circumstance of Mr. Frons-dahl coming home to your place and asking for a key? A. Yes, sir. Q. Do you know when that was? A. During the time he was suspended. Q. Did you hear the conversation between the two men? A. Partly. Q. Please tell the commission what the conversation was. A. I don't remember the exact words, but it was to the effect that he wanted a certain key. Q. Did he ask you for the key? A. He asked Mr. Black for the key. Q. Did Mr. Black get it for him, or did he show him a bunch of keys and he took one from the ring? (No answer.) * * * Q. What key was it that Frons-dahl took? Was it from a large bunch of keys? A. I don't know. Q. Did you see the keys? A. Yes, sir, I didn't see the one key; I just saw the bunch. I didn't see the one he took. Q. Was this a key that your husband had a long time, or not? A. Yes."

The time of this occurrence was fixed by her as "during the time he was suspended." According to other evidence, this suspension occurred about a month before. The hearsay evidence complained of was given mainly by the chief of police, as follows:

"She told about her husband, Earl, and Frons-dahl getting stuff, and the conversations she had heard between her husband and Frons-dahl, and remember when she said

she saw them making keys to get into stores with. From their conversations, that was what they were doing, and she saw them working on the keys. She said another place upon Mulberry Street they talked about. Some restaurant man said he hated to see a 'damn' policeman coming; they were all dead beats. They laughed at being pulled that night, and raided the place. They brought half of it to the house,—butter, eggs, etc.,—and that was what caused her to complain to the authorities about it. 'I cannot stand to see these little girls of mine eat stolen stuff;' and she told me she said to her husband, 'I will go down to the police station and tell about it.' 'They will laugh about it,—you won't get anywheres.' That is the reason she went to the Federal authorities. Q. Did you have any other conversation? A. She said, the morning it was stolen, about two weeks ago, it snowed, and they walked home, and carried some stuff, and she said Earl, her husband, said, 'I had a hell of a time carrying my stuff home. Whitey had a gunny sack to carry his stuff in.' She said they had some shoes and quite a bunch of stuff; made quite a gunny sack full. She said it was going on about two months that they had been bringing home stuff. She said it was about two months. * * * She told me that day about Fronsdaahl coming to the house. He came over for a key to one of the stores. Fronsdaahl was under suspension at the time."

It was shown that Fronsdaahl was not a user of tobacco. The goods taken on search warrant of his home comprised a large quantity of cigarettes and tobacco, the former being in cartons.

The hearsay evidence herein set forth disclosed information which the chief of police had no right to ignore, or to conceal from the civil service commission. This information and the sources of it were of such a nature as to call for a denial or an explanation from the plaintiff. He chose to stand silent. We think this was a circumstance that required consideration by the commission, and that it was permissible to give to it the force of substantive evidence.

The criminal statute which not only lays upon the State the burden of proof, but forbids consideration by the jury of the silence of the defendant, is not applicable, if for no other reason than that the finding of the commission did not purport to declare the plaintiff guilty of any crime. Nor was it incumbent upon the commission to so find.

If the commission had found the evidence introduced before it insufficient to justify a discharge on the more serious ground of looting stores, it was still confronted with the undisputed fact that the plaintiff had only recently been suspended for intoxication. It is earnestly urged in argument for the appellee that there was no evidence before the commission of the fact of such suspension. We find that Mrs. Black fixed the time of the transaction concerning the keys as "during the time he was suspended." The chief of police testified: "He was suspended for intoxication from December 8th to January 8th."

2. MUNICIPAL
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service regu-
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3. CERTIORARI:
scope of writ
and evidence
receivable.

We see no room, therefore, for the contention that the civil service commission lacked jurisdiction to confirm the order of discharge. Since it had such jurisdiction, the weight and credibility of the evidence were not subject to review. We do not overlook that, upon the hearing in the district court, Fronsdaahl testified as a witness in explanation of his possession of the goods in question. This explanation was that they had all been given to him by various persons. He also introduced the testimony of other witnesses in corroboration. Such evidence would have been very appropriate at the hearing before the civil service commission. It was not offered. It had no place in a hearing on the writ of certiorari in the district court. Though Section 4160 of the Code permits the introduction of evidence other than the certified return, such evidence must, however, have reference to the proceedings before the lower tribunal. The only issue upon the hearing in the district court was whether there was illegality or want

of jurisdiction in the action of the civil service commission. It was not open to the plaintiff to remain silent in the hearing before the commission, and then to prove his defense in a hearing in the district court upon a writ of certiorari. If it was incumbent upon him to produce such evidence at all, it was incumbent upon him to do so at the trial before the commission.

Finally, we may note that the criterion by which the civil service commission must be guided is set forth in Section 1056-a32(c), as follows:

"All persons subject to such civil service examination shall be subject to removal from office or employment by majority vote of such civil service commission for misconduct or failure to properly perform their duties under such rules and regulations as may be adopted by the council."

The scope and duty of the commission are quite fully considered in our recent cases of *Mohr v. Civil Service Commission*, 186 Iowa 240; *O'Donnell v. Civil Service Commission*, (Iowa) 173 N. W. 43 (not officially reported). See, also, *People v. Board*, 82 N. Y. 358, wherein it was held that intoxication was a sufficient ground to support the action of the board in confirming the discharge of a member of the fire department.

Upon the record before us, it was error to annul the order of the civil service commission. The judgment must, therefore, be reversed.—*Reversed and remanded.*

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

C. A. LEWELLEN, Appellee, v. R. N. THOMAS et al., Appellants.

PARTNERSHIP: Dissolution—Evidence. A partnership is not dissolved *per se* by the act of one partner in ceasing to give his personal services to the firm's business, when his capital remained in the firm, and the remaining partner made no request for a dissolution.

Appeal from Page District Court.—J. B. ROCKAFELLOW, Judge.

APRIL 6, 1920.

REHEARING DENIED NOVEMBER 23, 1920.

SUIT in equity for a partnership accounting. There was a decree for the plaintiff, and defendant has appealed. —*Affirmed.*

Ferguson, Barnes & Ferguson, for appellants.

Tinley, Mitchell, Pryor & Ross, and *Wilson & Keenan*, for appellee.

EVANS, J.—The plaintiff and the defendant R. N. Thomas entered into a certain partnership agreement, whereby they operated under the firm name of R. N. Thomas and R. N. Thomas Company. The partnership agreement was reduced to writing, but never signed. The contents of the writing are accepted, however, by both sides, as substantially correct. The agreement provided for a term of five years, beginning with January 2, 1906, and ending January 2, 1911. The partners were brothers-in-law. The defendant Thomas was the inventor of a husking peg, and had duly obtained patent for his device. The business

of the partnership consisted of the manufacture and sale of the husking peg and other novelties. Under the agreement, the plaintiff was to put into the capital the sum of \$4,000, and the defendant was to put in \$3,000. Thomas looked after the administrative work pertaining to the business, and the plaintiff kept the books. Thomas was to receive a salary of \$1,200 a year, and the plaintiff, a salary of \$1,000 a year. Profits accrued, if any, were to accumulate, and to remain in the business until the end of the term. At the end of the term, it was not deemed advantageous by either party to dissolve the partnership, and it was continued, first for one year, and later indefinitely. Each partner continued his work as before, and each drew the stipulated salary. After the close of the year 1913, and after the closing up of the business of the firm for that year, the plaintiff did not longer give his personal services to the partnership, nor did he draw thereafter any salary. The defendant continued his services as before, and continued to draw his salary, or its equivalent. He employed members of his family to do the bookkeeping formerly done by the plaintiff. Members of the plaintiff's family, consisting of three boys, were also employees of the partnership, and their employment continued for a period of two or three years after 1913. About the first of January, 1917, the plaintiff asked for a dissolution and settlement, based upon an accounting. This appears to have been the first time that anything was said between the partners on the subject of dissolving the partnership. At this time, the defendant Thomas took the ground that the partnership had been dissolved on January 1, 1914, by the act of the plaintiff in quitting the service of the firm at that time. This contention presents the issue in this case. The plaintiff claims an accounting for profits up to January 1, 1917. The defendant concedes an accounting up to January 1, 1914. The only question presented to us is one of fact. Was the partnership dissolved on January 1, 1914?

The circumstances attending the termination of plain-

tiff's personal service were quite uneventful. Nothing was said on the subject between the partners. There was no friction between them. The service was distasteful to the plaintiff. He preferred to waive the salary, rather than to do the work, and was content to allow others to be employed.

The facts that the partnership was originally for a fixed term, and that it was later continued for an indefinite period, and that its continuance was, therefore, subject to the will of either partner, and that the plaintiff did cease his personal connection with it about January 1, 1914, are circumstances which tend to sustain the defendant's contention. If the business of the partnership involved only the personal service and earnings of the partners, such circumstances would be quite persuasive in support of the defendant's contention. But capital was involved. Profits were to accumulate. Though plaintiff invested the larger amount of capital, he was to receive only 40 per cent of the profits, and defendant 60 per cent. The agreement expressly provided the manner of dissolution, and the settlement at the close of the partnership. The working tools and machinery of the factory were to be taken by the defendant at cost price, less a specified discount. The plaintiff's capital, if unimpaired by losses, was to be returned, and his share of the profits to be paid. Nothing of this kind was done; nor was anything of the kind proposed or discussed, prior to about January, 1917. During the three intervening years, the plaintiff's capital carried the risk of the business, and he himself was undoubtedly liable as a member of the firm to all the creditors thereof. The salary of the defendant Thomas continued, and the plaintiff necessarily bore his share of it. The plaintiff waived his salary, and permitted it to be utilized in the payment of someone else to do the work. Such a situation would not necessarily work inequitably, as between the partners. Thomas never complained thereof, nor did he ever propose an actual termination of the partnership. In view of the circumstances here indicated,

the court would not be justified in implying a termination of the partnership as a matter of law, because of the ceasing of plaintiff's personal service. We hold, therefore, that the trial court properly treated the partnership as existing up to January 1, 1917.

The appellant makes no complaint of items allowed by the trial court in the accounting. His complaint is directed to the finding of the continuation of the partnership up to January 1, 1917. The trial court found the amount due plaintiff as capital and profits, up to the date of the termination, as approximately \$8,700. The fact that so substantial a sum was left by plaintiff and retained by defendant as a part of the firm assets, without the issue to plaintiff of any evidence of indebtedness except the unsigned partnership agreement, is itself a very persuasive circumstance in support of the alleged continuance of the partnership.

The record is too voluminous for us to deal with in great detail. We are satisfied of the correctness of the decree of the district court. It is, accordingly,—*Affirmed*.

WEAVER, C. J., PRESTON and SALINGER, JJ., concur.

LYTLE INVESTMENT COMPANY, Appellant, v. J. A. McMORRIS,
Appellee.

APPEAL AND ERROR: Estoppel by Taking Benefit of Decree. A litigant who, on one distinct cause of action, prays for several different kinds of relief, and is awarded a decree for *some* of the relief asked, and thereupon avails himself of the benefits of such granted relief, may not thereafter appeal from that part of the decree *denying* relief. So held where a landlord plaintiff, being granted an *injunction* against the unlawful use of premises by the tenant, availed himself of the findings therein as a basis for an action of forcible entry and detainer, and thereafter attempted to appeal from that part of the decree which denied his prayer for a *cancellation* of the lease. (Sec. 4113, Code, 1897.)

Appeal from Woodbury District Court.—GEORGE JEPSON,
Judge.

NOVEMBER 23, 1920.

THE appellant appeals because the trial court did not give it all the relief it prayed. For one thing, appellee has interposed a motion to dismiss on the ground that appellant, having taken the benefit of the decree so far as it was in its favor, has no right to have it reviewed whether the parts of the decree not in its favor are erroneous.—*Affirmed.*

John F. Joseph and E. J. Stason, for appellant.

Kass Brothers, for appellee.

SALINGER, J.—I. The lease executed by McMorris to the appellant has provision (a) that, if the tenant uses the premises for “any (described) unlawful purposes,” it shall work “an immediate forfeiture of this lease and all rights of the second party;” (b) that the tenant especially covenants that he will not permit the premises to create the nuisance defined by Section 2384 of the Code and Section 4944-a, Code Supplement, 1913; (c) that the tenant will not “permit or suffer to be used or exercised or carried on in said premises any noisy or offensive trade or business, or occupy or use or permit said premises to be used for any immoral or illegal purposes.” Another agreement is that, even though there be no more than “a possible question as to whether said premises are being used for purposes herein prohibited,” said first party may terminate this lease upon three days’ written notice to quit, and that, thereupon, first party may, upon the expiration of the said three days’ notice to quit, immediately bring an action of forcible entry and detainer for possession of said premises, without further notice to quit.

Plaintiff, the landlord, having come to entertain the

belief that these covenants had been breached, in that the tenant permitted the premises to be used for immoral purposes, filed his petition asserting that the defendant is holding contrary to the terms of said lease, "in that he has permitted the use of the premises for purposes illegal and unlawful and prohibited by the terms of the lease; that he has permitted the committing of a nuisance, as defined by the 'Red Light' law of the state, as found in Sec. 4944-a of the Code and Supplement thereof; that thereby he has forfeited all rights under the lease; that the plaintiff has caused a three-day notice to quit to be served; that defendant refuses to surrender possession, and plaintiff asks judgment for possession and a warrant for the removal of defendant."

By amendment to petition, there are set out the covenants in the lease to which we have already referred. It is alleged that defendant has knowingly violated the provisions of the lease, by permitting the premises to be used as a place of assignation, to be frequented by lewd persons, by renting the rooms to men and women who he knew intended to use them and would use them for lewd, unlawful, and immoral purposes; that he knew this at the time he entered into the lease; that such use of the premises has brought them to ill repute, has reduced and impaired the rental value of the property to the great loss and damage of plaintiff, for which loss he has no adequate remedy at law. The relief prayed is that the lease be canceled by decree, that plaintiff have judgment for amount of rent then due and unpaid, and that it have general equitable relief. In still another amendment, it is averred that, at the execution of the lease, plaintiff intended that the premises should be used for lawful purposes only; that defendant concealed from plaintiff his real purpose in procuring the lease, and at all times intended to use the premises as he has since persistently used them, against the protest of plaintiff, for the said unlawful purpose, and that the belief that they would not be so used induced plaintiff to execute the lease. Still another amend-

ment alleges that plaintiff believes defendant will continue to use the premises in the same unlawful manner that he has used them in the past; further, that defendant has tendered all rent due under the terms of the lease. This time, the additional prayer is that defendant be perpetually enjoined and restrained from permitting the occupancy of any room of the premises by a man and woman who are not husband and wife, or by anyone to use the same for any lewd, unlawful, and immoral purpose whatsoever, and for judgment for the amount of rent due.

The court declined to give any of the relief prayed, except it decreed that "defendant be and he is hereby perpetually enjoined and restrained from directly or indirectly, either in person or by agent, servant, employee, or any person, from permitting the use of any room or rooms of the leased premises from being used for any lewd, unlawful, or immoral purpose whatsoever, and perpetually enjoined from permitting any man or woman who are not husband and wife from occupying or using, at the same time, any room or rooms of the said premises for immoral purposes, and perpetually enjoined from committing or permitting a nuisance on the premises, as nuisance is defined in Sections 2384 and 4944-a of the Code of Iowa and the Supplements thereto." And there is a judgment for the amount of the unpaid rent.

II. After the entry of the decree appealed from, the appellant herein served notice to quit, and upon that notice and upon the findings in the decree appealed from, brought an action of forcible entry and detainer, prosecuted the same as a law action, and the same was tried and determined adversely to it. It used the finding in his favor made in the instant suit as the basis for electing to prosecute and prosecuting the forcible entry and detainer suit. The motion to dismiss urges that this was a taking of benefits under the decree, and that such taking bars the prosecution of this appeal.

If appellant has waived its right to complain of the refusal to grant it part of the relief it asked, many ques-

tions ably argued on both sides will need no consideration. There will be no need to pass upon whether the alleged secret intent of the lessor works a fraud for which equity might relieve; nor whether this case presents an exception to the rule that equity is loath to decree a forfeiture; nor whether this is a case wherein, though a statute forfeiture and a warrant of removal and being put in possession, are asked, equity may not still proceed, because the lease will else remain a cloud on the title; nor whether the trial court was right in refusing cancellation and rescission on the ground that there was an adequate remedy at law. As said, all these questions become immaterial, if the right to appeal has been lost. But see *Byers v. Rodabaugh*, 17 Iowa 53; *Pratt v. Pond*, 87 Mass. 59; *Martin v. Graves*, 87 Mass. 601; 2 Story on Equity Jurisprudence (14th Ed.), Section 694; *Metler's Admrs. v. Metler*, 18 N. J. Eq. 270; *Hall v. Whiston*, 87 Mass. 126, at 130; *Eldridge v. Smith*, 34 Vt. 484; *Smith v. Griswold*, 95 Iowa 684.

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It is true that, under Section 4113 of the Code, an appeal from part of an order, or from one of the judgments of a final adjudication, or from part of a judgment, is recognized; for it is provided that such appeal shall not disturb, delay, or affect the rights of any party to any judgment or order, or part of a judgment or order, not appealed from. It is further true that the like right is recognized by Section 4114, Code Supplement, 1913, because that demands the entertaining of appeal on a notice of appeal which recites an appeal from a judgment "or from some specific part thereof, defining such part." But it does not follow that, therefore, one may use the part he is not appealing from, and maintain an appeal from the other part. These statute provisions merely cover cases where, for any reason, a party does not care to make complaint and seek a reversal of parts of a judgment, but does care to complain of other parts. It may be the parts that

are not appealed are also adverse. It may be, of course, that, while parts not appealed from are favorable, that, pending decision of the appeal, the appealing party has taken no advantage of what is not appealed from, and has made no use thereof. Those situations are what these statutes have reference to. The appeal from part is to be heard if the appellant has done nothing affirmative with what he is satisfied with, and is not appealing from. *Thomas v. Negus*, 7 Ill. 700; *Cornell v. Donovan*, 14 Daly (N. Y.) 292; *McKain v. Mullen*, 65 W. Va. 558 (29 L. R. A. [N. S.] 1). If one desires to appeal from an order made in a litigation in which he is a party, he should accept no benefit under it; for he cannot do both. *Cogswell v. Colley*, 22 Wis. 399; *McKain v. Mullen*, 65 W. Va. 558 (29 L. R. A. [N. S.] 1, 9).

Of course, if what is not appealed from is distinct from the part that is, the appeal will not be barred. *Dudman v. Earl*, 49 Iowa 37; *Upton Mfg. Co. v. Huiske*, 69 Iowa 558; *Succession of Kaiser*, 48 La. Ann. 973 (20 So. 184); *Liles v. New Orleans Canal Co.*, 6 Rob. (La.) 273. *Per contra*, of course, if the parts be not distinct. *Bennett v. Van Syckel*, 18 N. Y. 481; and *Reiger v. Turley*, 151 Iowa 491, at 502. In the last-named case, there is said what makes it a fair claim that, in the case at bar, the part appealed from and the part not appealed from are not distinct, but interdependent and inseparably related. The *Reiger* case declares that where, after rendition of decree in district court, defendant ordered out writ for removal of plaintiff, and execution to collect an installment of rent under authority given by his decree, and said writ has been duly executed, then the decree quieting title in the defendant and awarding him a writ of possession is so blended or connected with the condition or provision which required him to repay the money received by him on the proposed sale of land that he cannot be permitted to enforce that part of the adjudication which is favorable to him, and at the same time prosecute an appeal from the remainder of the decree.

True, the rule invoked by appellee will not be applied,

if there be an absolute right to the part not appealed from. But can it be said, in the light of the holding of the *Reiger* case and in other cases, that we have before us such case of absolute right? We do not have a case where, say, suit is brought on two notes, the right to recover on one is not disputed, and judgment upon that note is not appealed from, while a refusal to give judgment on the second note is appealed from. In the supposed case, the appellant cannot be barred by collecting the judgment on the first note. The taking what is confessedly due on the first cannot well bar a complaint of a refusal to give judgment on the second note. Here, the right to have injunction was contested. To be sure, the defendant has not appealed from the granting of the injunction. But he did, in a later suit instituted by plaintiff, challenge the rightfulness of the injunction. And in that later suit, he succeeded in getting a holding, also not appealed from, that the injunction should never have been granted. In one word, this case is not within the rule that governs where nothing is involved but a conceded right. Moreover, it is not absolutely clear that, on the very appeal we have, it might not result, of necessity, that the injunction would be vacated. It would come close to reaching such a result if we should hold on this appeal that the lease should not be canceled, either because there was an adequate remedy at law or because appellee had not broken any condition of the lease. If this appeal, then, is entertained, it might happen that we would be permitting an appellant who has taken the benefits of part of a decree to have that decree set aside. That is something which is never permitted. *Reichelt v. Seal*, 76 Iowa 275, at 276; *McKain v. Mullen*, 65 W. Va. 558 (29 L. R. A. [N. S.] 1).

III. We now reach the concrete case. This appellant obtained from the trial court a decree enjoining the defendant, which decree could not have been entered unless it were found that defendant had breached the covenants of his lease, as charged. True, the court refused to cancel the lease. But none the less it made said finding. There-

upon, this appellant began an action in forcible entry and detainer, wherein he asked the court to eject the defendant and put plaintiff in possession, because, for one thing, the granting of the injunction aforesaid had settled that such relief was due because the tenant had broken the conditions of the lease. It does not matter that the court trying the forcible entry and detainer case declined to give this appellant the benefit of this claim. The fact remains that the decree obtained was made use of in an attempt to get the relief asked in the second suit. It seems to us to be undeniable that this constitutes a taking of benefits under the decree now appealed from, and that, after the appellant has made use of the said decree in so far as it suited his interest to do so, he is now asking us to review whether the court rightly refused to give appellant something in addition to that part of the decree which appellant has so made use of. The plainest principles of the law of estoppel by inconsistent conduct constrain us not to entertain this appeal. *McKain v. Mullen*, 65 W. Va. 558 (29 L. R. A. [N. S.] 1, 4, 9, 11); *Harper v. Foster*, (Tex.) 40 S. W. 40. The same cases hold that the conduct of this appellant works an estoppel by acquiescence. Nor need we stop with these general principles, nor with the statement that the right to accept the fruits of a judgment and the right to appeal therefrom are not concurrent, are totally inconsistent, and work an election by which the taking of the one course is a renunciation of the right to appeal, for which proposition the affirmances are so numerous that citation is impracticable.

In our opinion, the precise point is quite fully ruled in authority. In *McKain v. Mullen*, 65 W. Va. 558 (29 L. R. A. [N. S.] 1, 4), and in *Stinson v. O'Neal*, 32 La. Ann. 947, it was held that a court cannot tolerate the pretensions of a litigant to reap the benefits of a judgment in its favorable features, and to ask in the same breath the reversal of such judgment in other respects in which it is unfavorable to him. It was said in *Smith v. Jack*, 2 Watts & S. (Pa.) 101, and *Hall v. Lacy*, 37 Pa. 366, that a plain-

tiff in ejectment who recovers only a portion of the land claimed, waives his right to prosecute a writ of error from such judgment by suing out a *fiery facias*, and collecting the costs from his adversary. In *Root v. Heil*, 78 Iowa 436, the plaintiff obtained a decree enjoining defendant from maintaining a liquor nuisance. He was awarded an attorney fee. He appealed on the ground that the court erred in not finding that defendant was keeping a place in which to sell intoxicating liquors in violation of law, and in not ordering the building to be closed, and the seizure and sale of movable property. And we held that, having accepted the attorney fee, this appeal could not be maintained, because a party cannot be allowed to accept the benefits of a judgment so far as favorable to him, and at the same time prosecute an appeal from other portions of it.

All that is held in *Denecke v. Miller*, 142 Iowa 486, at 493, cited by appellant, is that the bringing of an action in forcible entry and detainer does not, where it does not go to judgment, work such an election as will prevent the plaintiff from amending his petition so as to convert this suit into one of recovery of real property. This is irrelevant to any issue on this appeal.—*Affirmed*.

WEAVER, C. J., EVANS and PRESTON, J.J., concur.

JOHN OSNES, Appellee, v. F. T. SCANLON, Appellant.

PHYSICIANS AND SURGEONS: Exercise of Skill—Evidence. A

1 physician or surgeon sued for malpractice should be permitted
2 to testify whether, in the treatment of the patient, he exercised
his best skill, knowledge, and judgment.

APPEAL AND ERROR: Curing Error. Error in excluding a ma-

2 terial question is not cured by the fact that the question indi-
cates what the answer would have been, had an answer been
permitted.

PHYSICIANS AND SURGEONS: Conclusion Evidence. A question

3 is objectionable which calls upon a physician witness to state
whether a patient could endure the pain of an indicated condi-
tion, "without sedatives and without the loss of any weight."

Appeal from Cerro Gordo District Court.—JOSEPH J.
CLARK, Judge.

NOVEMBER 23, 1920.

ACTION to recover damages on account of alleged mal-
practice in the treatment of plaintiff's fractured leg.
Trial to a jury, verdict and judgment for plaintiff for \$500.
Defendant appeals.—*Reversed.*

*Ira W. Jones and Dutcher, Davis & Hambrecht, for ap-
pellant.*

*E. B. Stillman and Senneff, Bliss, Witwer & Senneff, for
appellee.*

PRESTON, J.—1. Plaintiff fell from a scaffolding, and
sustained a fracture in each of the bones of the leg above
the ankle. The defendant admits that he was plaintiff's

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cise of skill:
evidence.

physician, as alleged, and that, at the times stated in the petition, he was a practicing physician and surgeon, practicing in the vicinity of Clear Lake, Iowa; admits, also, that plaintiff had a fracture of the bones of the leg; denies all claims of negligence. Several grounds of negligence are alleged, but we do not understand plaintiff to claim that defendant did not possess the requisite skill and learning. The allegations are, for the most part, if not entirely, that defendant failed to use and exercise the proper degree of skill. The trial court sustained plaintiff's objections to questions propounded to the defendant, which rulings appellant assigns as error; and we understand appellee to concede that the rulings were erroneous. The record is:

"Q. Now this is a question that I presume is direct examination, if the court please,—I omitted it. I want to ask you, Doctor, to tell this jury whether or not, in the treatment of this plaintiff, you gave him the benefit of your best judgment and best skill.

"Mr. Senneff: We object to that as not proper redirect examination, and as incompetent, argumentative.

"Court: Sustained. I think that involves a matter for the jury to tell. He can tell what he did, and let them judge whether that was the best.

"Q. I will ask you, Doctor, whether, in the treatment of this plaintiff, you at all times gave him your best attention.

"Mr. Senneff: We object to that as not redirect examination, incompetent, argumentative. (Sustained. Exception.)

"Q. And whether or not you gave him your best skill.

"Mr. Senneff: We object to that for the same reason. (Sustained. Exception.)

"Q. And whether or not you gave him your best judgment.

"Mr. Senneff: We object to that for the same reason.

"The court: That is sustained. If I change my view

on that, why, you can renew your question. (Defendant excepts.)

"Mr. Dutcher: I want to be frank with the court. I will submit a case in the morning that I think is proper on that."

The trial court did not thereafter indicate that he had changed his view. The matter was not alluded to again. Counsel for appellant seemed to concede that the question was not redirect examination. Possibly the court had a discretion as to whether it would permit the questions on redirect examination, or require the witness to be recalled. It is apparent that the effect of the ruling was to consider the witness recalled, since the court did not sustain the objection on that ground.

Appellant cites and relies upon the case of *Ingwersen v. Carr & Brannon*, 180 Iowa 988, 1012. In the *Ingwersen* case, like evidence was offered and rejected, and this was one of the grounds of reversal. We also said in that case that we thought the rule different with a professional man: that is, that he was different from a mechanic or artisan. As bearing on this, see *Almond v. Nugent*, 34 Iowa 300; *Kline v. Nicholson*, 151 Iowa 710, 713.

No cases are cited by appellee, as against the *Ingwersen* case. Appellee concedes that the ruling was erroneous, for they say that it "constitutes the only error made by the court in this case. * * * While it must be conceded that defendant was entitled to have this question asked, under the ruling of this court in the case cited, the mere asking of it clearly indicated what the answer would be," etc.

They concede, too, that, if the *Ingwersen* case had been called to the court's attention, the ruling would have been different. Appellee's only answer is that the exclusion of the evidence was nonprejudicial, and that counsel for defendant did not call the court's attention to the matter the next morning. As to the last proposition, the record does not show that counsel for defendant did not present the authority the next morning, though it is so stated by appellee in argument. There might be a question of good

faith of counsel towards the court, but appellee states that "they have not the slightest doubt that the failure of counsel to call the court's attention to the case was due entirely to oversight, and his forgetfulness; for the time being;" so there is no question of bad faith. The ruling had already been made. Of course, it was the intention of the court to rule correctly, whether the case had been called to the court's attention or not.

One ground of the motion for new trial was that the court erred in excluding evidence, so that there was an opportunity to correct the error in ruling on the motion.

2. **APPEAL AND ERROR: curing error.** The nub of it is that the jury did not have the evidence before it which appellee concedes they were entitled to. The mere fact that the question indicates that defendant would have answered "yes" to the question does not cure the error. A question is not evidence. The fact that the court sustained the objection said to the jury, in effect, that the question should not be considered. We cannot assent to the proposition that the exclusion of the evidence was nonprejudicial. The very essence of the charge against defendant was, in effect, that he did not use the proper degree of skill; that he did not exercise the degree of skill possessed by him; that he did not use his best judgment. Without now attempting to state accurately or at length the rule as to defendant's duty, it is sufficient, in the consideration of the point now under consideration, to say that the rule is given in the books substantially thus: In the absence of a special contract, the law implies that a surgeon employed to treat an injury contracts with his patient, first, that he possesses that reasonable degree of learning and skill which is ordinarily possessed by others of the profession; second, that he will use reasonable and ordinary care and diligence in the exercise of skill, and the application of his knowledge to accomplish the purpose for which he is employed; and, third, that he will use his best judgment in the application of his skill in deciding upon the nature of the injury, and the best mode of treat-

ment. In the instant case, the trial court instructed substantially to that effect in Instruction 5, of which defendant does not complain. A part of the instruction is that, if "the defendant possessed and used such skill, care, and diligence, he was not guilty of negligence," etc. The defendant was asked whether he used his best judgment. No one else could testify as well as he, whether he did or not. Of course, if he had said he did, it would not be binding on the jury, necessarily; but they were entitled to the evidence. We are of opinion that there was prejudicial error in the ruling.

2. Several other errors are assigned in regard to rulings on evidence, but the one just noticed seems to be the more important. The other questions may not be framed

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dence.

in the same form on a retrial, so that we shall not discuss the others at length. The plaintiff claimed that the splints and cast were so loosely put on as to allow the foot to lie over on the bed, and move at the seat of fracture. Dr. Phillips testified that, assuming that to be true, he would say that the effect upon the foot of such a situation would be very painful. Then defendant asked:

"Q. And what would you say as to whether the patient could endure that pain without sedative, and without the loss of any weight?"

Plaintiff objected, as calling for a conclusion, and not the subject of expert testimony, and the court sustained the objection, stating that it was a conclusion, as to the endurance, especially.

Appellant cites *Purcell v. Jessup*, 99 App. Div. 556 (91 N. Y. Supp. 165); *Greenway v. Taylor County*, 144 Iowa 332, 336. The question asked in the *Purcell* case was:

"In your opinion and medical experience, is it possible for a child to show no symptoms of diphtheria on one day, and develop a fatal case of diphtheria the next?"

The question in the *Greenway* case was:

"What do you say as to whether he has suffered, during

the time since this injury, a great deal of pain?"

This was held equivalent to asking whether the injuries were of such a character as would be likely to cause pain, and it was held that it was competent; and it was further said that it is competent for the physician to say whether, in his judgment, the injuries of a person are such as would be likely to produce pain. We think the question asked in the instant case is broader than the questions in the cases cited. Dr. Phillips had already said that, in such a situation, it would be very painful. This seems to be as far as the cited cases go. Possibly the defendant could have elicited the information sought by framing the question somewhat differently: that is, for instance, how severe the pain would be, and whether the effect of that would be to cause the loss of weight, etc. We are not suggesting the form of the question, but think the question was objectionable, though perhaps we would not reverse on that ground alone.

Error 3 is similar to the question just noticed.

Error 4 relates to a question propounded by plaintiff to one of his medical witnesses, based on the assumption that the bones were out of alignment, when the cast was put on. The objection was that there was no evidence that the bones were out of apposition. The objection was overruled, because there was, in the opinion of the court, evidence which might be construed either way, as to whether they were or were not in apposition. We think such is the fact.

A number of grounds of negligence charged in the petition were submitted to the jury. The complaint of the instructions is, for the most part, that some of these were submitted, of which there was no evidence. The trial court withdrew, or attempted to withdraw, from the consideration of the jury, one or perhaps more of the grounds of negligence. Appellant contends that this was not clearly done, and that the jury were confused. The evidence may not be the same on another trial. The matter of withdrawing issues can be easily cured on another trial, if there is

anything objectionable in it, and the instruction may be worded differently.

These and other matters complained of are such that they are not likely to occur on a retrial. For the error pointed out, the judgment is reversed, and the cause remanded.—*Reversed and remanded.*

WEAVER, C. J., EVANS and SALINGER, JJ., concur.

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with notice of appeal. So held where a reversal would deprive a nonserved coparty of his declared right to inherit. *Oskaloosa Sav. Bank v. Miller*, 189—393.

PARTIES ENTITLED TO REVIEW.

Appeal by Administrator—Nonconsent of Court. An administrator may, without obtaining the consent of the court, appeal from the allowance of a claim against the estate. *Mortenson v. Knudson*, 189—379.

ESTOPPEL, WAIVER, OR AGREEMENT AFFECTING RIGHTS.

Estoppel by Taking Benefit of Decree. A litigant who, on one distinct cause of action, prays for several different kinds of relief, and is awarded a decree for *some* of the relief asked, and thereupon avails himself of the benefits of such granted relief, may not thereafter appeal from that part of the decree *denying* relief. So held where a landlord plaintiff, being granted an *injunction* against the unlawful use of premises by the tenant, availed himself of the findings therein as a basis for an action of forcible entry and detainer, and thereafter attempted to appeal from that part of the decree which denied his prayer for a *cancellation* of the lease. (Sec. 4113, Code, 1897.) *Lytle Inv. Co. v. McMorris*, 189—1355.

RESERVATION OF GROUNDS.

Exceptions to Instructions. Error resulting from an omission in instructions given on a trial before the repeal of Sec. 3705-a, Code Supp., 1913, cannot be considered on appeal, where the record fails to show that exceptions were taken before the reading of the same to the jury, or that additional instructions were asked, and where, although exception is set out in the motion for a new trial, there was no showing of failure to discover the omission before the instructions were given. *Stratmeyer v. Hoyt*, 189—85.

Failure to Enter Exception. Instructions passed by appellant in the trial court without objection or exception of any kind will not be reviewed on appeal. *Schott Mfg. Co. v. Clevenger*, 189—460.

APPEAL AND ERROR Continued

Insufficient Objections. Under Ch. 24, 37 G. A., the Supreme
6 Court, on appeal, will not review instructions where the only objections are statements of counsel, objecting to each and all of the instructions for not being correct statements of law, and an objection in the motion for new trial that the court gave the jury improper and erroneous instructions. *State v. Gibson*, 189—1212.

Failure to Renew Motion for Directed Verdict. The defendant
7 waives any right to assert, on appeal, the error of the trial court in overruling his motion for a directed verdict at the close of the State's evidence, by his failure to renew the motion at the close of all the testimony; but such failure does not preclude him from asserting, in his motion for new trial, that the verdict is contrary to the evidence. *State v. Gibson*, 189—1212.

NOTICE.

Effect of Naming Clients in Acknowledgment of Service. An
8 attorney who signs an acknowledgment of service of a notice of appeal, and enters after his signature a specific enumeration of the names of the persons for whom he is attorney, does not thereby acknowledge service for a party for whom he is, in fact, attorney, but whose name does not appear, either among those to whom the notice is addressed or among those entered in connection with his signature. *Fairchild v. Plank*, 189—639.

Construction of Notice of Appeal. Entering after the name of
9 an attorney to whom a notice of appeal is addressed an enumeration of names of parties for whom the attorney is, in truth, attorney, and the act of the acknowledging attorney in making a like enumeration after his acknowledging signature, may not be construed as simply an attempt to identify the attorney. *Fairchild v. Plank*, 189—639.

Varying Appeal Notice by Affidavit. A notice of appeal and
10 the acknowledgment of service indorsed thereon may not be varied by a conclusion affidavit relative to the intent of the parties. *Fairchild v. Plank*, 189—639.

APPEAL AND ERROR Continued

Disclaimer and Assignment of Interest. No notice of appeal need
11 be served on one who has disclaimed all interest in the
subject-matter of an action, and, in addition, has assigned
all possible interest to appellant. *Fairchild v. Plank*,
189—639.

“Adverse” Party Defined. An appeal by plaintiff from a judg-
12 ment in its entirety demands, as a matter of jurisdiction,
service of notice on “the” adverse party, to wit: on *all*
the defendants. It follows, in such case, that the statute
relative to appeals by coparties has no application. *Fair-*
child v. Plank, 189—639.

Definite Interest of Nonserved Party. Failure to serve notice
13 of appeal on a necessary party is in no wise excused because
the interest of such party is definite and certain on the
record. *Fairchild v. Plank*, 189—639.

Object of Notice of Appeal. The object of the requirement that
14 adverse parties be served with notice of appeal is not to
protect the *interest* of such party, but to invest the appellate
court with *jurisdiction* to determine questions which may
not be determined in the absence of such party. *Fairchild*
v. Plank, 189—639.

ABSTRACTS OF RECORD.

Motion to Strike Amendment. Appellee’s unnecessary or un-
15 authorized amendment to abstract will not be stricken,
when the only matter at stake is the costs, and when, under
the decision, appellee must pay all the costs. *Independent*
V. & S. Co. v. Iowa Merc. Co., 189—874.

TRANSCRIPTS.

Certified Report of Trial—Stenographic Notes in Lieu of Evi-
16 **dence.** Basis for appellate review *de novo* is properly laid
by filing a certified stenographic report of the trial within
six months after entry of decree, and by filing the certified
transcript of said notes *after* said six months. *Rodenkirch*
v. Layton, 189—430.

APPEAL AND ERROR Continued

ASSIGNMENTS OF ERROR.

Insufficient Assignment. The point "*that the verdict is not supported by the evidence*" is not raised by an assignment "that the court erred in overruling motion for new trial" based on multifarious grounds, even though one of the grounds presents the insufficiency of the evidence. *Fisher v. Skidmore Land Co.*, 189—833.

BRIEFS.

Points Noticed by Court Sua Sponte. The appellate court will note, on its own motion, that a creditor of a possible legatee under a will may not maintain an action to construe the will, and therefore has no right to maintain appeal from a decision adverse to such possible legatee, even though such point was not raised in the trial court. *Collins v. Ahrens*, 189—178.

Indefinite Brief Point. A brief point which asserts "that the court erred" in a certain ruling, and then, in substance, directs the court to wander through the reporter's notes to find the *reasons* for such error, will be given no consideration. *Linnemann v. Kirchner*, 189—336.

DISMISSAL.

Nontimely Appeal. An appeal will be dismissed, when the record affirmatively shows that it was not perfected within statutory time. *Carl v. Modern Brotherhood*, 189—630.

REVIEW—SCOPE AND EXTENT IN GENERAL.

Trial Theory on Appeal. Plaintiff's own pleaded theory of his cause, acquiesced in by his coplaintiff, must necessarily be controlling on appeal. *Ward v. Chew*, 189—523.

Misconduct—Reversal on Other Grounds. Alleged misconduct on the part of counsel for the prevailing party will not be passed on, when a reversal is ordered on other grounds. *Pickens v. Milwaukee Mech. Ins. Co.*, 189—900.

APPEAL AND ERROR Continued.

Improper Demurrer. A general equitable demurrer, that the
23 facts pleaded do not entitle the pleader to the relief prayed,
is wholly unallowable in a *law* action; yet, when no ob-
jections are made at any stage of the proceedings to the
form or propriety of such demurrer, the appellate court
will overlook such error, and review the cause on the
properly assigned errors. *Overland S. E. Co. v. Clemens*,
189—1293.

REVIEW—WHO MAY ALLEGE ERROR.

Motion for Directed Verdict—Waiver—Effect. A defendant who
24 unsuccessfully moves for directed verdict at the close of
plaintiff's evidence, and does not renew the motion at the
close of *all* the evidence, waives error in the ruling; yet
he may, in motion for new trial, continue to insist that
the evidence is insufficient to support the verdict. *Linne-
mann v. Kirchner*, 189—336.

REVIEW—QUESTIONS OF FACT, VERDICTS, AND FINDINGS.

Law of Case. A finding that a petition stated a cause of action
25 is conclusive on appeal from an order setting aside a judg-
ment by default. *Western F. & C. Co. v. McFarland*, 189—
717.

REVIEW—HARMLESS ERROR.

Defendant Disproving That Which Plaintiff Must Affirmatively
26 **Prove.** A plaintiff who proffers no testimony of a fact
which he must affirmatively show is true, cannot be harmed
in a legal sense by the reception of incompetent testimony
which tends to show that such fact is not true. *Johnson
v. Lincoln Hotel Co.*, 189—291.

Withdrawing Improper Exhibit. After the erroneous reception
27 in evidence of a written exhibit which embodied the state-
ments of fact already testified to by an impeaching witness,
the immediate withdrawal of the same, without reading to
the jury, with direction by the court to the jury to wholly

APPEAL AND ERROR Continued

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disregard it, effaces all possible prejudice to the objecting party. *Wiley v. Fleck*, 189—614.

REVIEW—SUBSEQUENT APPEALS.

Law of Case. The law as declared on appeal must necessarily govern the retrial on the same pleadings and facts. *Conklin v. City of Des Moines*, 189—181.

AFFIRMANCE.

Affirmance Without Prejudice. When it affirmatively appears that plaintiff, as appellant, has a good ground for reversal, but pins his faith, in his "brief points," to an untenable ground, the appellate court will *affirm*, but may do so without prejudice—with permission to amend in the trial court, or to bring a new action. So held where appellant, seeking to recover as administrator on a *non-benevolent* policy of insurance, on the ground that the beneficiary had murdered the insured, contended for reversal on the untenable ground that Sec. 3386, Code Supp., 1913, was applicable, and demanded a reversal, when he should have assigned the common-law rule as the basis for his contention. *Kascoutas v. Federal Life Ins. Co.*, 189—889.

REVERSAL.

"Moot" Questions. Remanding a cause for complete retrial may render an assignment of error wholly moot. So held where the assignment was (1) excessive verdict, (2) verdict contrary to charge, (3) improperly permitting the belated filing of a claim, and (4) refusal of a continuance. *Linnemann v. Kirchner*, 189—336.

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ATTACHMENT Continued

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BANKS AND BANKING

Failure to Note Bond on Appearance Docket. Failure to enter, on the appearance docket, a notation of the filing of an attachment bond, in no wise invalidates the attachment. (See Secs. 291, 3557, 3885, Code, 1897.) *Farmers' & Merch. Bank v. Wells & Potter*, 189—1312.

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 3 wholly insufficient to justify the court in directing a verdict for plaintiff, on the theory that plaintiff had procured a purchaser in accordance with his contract with defendant. *Shuck v. Conway*, 189—1159.

Commission from Both Parties. A broker (other than a mere
 4 middleman to bring two parties together) who is the agent of both vendor and vendee, may not recover compensation of *either* party unless it is made to appear that, at the time of the transaction, *both* principals had full knowledge of the broker's dual relation. *Bowers & King v. Roth*, 189—1200.

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Allegation of "Ownership." A general allegation of ownership
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be committed by the concerted action of two persons, i. e., adultery, does not constitute an indictable conspiracy. State v. Law, 189—910.

CONSTITUTIONAL LAW.**Personal, Civil, and Political Rights—Freedom of Speech.**

- 1 Ch. 372, 37 G. A., against inciting, abetting, promoting, and encouraging hostility and opposition to the government of the state and nation, does not violate Sec. 7, Art. 1, of the state Constitution, guaranteeing freedom of speech, as the right of free speech does not include the right to promote sedition; nor can one who utters slander or publishes a libel shield himself behind the right of free speech. State v. Gibson, 189—1212.

Legislative Proceedings—Title of Statute. The title of a statute

- 2 must not contain matter utterly incongruous to the provisions of the body of the act, but need not be an index of the act or its details; and, no matter how broadly the general subject is expressed in the title, the statute is valid, unless it contains matter utterly incongruous to that general subject, the purpose of the provision of Sec. 29, Art. 3, of the state Constitution, that every act shall embrace but one subject and matters properly connected therewith, which subjects shall be expressed in the title, being to prevent surprises or fraud upon the legislature. State v. Gibson, 189—1212.

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- 1 purchase of a commodity at a specified price and for a specified time, which leaves the purchaser with the option to purchase much or to purchase little or not to purchase at all, is void for want of mutuality, and mutuality is not supplied by the act of the seller in complying with some of the orders. So held where the agreement was to deliver such carload shipments of coal "*as defendant would want*"

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between third parties, is not converted into a *general* appearance because defendant makes an additional showing as to a matter which does not go to the jurisdiction of the court,—to wit, a showing that an action between the same parties, involving the same subject-matter, is then pending in the courts of defendant's residence,—and prays for a dismissal of the action in this state on *all* the grounds set forth in the showing. *Read v. Rousch*, 189—695.

Special (?) or General (?) Appearance. An appearance "for the
2 sole purpose of attacking the jurisdiction of the court" is not converted into a *general* appearance because the defendant embraced in his application to quash the service a showing that the attachment writ had been unlawfully issued. (Sec. 3541, Code Supp., 1913.) *Dolan v. Keppel*, 189—1120.

ARBITRATION AND AWARD.

Oral Agreement for Oral Award. An oral agreement for an oral award is valid. *Maxson v. Cress*, 189—362.

ASSAULT AND BATTERY.

Other Offenses to Show Purpose. In a damage action for lascivious assault, evidence of an unalleged previous and nonremote assault on plaintiff is admissible, as beating on defendant's purpose in making the later assault, on which recovery is sought. *McKenny v. Davis*, 189—358.

ASSIGNMENTS.

Expectancy—Inadequate Consideration. An assignment by a prospective heir of his expectancy (which was a practical certainty) for 14½ per cent of its then value, is against equity and good conscience, and voidable. *Richey v. Richey*, 189—1300.

ATTACHMENT. See CONTRACTS, 4; MORTGAGES, 1; VENDOR AND PURCHASER, 9.

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thereon to the owner amounts to a conversion, yet all damages are satisfied by returning the certificates to the owner, with interest thereon for the period of wrongful detention. *Richmond v. First Nat. Bank*, 189—704.

BASTARDS.

Child Born in Lawful Wedlock. Principle recognized that children born in lawful wedlock are conclusively presumed to be legitimate. *Gilbert v. Ruggles*, 189—206.

BOUNDARIES.

Suddenly Formed River Channel as Boundary. A suddenly formed river channel will not, by any length of time, become a boundary line by acquiescence, in the absence of a showing that one landowner claimed ownership to such new channel, and that the other landowner expressly or impliedly consented to such claim. Especially was this true when the land of the owner asserting such boundary line was separated from the land in controversy by the old channel, title to which was in the state. *Cotter v. Kadera*. 189—186.

BROKERS.

Reasons for Rejection of Bid. In an action for commission, evidence by the proposed purchaser, tending to show that the owner of the property rejected his bid (which the owner had once authorized), solely on the ground that the owner had discovered that he could secure a higher price, is competent, relevant, and material. *Fisher v. Skidmore Land Co.*, 189—833.

Waiver of Terms of Sale. A broker who contracts to produce a purchaser who will (1) make a named deposit and (2) pay a named price, is entitled to recover his commission when he produces a purchaser who is ready, able, and willing to pay the price, but is unable to make the deposit, and the owner, in effect, *agrees to omit the deposit*, but refuses to sell, solely on the ground that he must have a higher price. *Fisher v. Skidmore Land Co.*, 189—833.

BROKERS Continued

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of destination. Keota Prod. Co. v. Chicago, R. I. & P. R. Co., 189—1284.

Interstate Commerce—Dismantling and Reconstructing Equip-

3 ment. A workman, even though employed by an interstate common carrier, is not engaged in interstate commerce while employed in dismantling and reconstructing a room or station and the electrical equipment therein, when the room and equipment are not employed during the period of said work as an instrument of commerce. This is true even though said work is being done with the purpose in view of using the reconstructed room and equipment, immediately on the completion thereof, as an instrument of commerce. Wright v. Interurban R. Co., 189—1315.

CERTIORARI.**Judgment as Adjudication.** A judgment, on certiorari, that a

1 default had been set aside in an improper manner—without application or hearing—is no impediment to the setting aside of such default in a proper manner. Western F. & C. Co. v. McFarland, 189—717.

Refusal to Grant Change of Venue. Certiorari will lie to review

2 the refusal of the trial court to grant a change of venue to the county of defendant's residence on the ground of fraud in the inception of the contract sued on, proper answer and bond having been filed, as provided by law. Appeal in such case after trial in the wrong county affords no adequate remedy. State v. District Court, 189—1167.

Scope of Writ and Evidence Receivable. On certiorari to review

3 the action of a civil service commission in affirming the discharge of an officer subject to its jurisdiction, no evidence is receivable unless it bears on the one narrow issue whether the commission acted illegally, or beyond its jurisdiction. It follows that the accused officer may not withhold his exculpatory evidence from the commission and introduce it for the first time on hearing on certiorari. Fronsdaahl v. Civil Serv. Com., 189—1344.

CONSPIRACY.

Adultery. An agreement to commit an offense which can only

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to purchase from plaintiff." Wickham & Burton v. Farmers Lbr. Co., 189—1183.

Consideration—Assumption of Obligation by Uninterested Party.

- 2 Inducing one to render services and incur expense on a subject-matter as to which the promisor has no *personal* interest, furnishes adequate consideration for a promise to pay for such services and expense. Blair v. Fitch, 189—1307.

Existing Matured Debt as Consideration. An existing, matured

- 3 claim will not, of itself, furnish a consideration for an oral promise to pay such claim *at a future date*. Mortenson v. Knudson, 189—379.

Public Policy—Property in Custodia Legis. It is not violative

- 4 of public policy for the president of a corporation which has levied on a restaurant stock and fixtures to contract, without the authority of the court, with an employee of the restaurant owner (and while the sheriff is holding the property) to operate the restaurant and preserve it as a going concern, it appearing that the sheriff was not to receive any compensation under said contract, that all parties impliedly consented thereto, and that the property was properly preserved. Blair v. Fitch, 189—1307.

Construction and Operation—Recovery. The common-law rule

- 5 that there could be no recovery on a written contract without a showing that it had been strictly performed has been modified in this state, and there can be a recovery where the other contracting party has been benefited, and there has been substantial performance, and the omissions are inadvertent or unintentional, and deductions can be made from the contract price for the deviations. Stratmeyer v. Hoyt, 189—85.

Performance or Breach—Evidence. Evidence reviewed, in an

- 6 action on a written contract for the furnishing of a monument, and held sufficient to go to the jury on the question of substantial performance of the contract on the part of the seller. Stratmeyer v. Hoyt, 189—85.

CORPORATIONS

CORPORATIONS. See **RECEIVERS**, 3, 4.

Ownership of Stock Dividends Under Agreement to Resell. A
1 holder of corporate shares of stock who has purchased them under an agreement that he shall receive "all dividends" thereon during his lifetime, but that the seller may repurchase after the death of such holder, is the absolute owner of *stock* dividends declared and issued on said stock during the lifetime of the said holder, when such stock dividends represent *income* or *earnings* of the company, and not the natural growth or increase in value of its permanent property. *Sexton v. Percival Co.*, 189—586.

Dividends—Presumption. Stock dividends are presumed to rep-
2 resent *earnings*. Corporate records reviewed, and held not to overcome the presumption. *Sexton v. Percival Co.*, 189—586.

Nature of Earnings. Earnings of a corporation remain such
3 until the intent to make them a part of the permanent property of the corporation is in some way manifested. *Sexton v. Percival Co.*, 189—586.

Dual Way of Distributing Earnings. Earnings may be divided
4 in two ways: (1) By declaring and paying a *cash* dividend; or (2) by declaring and issuing a stock dividend. *Sexton v. Percival Co.*, 189—586.

Purchase of Stock as "Loan." A purchase of preferred stock
5 may, in view of the subscription contract and articles of incorporation, constitute a "loan" to the corporation, with consequent right on the part of the certificate holder to surrender the certificate and recover the amount thereof as a general creditor. *Allen v. Northwestern Mfg. Co.*, 189—731.

Retiring Stock Prior to Paying General Creditors. A corporation
6 which has lawfully issued its preferred stock under agreement to repay the sum paid for the stock at a named time, on surrender of the certificate, may not avoid its obligation under the plea that to enforce the obligation would, in effect, compel the company to retire said stock prior to

CORPORATIONS Continued

the payment of its general creditors. (Sec. 1621, Code, 1897.) *Allen v. Northwestern Mfg. Co.*, 189—731.

Transfer of Shares—Recovery Because of Unanticipated Event.

7 He who buys corporate shares of stock, and pays a sum therefor which includes the then owner's estimated interest in the corporation's undivided surplus, may not recover of the seller such estimated interest because, subsequent to the sale, the Federal government enacted a *retroactive* tax law, under which the corporation was compelled to pay a *retroactive* tax which wholly dissipated the corporation's undivided surplus. *Overland S. C. Co. v. Clemens*, 189—1293.

Transfer of Shares—Mistake of Law and Fact. A plea of mis-

8 take of law and fact may not be based on unanticipated matters, occurring subsequent to the transaction in question. So held in the transfer of corporate stock. *Overland S. C. Co. v. Clemens*, 189—1293.

Recovery of Dividend Because of Unanticipated Event. A cor-

9 porate dividend, duly declared and distributed, is not rendered illegal by the fact that, subsequent to the declaration and distribution of the dividend, the Federal government unexpectedly enacted a *retroactive* tax law, under which the corporation was compelled to pay (generally, and not out of any particular fund) a tax on its income for a part of its fiscal year in which the income accumulated on which the dividend was declared. It follows that the corporation may not, after paying said tax, recover any part of said dividend from the stockholder, on the theory that the declared dividend was excessive in view of subsequent events. *Overland S. C. Co. v. Clemens*, 189—1293.

Right of Foreign Corporation. Principle reaffirmed that a

10 foreign insurance corporation may not transact business in this state unless with the consent of the state, and unless compliance is had with the laws of this state. *Dixon v. Northwestern Nat. L. Ins. Co.*, 189—1268.

Foreign Corporations—“Doing Business in this State.” The

11 act of a foreign corporation in soliciting insurance in this state, of a citizen of this state, and delivering the policy

CORPORATIONS Continued

TO

CRIMINAL LAW

in this state, constitutes a "doing (of) business in this state." (Secs. 1741, 1819, Code, 1897.) *Dixon v. Northwestern Nat. L. Ins. Co.*, 189—1268.

COURTS.

Modification of Correct Record. No power exists in a court of equity to disturb or in any wise modify an absolutely correct judicial record. So held where a party, years after he had been convicted of crime, applied for an order expunging from admittedly correct record shorthand notes, a paragraph of testimony alleged by him to be false and perjured. *Coppock v. Reed*, 189—581.

CRIMINAL LAW. See HUSBAND AND WIFE, 3.**RESPONSIBILITY FOR CRIME.**

Presumed Coercion of Wife. Whether a wife will be shielded
1 from responsibility for murder by the presumption that she acts, while in the presence of her husband, under his coercion, *quaere*. *State v. Reynolds*, 189—1033.

PARTIES TO OFFENSE.

Preconcerted Action Rendering Party Accomplice. When two
2 persons, by previous agreement, voluntarily go to the room of a third person for the purpose of having said third person commit the crime of sodomy on each of their persons, with the mutual expectation of receiving money from said third person for said offenses, and said crimes are consummated as contemplated, each of said persons is an accomplice in the crime committed by the other. *State v. Farris*, 189—505.

EVIDENCE.

Failure to Call All Witnesses. The State is not bound, on the
3 trial of a criminal, to call every attainable witness; neither is the accused entitled to an instruction that the failure to call an attainable grand-jury witness creates a presump-

CRIMINAL LAW Continued

tion that the testimony of such omitted witness would be adverse to the State. Especially is this true when other witnesses testify to every fact immediately attending the commission of an offense which the omitted witness could testify to. *State v. Christ*, 189—474.

Admissions as Substantive Evidence. An admission by the defendant of a fact tending to show guilt is admissible as substantive evidence of the fact, though not amounting to a confession. *State v. Long*, 189—512.

Financial Ability to Aid Government. In a prosecution for inciting and encouraging hostility to the government, the matter of defendant's ownership of land was purely collateral, and could be proved by parol evidence, for the purpose of showing his ability to financially aid the government, the Red Cross, and other organizations. *State v. Gibson*, 189—1212.

Omission of Immaterial Matter. In a prosecution for inciting and encouraging hostility to the government, omission of evidence as to statements pertaining to religious matters, written by defendant on the back of checks, held immaterial and harmless. *State v. Gibson*, 189—1212.

TRIAL.

Misconduct in Argument. The appellate court will not declare prejudicial a statement by the prosecutor in argument that defendant is "guilty as hell," when it appears that such claim of prejudice has been overruled by the trial court. *State v. Christ*, 189—474.

Suggesting Conviction on Former Trial. It is not error for the court to say to the jury "that, *by reason of a former trial*, the defendant cannot be convicted of murder in the first degree." Such expression does not, in effect, tell the jury that the defendant has already been convicted of second-degree murder. *State v. Christ*, 189—474.

Curing Error by Striking Testimony and by Instructions. Error, if any, in receiving testimony is cured by striking it from

CRIMINAL LAW Continued

the record, and by pointed instructions to disregard it.
State v. Christ, 189—474.

Inexplicit but Correct Instructions. Instructions inexplicit, but
10 correct so far as they go, are sufficient, in the absence of
a request for more explicit ones. State v. Christ, 189—474.

Completing Trial with Substituted Judge. The trial of a felony
11 which is interrupted by the sickness of the trial judge may
validly proceed to a final determination before another
judge of the same court who familiarizes himself with the
record, when the accused (1) asks no continuance, (2) does
not ask for the recall of the witnesses already examined,
and (3) fully consents through his counsel that the trial
shall so proceed. State v. McCray, 189—1239.

APPEAL AND ERROR.

Harmless Error. An instruction correctly stating that defendant
12 admitted the possession of the property in question on a
Sunday and Monday is not rendered prejudicially erroneous
by giving to said days an incorrect date. State v. Rebbeke,
189—514.

Inaccurate Instructions. An inaccurate instruction will not con-
13 stitute prejudicial error, when the record and instructions
as a whole demonstrate that the jury could not have been
misled. So held where the court, in instructing as to two
facts, either of which constituted a complete defense, joined
the clauses by the conjunctive "and," instead of the dis-
junctive "or." State v. Rebbeke, 189—514.

Setting Verdict Aside. A verdict on conflicting evidence must
14 stand, unless it clearly appears that such verdict is con-
trary to the weight of the evidence. So held on the issue
of agency in an embezzlement charge. State v. Wilson,
189—1057.

Constitutionality of Statute. While, in a civil case, the consti-
15 tutionality of a statute may not be raised for the first time
in the appellate court, in a criminal action the defendant
is entitled to be heard on appeal on his claim that the

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- statute under which he was prosecuted is in violation of the Constitution, even though such objection is raised for the first time on the appeal. *State v. Gibson*, 189—1212.

Substantial Evidence in Support of Verdict. Where there is 16 substantial evidence in support of the allegations of the indictment, the Supreme Court, on appeal, will not disturb a verdict of conviction. *State v. Gibson*, 189—1212.

DAMAGES. See **VENDOR AND PURCHASER**, 11, 13.

Unquestioned Trial Theory. A trial theory of damages to which 1 no objections were in any wise interposed in the trial court will not be reviewed on appeal. *Burgess v. Bremer County*, 189—168.

Speculation and Conjecture. Evidence reviewed, and held not 2 so speculative and uncertain as not to furnish fair basis to the jury to estimate the damages done by defendant's trespassing hogs, even though plaintiff's hogs were also in the same field. *Goslar v. Reed*, 189—1198.

DEATH.

Presumption from Seven Years' Absence. No particular standard of "search or inquiry" exists in this state in order to generate a presumption of death by reason of a person's unexplained absence for seven years. A showing of such absence usually presents a jury question. *Haines v. Modern Woodmen*, 189—651.

DEEDS. See **FRAUD**, 1, 3.

Undue Influence—Performance of Legal Obligation. Undue in- 1 fluence becomes quite immaterial when it is made to appear that the alleged victim of such influence did nothing more nor less than he was under legal obligation to do. *Gilbert v. Ruggles*, 189—206.

Undue Influence—Gift to Illegitimate Child. Grantor's deed of 2 gift to his illegitimate minor child, *nothing else appearing*,

DEEDS Continued

TO

DESCENT AND DISTRIBUTION

may be justified on the legal basis that grantor was simply discharging a legal obligation. *Gilbert v. Ruggles*, 189—206.

Undue Influence. Evidence held insufficient to show that a deed
3 from mother to son was obtained by undue influence. *Saundry v. Saundry*, 189—443.

Quitclaim of Easement—Fraud. A quitclaim of a private way
4 passes, at best, but an easement. Evidence held wholly insufficient to show fraud in obtaining such a conveyance. *Blazek v. Telecky*, 189—542.

Deed to Wife with Consideration Paid by Husband—Presumption.
5 A deed made to a wife at the instance of her husband, who furnished the consideration, creates a presumption of *gift* to the wife; and such presumption, after the death of the parties, can be overthrown only by evidence which is clear, satisfactory, and convincing. Evidence reviewed, and held insufficient. *Wright v. Wright*, 189—921.

Assumption of Unpaid Special Assessments. One who has given
6 a tenant the option to purchase the leased premises at a specified time during the term of the lease, is under no obligation, on the exercise of the option, to pay special assessments for improvements which were *not* within the contemplation of the parties when the option was granted. *Nelson v. Robinson*, 189—1076.

DESCENT AND DISTRIBUTION.

Right of Heir—Release of Inheritance. Evidence reviewed, and
1 held that a release by an heir "of all claims against him [intestate] or his estate" was not intended by either party to release the heir's right of inheritance. *Patterson v. Carr*, 189—69.

Ownership of Claim—Evidence. Evidence held insufficient to
2 show that a claim did not pass to the surviving husband and heirs. *Mortenson v. Knudson*, 189—379.

Distributive Share—Evidence. Evidence held to show that, in
3 the division of an estate, the widow took certain real estate

DESCENT AND DISTRIBUTION Cont'd TO

DIVORCE

as part of her distributive share. *Schleuter v. Reinking*, 189—452.

DISMISSAL AND NONSUIT.

Belated Filing of Petition—Waiver. Defendant's right to have an action dismissed because the petition is not filed on or before the time stated in the notice of suit, is in no wise waived by the fact that defendant, in attempting to make a special appearance, made a general appearance, by pleading to matters which did not go to the jurisdiction of the court. (Sec. 3515, Code, 1897.) *Read v. Rousch*, 189—695.

DIVORCE. See ATTORNEY AND CLIENT, 2, 3; PLEADING, 8.

GROUND.

False Charges of Infidelity. False charges of infidelity made in
1 a pleading constitute cruel and inhuman treatment, especially when aided by oft repeated, vile, and abusive language. *Anderson v. Anderson*, 189—95.

Dissipated Habits Contributed to by Plaintiff. Dissipated habits
2 of a wife, with consequent demoralization of the domestic relation, will not be denominated cruel and inhuman treatment, when it appears that the husband's conduct and method of living have distinctly contributed thereto. *Frith v. Frith*, 189—201.

Untrue but Justifiable Accusations. Accusations of misconduct
3 which are untrue in fact, but made in good faith and in the reasonable belief of their truth, are not grounds for divorce, even though accompanied by a measure of abuse and threats prompted by such justifiable belief. *Veeder v. Veeder*, 189—912.

Bad Faith in Consummating Marriage—Effect. Entering into
4 the marriage relation in bad faith, and with ulterior motives, may present a very persuasive reason why such person should be denied a decree of divorce. *Veeder v. Veeder*, 189—912.

Bad Faith of Wife as Grounds. One party to a marriage may
5 not have a divorce on the sole ground that the other party

DIVORCE Continued

entered into the relation in bad faith, and with ulterior purpose of obtaining the property of the applicant for divorce. *Veeder v. Veeder*, 189—912.

EVIDENCE.

Impossibility of Obtaining Corroboration. Corroboration of the
6 truth of the assigned ground for divorce must be produced, even though, from the very nature of the wrongful act, it may be practically impossible to obtain such corroboration. So held as to a charge of excessive sexual indulgence. *Veeder v. Veeder*, 189—912.

Nonproof of Loss of Health. Proving grounds for divorce with-
7 out proving that health or life has been endangered thereby, presents a total failure of proof. *Veeder v. Veeder*, 189—912.

JUDGMENT OR DECREE.

Residence—Avoiding Decree for Fraud. A decree of divorce
8 which specifically finds that petitioner was a bona-fide resident of the county in which the action was pending (defendant being a resident of this state) may not be impeached by the naked showing that petitioner, shortly after the decree was entered, *took up her residence in another state*. *Holmes v. Holmes*, 189—256.

Modification of Contractual Decree. A contractual decree (based
9 upon a contract entered into prior to the decree of divorce) wherein defendant was charged *generally* with the obligation to defray the expense attending the education of his children after they should attain their majority, may, on defendant's subsequent default, be so modified as to fix and determine the *specific* amounts which defendant shall pay for said purpose. *Dunham v. Dunham*, 189—802.

**Contractual Decree in re "Extraordinary" Expense—Attorney
10 Fees.** In an action to enforce a contractual decree, in so far as such decree was for the benefit of minors, *held* that the court might make a reasonable allowance of attorney fees in favor of the minors. *Dunham v. Dunham*, 189—802.

DIVORCE Continued

Unauthorized Annulment. The district court has no jurisdiction
11 to set aside a decree of divorce for fraud in its procurement, at a term subsequent to the entry of the decree, and on the hearing of an application confined solely to a prayer for modification of the alimony provision; and especially is this true where, in the meantime, both parties have remarried. *Delbridge v. Delbridge*, 189—1116.

ALIMONY.

Division of Property. Evidence reviewed, and held to require
12 a decree equally dividing the real estate of the parties. *Anderson v. Anderson*, 189—95.

Wife Liable for Temporary Alimony and Suit Money. A wife,
13 plaintiff in a divorce action, may, on a proper showing, be compelled to pay temporary alimony and suit money to an impecunious husband. *Lindsay v. Lindsay*, 189—326.

Insufficient Temporary Alimony. In the absence of a definite
14 showing of inadequacy in the allowance of temporary alimony, the appellate court will decline to interfere, and will leave the matter for adjustment on final hearing on the merits. *Lindsay v. Lindsay*, 189—326.

CUSTODY AND SUPPORT OF CHILDREN.

Support of Children. A fair and just contract, carried into the
15 decree of divorce, and providing for the support of the children of the parties by one of the parties, may be enforced. *Dunham v. Dunham*, 189—802.

Contractual Decree in re Support of Children—Enforcement.
16 When one parent is, by the decree of divorce, obligated to provide for the support and education of a child, in accordance with a fair and just contract which is carried into the decree, and refuses to carry out such obligation, the other party to the proceeding may recover of the defaulting party sums necessarily expended in supporting and educating the child. *Dunham v. Dunham*, 189—802.

DOMICILE

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EASEMENTS

DOMICILE. See DIVORCE, 8; OFFICERS.

Insufficient Residence. Evidence tending to show residence in this state held to be overcome by counter evidence of the taking up of a homestead in another state, and of long continued absence from this state. *Dolan v. Keppel*, 189—1120.

DRAINS. See WATERS AND WATERCOURSES.

Maximum Flood Conditions as Bearing on Assessment. Substantial benefits may be assessed when it appears that the improvement in question will afford substantial relief from normal flood conditions, even though it is made to appear that the improvement will not afford *complete* relief from maximum—extraordinary—flood conditions. Record reviewed in detail, and *held* that the assessment against a railway right of way, as fixed by the board of supervisors, was *excessive*, and that, as reduced by the court, it represented a *fair proportional part* of the total cost. *Inter-Urban R. Co. v. Board of Supervisors*, 189—35.

Substantial Benefits and Moderate Costs. An order establishing a drainage district will not be reversed, when it is made to appear that the improvement will result (1) in substantial benefits, (2) at comparatively moderate cost. *Hixson v. Boards of Supervisors*, 189—244.

Appeal—Delay—Effect. The reluctance of the appellate court to interfere with orders establishing drainage improvements will, it is impliedly suggested, be increased in the same ratio that there is delay in prosecuting the appeal. *Hixson v. Boards of Supervisors*, 189—244.

EASEMENTS. See DEEDS, 4; FRAUDS, STATUTE OF, 8.

Naked Use. *Naked use* of land as a road, with the consent of the owner, howsoever long continued, will not ripen into an easement. *Austin v. Baxter*, 189—138.

Naked License and Contract Therefor Distinguished. A naked license, without consideration therefor, is revocable at pleasure. A contract for an easement on a consideration

EASEMENTS Continued

TO

EMINENT DOMAIN

paid in advance is not so revocable. *Cusack Co. v. Myers*, 189—190.

ELECTION OF REMEDIES.

Single Contract. The doctrine of election of remedies has no application to an action wherein plaintiff rests his right of recovery on a *single* contract, even though his testimony is conflicting as to when and where the contract was made. *Linnemann v. Kirchner*, 189—336.

ELECTIONS. See MUNICIPAL CORPORATIONS, 5—8.

ELECTRICITY. See PLEADING, 11.

Insulation of Wires at Dangerous Places. An electric power transmission company is under a duty to properly insulate its wires at all points where it may reasonably anticipate the lawful presence of people, e. g., along and near the trees of another, close to which trees the lines run. *Graves v. Interstate Power Co.*, 189—227.

EMBEZZLEMENT.

Tender as Barring Prosecution. One charged with embezzlement may not bar prosecution by making a tender after indictment. *State v. Wilson*, 189—1057.

Evidence of Other Offenses. On the trial of an indictment for embezzlement, evidence of other acts of embezzlement by the accused may properly be received for the *sole* purpose of throwing light on the motive and intent of the accused in the transaction on trial. *State v. Wilson*, 189—1057.

EMINENT DOMAIN.

Answer on Appeal. No answer is necessary on appeal from an award of damages in eminent domain proceedings. *Burgess v. Bremer County*, 189—168.

Right to Condemn Private Way. A landowner who has, or may obtain, a vested interest in a private way which will afford

EMINENT DOMAIN Continued

TO

ESTOPPEL

him reasonable opportunity to pass to and from his land, and enable him to reach a public way, may not condemn a private way over the land of another. (Sec. 2028, Code Supp., 1913.) *Strawberry Point D. F. Soc. v. Ball*, 189—605.

Access to Premises. Evidence held to show that the building
3 of a viaduct had, in *some* degree, interfered with access to adjoining property, and therefore that a jury question on the issue of damages was presented. *Wulke v. Chicago, M. & St. P. R. Co.*, 189—722.

Authorized Improvement. Statutory authority to a railway cor-
4 poration to construct a viaduct over its tracks, does not absolve the corporation from the duty to pay resulting damages to abutting property. (See Sec. 2017, Code Supp., 1913.) *Wulke v. Chicago, M. & St. P. R. Co.*, 189—722.

EQUITY.

Doing Equity—Forfeiture. Equity will not permit a contract
1 forfeiture for nonpayment of a balance due, when it appears that the property has already been paid for in an amount greatly in excess of its value. *Groen v. Ferris*, 189—21.

Once-Acquired Jurisdiction. Principle recognized that equity,
2 having once acquired jurisdiction, will adjudicate all matters pending, even though some such matters are purely law questions. *Dunham v. Dunham*, 189—802.

ESTOPPEL.

Equal Possession of Facts. One may not be estopped to assert
1 a right, when the facts pertaining to that right are equally within the knowledge of both contending parties. So held where it was claimed that a child by adoption had permitted an estate to be closed, without asserting its right of inheritance. *Holmes v. Curl*, 189—246.

Wrongful Act of Escrow Holder. An owner of land who places
2 deeds, with grantee in blank, in the hands of a party to hold, pending the final closing of an exchange, is not there-

ESTOPPEL Continued

TO

EVIDENCE

by estopped to dispute the validity of a mortgage arising out of the unauthorized act of said party in filling in his own name as grantee, and mortgaging the property. *Rhodes v. Uhl*, 189—408.

EVIDENCE. See CRIMINAL LAW, 3—6; LARCENY, 2; NEGLIGENCE, 12; PHYSICIANS AND SURGEONS; WILLS, 6; WITNESSES, 9.

JUDICIAL NOTICE.

Nature of Contract of Sale of Real Estate. Judicial notice will
1 be taken of the fact that a contract of sale of real estate is usually an instrument of various details which are essential to a complete understanding and agreement. So held where there was an agreement as to price, but no agreement as to an outstanding lease and an existing easement. *Petersen v. Jensen*, 189—400.

Societies Auxiliary in War Work. The courts will take judicial
2 notice that the Red Cross, Y. M. C. A., and similar organizations were auxiliaries in the war work of the government during the World War; and, in a prosecution for inciting and encouraging hostility to the government, the jury may consider the hostility of defendant, during the war, to such organizations. *State v. Gibson*, 189—1212.

PRESUMPTIONS.

Owner Presumed to Control His Property. An owner of property
3 is presumed to be in control of his own property; therefore, a showing of ownership casts upon the owner the duty to show that the use of his property, on the occasion in question, was *without his consent*. So held in the operation of an automobile. *Hall v. Young*, 189—236.

RELEVANCY, MATERIALITY, AND COMPETENCY.

Testimony Inconsistent with Statutory Requirements. Testimony
4 tending to demonstrate the impracticability of insulating high-tension electrical wires by wrapping or covering them,

EVIDENCE Continued

and the customary method of constructing such lines by first-class systems, is wholly irrelevant in view of the statutory requirement that such lines shall be "properly insulated." (Sec. 1527-c, Code Supp., 1913.) *Graves v. Interstate Power Co.*, 189—227.

Lascivious Relation of Parties. In damage action for lascivious
5 assault, statements by defendant to plaintiff and others, suggestive of a lascivious disposition toward plaintiff, are admissible, as tending to prove such disposition. *McKenny v. Davis*, 189—358.

Res Gestae. Statement of a witness, material, and explanatory
6 of circumstances immediately preceding a homicide and connected therewith, reviewed, and held to constitute a part of the *res gestae*. *State v. Christ*, 189—474.

Similar Facts—Impure Food. On the issue of negligence on the
7 part of a manufacturer in the preparation of an article of food, evidence of the impure condition of other packages of the same kind of food and the same consignment, is admissible. *Davis v. Van Camp Pkg. Co.*, 189—775.

Inference from Failure to Speak. In a prosecution for inciting
8 and encouraging hostility to the government, evidence that the defendant had never been heard to say anything in favor of the United States in time of war was admissible. *State v. Gibson*, 189—1212.

Duty of Nurse. One who is familiar with the duties of a nurse
9 in a hospital is competent to say what those duties are. *Burris v. Titzell*, 189—1322.

Subsequent Condition as Proving Prior Condition. Evidence
10 that a patient was able at a certain time to take an anæsthetic is not competent on the issue whether he was able to take an anæsthetic at a time a year prior thereto. *Burris v. Titzell*, 189—1322.

HEARSAY.

Hearsay. Testimony that a third party "consented" to a con-

EVIDENCE Continued

TO EXECUTORS AND ADMINISTRATORS

11 tract is not hearsay when plaintiff's claim is that the making of such contract was conditional on the consent of such third party. *Linnemann v. Kirchner*, 189—336.

OPINION EVIDENCE.

Duration of Condition of Mind. An expert who has personal
12 knowledge of the condition of a testator at a certain time may testify, not only (1) as to testator's mental incompetency at said time, but (2) as to the probable duration thereof. *Dolan v. Henry*, 189—104.

Conclusion. It is objectionable to permit a witness, after recit-
13 ing what was said, to interject the statement, "He as much as said that, you know." *Linnemann v. Kirchner*, 189—336.

Allowable Conclusion. The testimony of a witness that he is
14 "ready, willing, and able" to pay a named sum for a thing, in accordance with his contract, is an allowable conclusion, in so far as it does partake of the nature of a conclusion. *Fisher v. Skidmore Land Co.*, 189—833.

EXECUTORS AND ADMINISTRATORS. See APPEAL AND ERROR, 2; LIMITATION OF ACTIONS, 6.

Estate Debtor May Not Transfer Title to Claim. The oral prom-
1 ise of one who is indebted to a decedent's estate that he will pay the claim to decedent's sole surviving heir, is ineffective to transfer title to such promisee. Title still remains in the estate. *Mortenson v. Knudson*, 189—379.

Enforcing Claims Against Administrator on Final Report. An
2 administrator takes title in trust to every claim due to the testator at the time of his death, even though it be a claim for damages for fraud perpetrated on the testator *by the administrator himself*, before he became such; and he must voluntarily account therefor, or submit to an order for accounting by the probate court without a jury, on objections to his *final report*. *In re Estate of Parker*, 189—1131.

Waiver of Jury Trial. The act of qualifying as administrator
3 works a legal waiver of right of trial by jury, in case

EXECUTORS AND ADMINISTRATORS Cont'd. TO

FIXTURES

claims in favor of the estate and against the administrator are sought to be enforced, on objections to the administrator's final report. In re Estate of Parker, 189—1131.

Jury on Issue Arising on Final Report. An administrator may
4 not complain that an issue arising on his final report was sent to a jury, when his only objection to such course was an untenable one. In re Estate of Parker, 189—1131.

Effect of Inquisitorial Examinations. The act of the probate
5 court in calling the administrator into court and entering upon an inquisitorial examination as to the indebtedness of the administrator to the estate, does not exhaust the jurisdiction of the court, later, to enter upon a formal hearing of objections to the administrator's final report, and to adjudicate such indebtedness. In re Estate of Parker, 189—1131.

Interrogatories in re Claims. The statutory provisions (Secs.
6 3604 *et seq.*, Code, 1897) relative to the attaching of interrogatories to petitions, answers, or replies, are applicable to proceedings in probate for establishment of claims. (Sec. 3341, Code, 1897.) Lee v. Blumer, 189—1145.

FALSE IMPRISONMENT. See INSANE PERSONS.

Proximate Cause. Evidence reviewed, and held wholly insufficient to present a jury question on the issue whether defendant's conduct was the proximate and efficient cause of the arrest of plaintiff. Klemm v. Adair, 189—896.

FENCES. See ANIMALS, 2.**FIXTURES.**

Replevin—Intervening Rights of Lessee. Fixtures installed in a building, under contract with the owner and under an agreement that title and right to possession shall remain in the one installing until the fixtures are paid for, may be replevined for default in payment, even against the tenant, who has caused modifications and additions to be made thereto, none of which are injured or rendered nonusable

FIXTURES Continued

TO

FRAUD

by removal under the writ. *Automatic S. Co. v. Central A. Co.*, 189—145.

FOOD.

Proximate Cause of Sickness. Evidence held to present a jury

- 1 question on the issue whether plaintiff's sickness was caused by eating certain food. *Davis v. Van Camp Pkg. Co.*, 189—775.

Negligence in Manufacturing—Prima-Facie Case. One who

- 2 shows that he was made sick by eating an article of food which was intended for human consumption, makes a prima-facie case of negligence on the part of the manufacturer of the article, when the processes of manufacturing are unknown to the injured party, and are wholly within the knowledge of the manufacturer. *Davis v. Van Camp Pkg. Co.*, 189—775.

FORCIBLE ENTRY AND DETAINER.

Limitation on Action. A landlord who serves his tenant at will with a 30-day notice of the termination of the tenancy, and then allows the tenant to remain in possession for 30 days following the expiration of said notice, may not resort to an action of forcible entry and detainer. *Fritch & Himes v. Reynolds*, 189—16.

FRAUD. See VENUE.

Fiduciary Relations. A showing of long-continued intimate rela-

- 1 tions between a nonassertive sister of but little education and experience and a domineering brother of good education and wide business experience may be sufficient to cast upon the brother the burden of proof to show freedom from fraud in a conveyance executed by the sister to the brother without consideration. *Grace v. Callahan*, 189—213.

Rescission Notwithstanding Examination. Rescission of a con-

- 2 tract of exchange is fully justified when the one rescinding, being wholly inexperienced in land deals, exchanges land of large value for land of materially less value, on the strength

FRAUD Continued

TO

FRAUDS, STATUTE OF

of willfully false representations as to the value and quality of the latter land, and after an examination thereof which was manifestly so engineered as to prevent the examination from revealing the real truth. *Rhodes v. Uhl*, 189—408.

Gross Deception and Inadequacy of Price. Equity may grant
3 relief, even though a scheme be so cunningly planned and ingeniously executed as to enmesh the victim in a net of intrigue, without disclosing any actionable misrepresentation. Evidence reviewed, and held to show such deception and gross inadequacy of price as to demand the cancellation of a deed. *Rodenkirch v. Layton*, 189—430.

Right to Rely. An action for fraud and deceit may not be based
4 on *borrowed* fraud and deceit. In other words, a party has no right to rely on representations unless they were made for the purpose of influencing *his* action. Applied where the owner of land, in obtaining a loan *from a bank*, was alleged to have fraudulently represented to the cashier the condition of the land, and where the cashier *subsequently* bought the land, and sought to avail himself of the former representations *to the bank*. *McCane v. Wokoun*, 189—1010.

FRAUDS, STATUTE OF.

Party's Direct Obligation. A contract directly binding the ob-
1 ligor for the support and education of the wards of another is not within the statute of frauds. *Linnemann v. Kirchner*, 189—336.

Oral Agreement in re Drainage. An oral agreement to arbitrate
2 a dispute as to the course of natural drainage over lands is not within the statute of frauds. *Maxson v. Cress*, 189—362.

Oral Testimony of Vendor to Prove Contract. The oral testimony
3 of vendor that he had neither sold certain personal property to plaintiff nor authorized another person to sell it for him is conclusive—may not be contradicted. *Quaker Oats Co. v. Kidman*, 189—906.

Personalty—Delivery. An owner of cattle, seeking to enforce an
4 oral contract of sale on which no payment has been made, may not base *delivery* to the buyer either:

FRAUDS, STATUTE OF Continued TO FRAUDULENT CONVEYANCES

1. On mere words of the alleged contract, when the cattle were, at the time, in the owner's possession in the stockyards of a distant state, or

2. On the fact that the alleged buyer received and appropriated to his own use the proceeds of a subsequent sale of cattle, when such transaction was, in view of the relations of the parties, perfectly consistent with the claim of no sale. *Deitrick v. Sinnott*, 189—1002.

Testimony of Adverse Party. A petition which seeks to enforce
5 an oral contract which is within the statute of frauds, is demurrable, unless it contains an allegation that plaintiff relies on the testimony of the adverse party to prove the contract. The Code of 1897 has not changed this rule. *Deitrick v. Sinnott*, 189—1002.

Defendant as Witness. A defendant against whom an alleged
6 oral contract which is within the statute of frauds is sought to be enforced, may become a witness *on his own behalf*, and testify as to the real nature of the transaction in question, and *plaintiff will not be permitted to contradict such testimony*. *Deitrick v. Sinnott*, 189—1002.

Election to Renew Lease. An election by a tenant to avail him-
7 self of the option to extend the lease for an additional number of years at a *quantum meruit* rate, as provided in a written lease, need not be in writing—may be proven by the same kind of evidence which would establish delivery of a written instrument, i. e., oral testimony or acts. *Marckres Bros. v. Perry Gas Works*, 189—1204.

Agreement to Procure Easement. An agreement to *procure* an
8 easement is not within the statute of frauds. Evidence reviewed, and held to show that such was the contract. *Graeser v. Gordon*, 189—1279.

FRAUDULENT CONVEYANCES.

Fiduciary Relations. A presumption of fraud attends the transfer of property by a principal to his *confidential* agent, and especially when the principal is very aged and physically and mentally weak. Evidence held to render the presumption conclusive. *In re Estate of Parker*, 189—1131.

GIFTS

TO

HOMICIDE

GIFTS. See DEEDS, 2, 5.

Unnatural Gift as Bearing on Mental Competency. While a certain showing of mental weakness due solely to physical infirmity of the donor may be insufficient to present a jury question on the issue of mental competency, yet such showing may be amply sufficient when aided by a showing that the gift in question was most unreasonable and unnatural. *Richmond v. First Nat. Bank*, 189—704.

Parol Gift of Land—Evidence. Evidence reviewed, and held insufficient to establish a parol gift of land with that degree of clearness required by law. *Kasper v. Kasper*, 189—297.

GUARDIAN AND WARD. See TRUSTS, 1; WITNESSES, 5.

HIGHWAYS. See EASEMENTS, 1; EMINENT DOMAIN, 2; MUNICIPAL CORPORATIONS, 17.

Damages Consequent on Vacation—Appeal. No appeal lies from the disallowance by the board of supervisors of claims consequent on the vacation of the highway. *Yonota v. Modrachek*, 189—538.

HOMICIDE.

Nonpositive Identification of Accused. Evidence held to sustain a verdict of guilt, even though the identification of the accused was not altogether positive. *State v. Christ*, 189—474.

Negating Self-Defense. Circumstantial evidence reviewed, and held to negative a plea of self-defense. *State v. Christ*, 189—474.

Self-Defense—Instructions. Instructions reviewed, and held (1) not to turn the jury into a field of mere conjecture on the subject of self-defense, nor (2) to assume that deceased was not armed with a dangerous weapon. *State v. Christ*, 189—474.

HOMICIDE Continued

TO

INDICTMENT AND INFORMATION

Verdict on Conjecture. Evidence held wholly insufficient to
4 sustain a verdict that defendant had aided, abetted, or encouraged the murder of her infant child. *State v. Reynolds*, 189—1033.

HUSBAND AND WIFE. See **CRIMINAL LAW**, 1; **DEEDS**, 5; **WITNESSES**, 6.

Wife Desertion—Jury Question. A jury question, on the issue
1 whether a husband had deserted his wife, arises on testimony tending to show: (1) That the husband married the wife in bad faith; (2) that he took his wife to a foreign state, and, after a short experience in business, caused her to return to the home of her parents in this state, under an agreement that he would soon return to the same place and provide for her; and (3) that he did so return, but refused, for a period of some three months, to go to his wife, or to speak to or provide for her. *State v. Jinkens*, 189—1233.

Wife Desertion—Venue. The venue in a prosecution for de-
2 sertion by the husband of his wife may be laid in the county in this state in which the husband and wife had, at the husband's instigation, mutually agreed to live, and in which they did live, and in which he refused to provide for her; and this is true even though it be conceded that the husband retained a legal residence in a foreign state. *State v. Jinkens*, 189—1233.

Crimes—Presumption In Re Coercion. Slight circumstances are
3 sufficient to carry to the jury the issue whether a wife, in the commission of a crime, exercised her own free volition, or was coerced by the will of her husband. Evidence held sufficient. *State v. Stoner*, 189—1304.

INDICTMENT AND INFORMATION.

Waiver of Defects and Objections—Belated Objection. An ob-
1 jection that an indictment does not enable a person of common understanding to know what was intended, as required by Sec. 5280, Code, 1897, cannot be made for the first time on appeal. *State v. Gibson*, 189—1212.

INDICTMENT AND INFORMATION Cont'd. TO

INSANE PERSONS

Requisites and Sufficiency of Accusation—Duplicity. An indictment charging that one "did attempt by speech, action, and manner of speaking to incite, abet, promote, and encourage hostility and opposition to the government of the state of Iowa and the United States," charged a single offense against the state, and not separate offenses against the state and nation, and therefore did not charge two offenses. (Sec. 5284, Code, 1897.) *State v. Gibson*, 189—1212.

Accessories Before the Fact. Accessories before the fact are very properly indicted just as though they had actually committed the full criminal act. (Sec. 5299, Code, 1897.) *State v. McCray*, 189—1239.

INFANTS. See ADOPTION; BASTARDS; DEEDS, 2; PARTIES, 2.

Guardian Ad Litem—Authority—Stipulation of Settlement. A guardian ad litem, appointed to defend a minor in the probate of a will, has no authority to enter into a stipulation of settlement covering the minor's interest. *Nothem v. Vonderharr*, 189—43.

Action by Next Friend—Abatement. An action beneficial in its nature, brought by a minor by his next friend, does not automatically abate, upon the minor's attaining his majority. *Dunham v. Dunham*, 189—802.

INJUNCTION. See TRESPASS.

Restraint of Continuing Trespass. An injunction will lie to restrain defendant from painting signs on walls for the use of which for like purposes plaintiff has paid a valuable consideration in advance. *Cusack Co. v. Myers*, 189—190.

Motion to Dissolve as Involving the Merits. A motion to dissolve an injunction does not necessarily raise an issue which goes to the merits. *Cusack Co. v. Myers*, 189—190.

INSANE PERSONS.

Justifying Reasonable Restraint. An insane person who is dangerous to himself and others if permitted to go at large may, without process of law, be reasonably restrained by

INSANE PERSONS Continued

TO

INSURANCE

one who, by relationship or otherwise, is the natural or proper custodian of such insane person. But the one who does so restrain has the burden to justify his conduct by proof of every fact called for by the rule. *Maxwell v. Maxwell*, 189—7.

INSURANCE. See CORPORATIONS, 10, 11; TAXATION, 3, 4.

AGENTS.

What Constitutes "Soliciting" Agent. Testimony that a party
1 solicited and secured an application for insurance, collected the premium, and delivered both to the recording agent of the company, and that the recording agent issued a policy thereon and delivered it to the soliciting party, who, in turn, delivered it to the insured, justifies a jury in finding that said soliciting party was, under Sec. 1749, Code, 1897, the soliciting *agent* of the company, even though such party was not, in fact, in the employ of the company, and received no compensation from the company. *Pickens v. Milwaukee Mech. Ins. Co.*, 189—900.

CONSTRUCTION AND OPERATION OF POLICY.

Preliminary Insurance Dependent on Insurability. An applica-
2 tion for life insurance, accompanied by the premium, under an agreement that the insurance shall be effective from the date of the medical examination, provided the insurer is satisfied that the applicant is then insurable, creates preliminary insurance, but with reserved right in the insurer in good faith to reject the application, for noninsurability at the time of the application. *Reynolds v. Northwestern M. L. Ins. Co.*, 189—76.

Contract Rule of Evidence. An insurer may not, after the issu-
3 ance of a policy, and under a reserved contract power to adopt and change by-laws, provide that "disappearance" of the insured, however long continued, shall not be evidence of death. *Haines v. Modern Woodmen*, 189—651.

Severance "at" Ankle Defined. A policy which provides in-
4 demnity "*for loss of either foot*," but defines "*loss*" to mean, "*complete severance at or above the * * * ankle*,"

INSURANCE Continued

is, in view of the manifest purpose of the policy, and in view of the varied meanings of the words "*ankle*" and "*at*," reasonably susceptible of two constructions, to wit:

1. That the severance must be at the precise point of articulation of the leg and foot; or

2. That the severance must be *near* to said point of articulation—so near as to practically destroy the use of the foot.

It follows that the insured is entitled to the benefit of the latter construction. *Jones v. Continental Cas. Co.*, 189—678.

Strict Construction of "Death" and "Disability" Clauses. A
5 policy which clearly distinguishes between loss by "*death*" and loss by specified "*disabilities*," and promises to pay the former to a named beneficiary, and the latter to the insured himself, with a proviso that the policy "*does not cover disability resulting from intentional injury of the insured, inflicted by himself or any other person, whether fatal or nonfatal,*" does not exempt the insurer from making payment to the estate of the insured, in case the insured is *murdered* by the beneficiary. *Kascoutas v. Federal Life Ins. Co.*, 189—889.

Murder of Insured by Beneficiary. The statute (Sec. 3386, Code
6 Supp., 1913) which provides that policies of insurance issued by *benevolent* associations shall be payable to the estate of the insured in those cases where the named beneficiary feloniously takes the life of the insured, simply converts the common-law rule into statute rule, but does not abrogate the common-law rule that, under a like state of facts arising under a *nonbenevolent* policy, the same result must be worked out. *Kascoutas v. Federal Life Ins. Co.*, 189—889.

REFORMATION OF POLICY.

Non-Necessity for Reformation. Reformation of a policy, in
7 order to correct a mistaken description of personal property, is not necessary, when the property may be and is definitely and unquestionably identified by extrinsic evidence. Especially is this true when the description is inherently ambiguous. *White v. Home Mut. Ins. Assn.*, 189—1051.

INSURANCE Continued

AVOIDANCE OF POLICY.

Fraud in Obtaining Policy. An insurer may not avoid a policy
8 for misrepresentation as to the manner in which the insured acquired the policy, unless the record reveals some dishonest motive, or the fact that the insurer has been misled. *White v. Home Mut. Ins. Assn.*, 189—1051.

Representation as to Location of Property. A representation
9 that a motor vehicle was usually kept in a "private garage" is not violated by keeping the vehicle in a shed or "lean-to" on the insured's barn, even though the shed is also used for housing other vehicles, and even though a portion of the shed is fenced off for stock. *White v. Home Mut. Ins. Assn.*, 189—1051.

Failure to Attach Copy of Application. Failure to attach an
10 application for insurance, or a copy thereof, to the policy, works no invalidation of the policy, but simply prevents the insurer from pleading, proving, or disproving such application or any part thereof, when the same bears on the validity of the policy. *Dixon v. Northwestern Nat. L. Ins. Co.*, 189—1268.

Understating Age—Amount Recoverable. The provision of Sec.
11 1813, Code, 1897, as amended by Ch. 348, Sec. 11, 38 G. A. (1919), providing that, in case the insured has *understated* his age, recovery shall be limited to the amount which the premium paid would have purchased at the correct age, has application only to those cases wherein the fact of *understating the age* is legally provable by the insurer. In other words, if the copy of the application containing such "understating" of age, or a copy thereof, be not attached to the policy, then the fact of such "understating" of age is not legally provable, and Sec. 1813 has no application. *Dixon v. Northwestern Nat. L. Ins. Co.*, 189—1268.

ESTOPPEL, WAIVER, ETC.

Estoppel to Dispute Health Certificate. The statutory provision
12 that a certificate of health and insurability, made by the company's medical examiner, may not be disputed, does

INSURANCE Continued

not apply *until a policy* has been issued. (Sec. 1812, Code, 1897.) *Reynolds v. Northwestern M. L. Ins. Co.*, 189—76.

Estoppel in re Location of Property. An insurer who accepts a
13 premium, with full knowledge of the nature of the place where an insured automobile is to be kept, may not avoid liability on the plea that the insured described the place as a "garage," when it was not strictly such. *White v. Home Mut. Ins. Assn.*, 189—1051.

ACTIONS ON POLICIES.

Limitation on Action. An action brought on a beneficiary cer-
14 tificate of insurance, some eight years and three months after the unexplained disappearance of the insured, is not barred by a policy provision which prohibits such action after eighteen months from the death of the insured. Seven years' unexplained absence of a party generates no presumption that a party died at any *particular* time. *Haines v. Modern Woodmen*, 189—651.

Copy of Premium Note. Record reviewed, and held to show
15 failure to attach to a policy a copy of premium note, as required by statute. (Sec. 1741, Code, 1897.) *Alexander Bros. v. Hawkeye & D. M. Ins. Co.*, 189—726.

Nonpayment of Premium Note—Avoidance. A plea that a policy
16 was, at the time of loss, suspended because of the non-payment of the premium note, presents a full defense, in the absence of any showing at that time that a copy of the note had not been attached to the policy. Plaintiff, if he admits the truthfulness of the plea, must plead in avoidance, i. e., *that no copy of the note was so attached*. (Sec. 1741, Code, 1897.) *Alexander Bros. v. Hawkeye & D. M. Ins. Co.*, 189—726.

Incendiarism—Evidence. On the issue whether the insured and
17 his renter had feloniously burned the insured premises and contents, witnesses should be permitted to testify: (1) That one of the alleged conspirators had been seen to leave the premises shortly before the fire; (2) that, when one of the parties moved, shortly before the fire, to the premises in question, he possessed and took with him but a trifling amount of furniture; and (3) (there being relevant

INSURANCE Continued

counter testimony) that gasoline was not suitable for mixing with paint, and that, if it had been so used, the smell therefrom would have disappeared in a short time. *Pickens v. Milwaukee Mech. Ins. Co.*, 189—900.

Negligence of Insured. The fact that a fire was caused by the mere negligence of the insured is no defense to an action on the policy. *White v. Home Mut. Ins. Assn.*, 189—1051.

Failure to Attach Copy of Application. A misrepresentation by insured of his age is *not provable*, when neither the application (which contains the misrepresentation) nor a copy thereof is attached to the policy, whether the policy be issued by a domestic or a foreign company, and whether the action in which such proof is sought to be made is at law or in equity. (Secs. 1741, 1819, Code. 1897.) *Dixon v. Northwestern Nat. L. Ins. Co.*, 189—1268.

REINSURANCE.

Statutory Requirements. The requirement of our statute (Secs. 1710, 1711, Code Supp., 1913), that insurance companies authorized to do business in this state shall not expose themselves to a loss on one risk in excess of 10 per cent of their capital stock, unless they reinsure such risk in some like company authorized to do business in this state, has no application to voluntary reinsurance, entered into wholly outside this state, on policies the amounts of which are not shown. *In re Continental Cas. Co.*, 189—933.

FRATERNAL BENEFICIARY INSURANCE.

Unreasonable Changes in By-Laws. An advance agreement by an insured in a fraternal benefit certificate, to be bound by future changes in the constitution and by-laws of the society, does not authorize a change, even before the insured has disappeared, which provides:

1. That disappearance of the insured shall create no presumption of death until it has continued for a period of time equal to his life expectancy at the time of disappearance; and

2. That, in case of disappearance, no liability shall at-

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tach under the certificate, unless payments of assessments, dues, etc., are continued up to the close of such member's life expectancy. *Haines v. Modern Woodmen*, 189—651.

INTOXICATING LIQUORS.

Manufacture without Intent to Sell. The manufacture in this
1 state of intoxicating liquors, without intent to traffic in
any manner in the same, is prohibited. (Sec. 2382, Code
Suppl. Supp., 1915.) *State v. Ohman*, 189—992.

Nuisance. On the trial of an indictment for nuisance, under
2 Sec. 2384, Code, 1897, due consideration may be given to
the prohibitions of Sec. 2382, Code Suppl. Supp., 1915.
State v. Ohman, 189—992.

Other Sales as Evidence. On the trial of an indictment for
3 keeping intoxicating liquors for unlawful sale, evidence of
defendant's connection with *other* sales of liquors, about
the time of the transaction on trial, is admissible, as bearing
on the intent and purpose of the defendant. *State v.*
Witty, 189—1039.

Presumption from Undue Quantity. The finding of 13 gallons
4 of whisky in a private residence may well justify the jury
(under the record) in finding that the same was kept for
unlawful sale. *State v. Witty*, 189—1039.

Jury Question as to Unlawful Intent. Evidence held to sustain
5 a verdict of guilt in keeping intoxicating liquors for un-
lawful sale, even though no actual sale was proven. *State*
v. Witty, 189—1039.

Unusual Quantity. Record reviewed, and held insufficient to
6 justify the court in holding that defendant had, as a matter
of law, overcome the presumption arising from the finding
of 13 gallons of whisky in his private residence. *State v.*
Witty, 189—1039.

JUDGMENT. See RECEIVERS, 6.

Application to Set Aside—Sufficiency. Perjury committed on the

JUDGMENT Continued

1 trial of the material issues of a cause is not sufficient ground for setting aside the judgment after the entry term, and especially when the alleged perjury reaches only to a *part* of the evidence—would only extend the conflict already existing. *Holmes v. Holmes*, 189—256.

Application to Set Aside—Sufficiency. An application to set
2 aside a decree for fraud may require a more specific and detailed statement of facts than would be necessary in pleading an ordinary cause of action. *Every* fact should be alleged which will enable the court to say, on the face of the pleading, that the decree is unconscionable, unjust, or inequitable, and that a different result will probably be reached on a retrial. *Holmes v. Holmes*, 189—256.

Setting Aside—Extrinsic Perjury. Perjury, extrinsic or col-
3 lateral to the material issues tried, may constitute grounds for setting aside a decree. *Holmes v. Holmes*, 189—256.

Vacation—Ratification as Bar. One may not, in the absence
4 of a showing of full knowledge of all the material facts, be held to have ratified an unauthorized and void judgment by receiving benefits thereunder. *Nothem v. Vonderharr*, 189—43.

Construction of Contractual Decree. In the construction of a
5 contractual decree, the facts and circumstances attending the execution of the contract, which was, in part, carried into the decree, may be given due consideration. *Dunham v. Dunham*, 189—802.

Construction of Contractual Decree. A contractual decree re-
6 quiring defendant "to pay all the expenses of each of said children while they are away from the home of their mother, at school or college, and shall pay (other named expenses of the children) until each of said children is of legal age," is reviewed, and, in the light of the circumstances, is held to charge defendant with the college expenses of the children, *even after they attained their majority*. *Dunham v. Dunham*, 189—802.

LANDLORD AND TENANT

LANDLORD AND TENANT. See APPEAL AND ERROR, 3; FIXTURES; FORCIBLE ENTRY AND DETAINER; PRINCIPAL AND AGENT, 4; REPLEVIN; TRESPASS; TRUSTS, 5.

Holding Over—Effect. Under a lease providing that the lessee
1 might have an extension for a named time by giving a prescribed notice, the naked holding over, without giving such notice, will not be deemed such extension. *Fritch & Himes v. Reynolds*, 189—16.

Option to Purchase—Special Assessments. A lessee in a long-
2 time lease, who acquires an option to purchase, and thereby to terminate the lease, must, on exercising the option, assume the payment of special assessments for improvements which were *not* within the contemplation of the parties when the lease and option contract were entered into. *Nelson v. Robinson*, 189—1076.

Evidence of Option to Renew Lease. The exercise of the option
3 to "renew" a lease for a definite number of years at a *quantum meruit* rate, as provided in a written lease, is sufficiently shown by evidence (1) that the tenant remained in possession, and (2) that the parties mutually agreed on the new rental. *Marckres Bros. v. Perry Gas Works*, 189—1204.

Premises—Possession, Enjoyment, and Use—Repairs. In the ab-
4 sence of a covenant or agreement by the landlord to make repairs, or to maintain the leased premises in a safe and suitable condition for the occupancy and use of the tenant, he is not bound to do so. *Divines v. Dickinson*, 189—194.

Premises—Possession, Enjoyment, and Use—Duty of Landlord.
5 While a tenant could not require the landlord to repair a defect existing at the time of the lease, or occurring thereafter from causes other than the landlord's acts, nevertheless the landlord was under an implied obligation not to disturb or otherwise interfere with the leased premises. *Divines v. Dickinson*, 189—194.

Premises—Possession, Enjoyment, and Use—Duty of Landlord.
6 It was the duty of the landlord, after removal of the build-

LANDLORD AND TENANT Continued TO

LIMITATION OF ACTIONS

ing adjoining the one leased, to take such steps as were reasonably necessary to maintain the leased building in the condition in which it was at the time the lease was entered into, except as to defects or injuries other than from his acts. *Divines v. Dickinson*, 189—194.

Premises—Possession, Enjoyment, and Use—Negligence of Land-
 7 lord. Evidence reviewed, in an action against a landlord by a tenant for injuries to property from the collapse of a wall on leased premises, and held sufficient to go to the jury on the question whether the landlord was negligent, and had caused an adjoining building to be removed, without making reasonable provision for protecting the leased premises from becoming untenable or dangerous, because of the weakening or exposure of the wall and foundation to the action of the elements. *Divines v. Dickinson*, 189—194.

LARCENY.

Recent Possession. Evidence held to justify the court in in-
 1 structing as to the effect of possession of recently stolen property. *State v. Davis*, 189—1210.

Value. The amount paid for an article is competent evidence
 2 of its value, and the owner is a competent witness to so testify. So held where a new article had been purchased two days prior to the theft. *State v. Monroe*, 189—1253.

LIMITATION OF ACTIONS.

Roads and Streets—Dual Notices. The written notice necessary
 1 to avoid the three months' limitation of actions for injury on account of defective streets, may be given to the city or to a committee thereof having the matter in charge, by a series of notices which, together, set forth the "time, place, and circumstances" of the injury. *Blackmore v. City of Council Bluffs*, 189—157.

Unwritten Continuing and Unexecuted Contract. An action to
 2 recover sums of money, under a continuing and unexecuted contract for the support of plaintiff's wards, is not barred,

LIMITATION OF ACTIONS Continued TO

MASTER AND SERVANT

though brought more than five years after the expenditures were made. *Linnemann v. Kirchner*, 189—336.

Tolling Statute—Oral Promise to Pay Existing Matured Debt.

- 3 An oral promise to pay, at a future date, an already matured claim, does not toll the statute of limitation. *Mortenson v. Knudson*, 189—379.

New Promise to Avoid Bar on Old Promise. An oral promise to

- 4 pay, *at a future date*, an already matured claim, creates no new cause of action. *Mortenson v. Knudson*, 189—379.

Amplifying Amendment. An allegation that plaintiff's fall and

- 5 resulting injury were due to the sickening effect of poisonous gases, negligently allowed to escape from a defective stove, may, *after the statute of limitation has fully run*, be amended by alleging that such fall and injury were also caused by an *explosion* of the said stove. *Swan v. Dalbey*, 189—1046.

Tolling Statute on Claims Due Estate from Administrator. The

- 6 statute of limitations does not run during administration, on claims owed by an administrator to the estate. In re *Estate of Parker*, 189—1131.

MANDAMUS.**Possession of Funds of Public Office—Mandamus (?) or Quo**

Warranto (?) Mandamus is the appropriate remedy to compel the turning over of the funds and papers belonging to a public office, and in such case the court will determine whether plaintiff has *prima-facie* title to the office, even though quo warranto is the sole remedy for finally testing the *title* to the office. *Independent Sch. Dist. v. Miller*, 189—123.

MASTER AND SERVANT. See CARRIERS, 3; NEGLIGENCE, 19.**Workmen's Compensation Act—Hearsay Evidence.** Relevant

- 1 hearsay evidence, received without objection, must be given due consideration, on hearings under the Workmen's Compensation Act. *Reid v. Automatic Elec. Washer Co.*, 189—964.

MASTER AND SERVANT Continued

Workmen's Compensation Act—Review on Appeal. The refusal
2 of the arbitration committee and of the industrial commissioner, on review, to consider hearsay evidence (introduced without objection) and an ex-parte affidavit, under the mistake of law that the same were wholly incompetent, is reviewable on appeal. (Sec. 2477-m33, Code Supp., 1913.) *Reid v. Automatic Elec. Washer Co.*, 189—964.

Workmen's Compensation Act—Ex-Parte Affidavits. Ex-parte
3 affidavits material to the issues *may* be received and given consideration in hearings under the Workmen's Compensation Act: exceptional circumstances may imperatively *require* the reception of such evidence. So held where affiant was in the army. (Sec. 2477-m24, Code Supp., 1913, as amended by Ch. 270, Sec. 15, 37 G. A.) *Reid v. Automatic Elec. Washer Co.*, 189—964.

Workmen's Compensation Act. An injury to an employee
4 "*arises out of*" an employment:

1. 'When the injury results from a risk reasonably incident to the employment and to the duties of the employee thereunder; or (as it is sometimes phrased)

2. When it is apparent to the rational mind, in view of all attending circumstances, that a causal connection exists between the conditions under which the employee is required to perform his work, and the resulting injury.

These principles are none the less applicable because of the intervention of an act of God which the acts or omissions of man have humanized.

Held, the death of an employee "*arose out of*" his employment, when the employee, being warned by the master to cease work and leave the building, on account of an on-coming storm, remained to close the windows, *which was part of his duties*, and was killed while so doing, by the blowing down of the building by the storm. *Reid v. Automatic Elec. Washer Co.*, 189—964.

Workmen's Compensation Act—Cross-Examination. The fact
5 that the Workmen's Compensation Act casts upon a rejecting master the presumption of negligence, furnishes no reason why the master should not, in the cross-examination of the employee, be confined to the points brought out on direct examination. *Adami v. Fowler & Wilson Coal Co.*, 189—995.

MASTER AND SERVANT Continued

TO

MINES AND MINERALS

Workmen's Compensation Act—Overcoming Presumption. Proof

- 6 (1) that an injured person was in the employ of a master who had rejected the Workmen's Compensation Act, and (2) that his injury arose "out of" and "in the course of" the employment, *ipso facto* brings to the aid of the injured employee the statutory presumption that the injury was proximately caused by *some* negligence of the employer. Evidence of the care exercised by the master in carrying on his work must be very comprehensive, before it may be said *per se* that the said presumption is overcome. (Sec. 2477-m, Code Supp., 1913.) *Mitchell v. Mystic Coal Co.*, 189—1018.

Scope of Employment. The fact that an injured employee may

- 7 have been, at a time prior to the injury, a foreman or vice-principal, is quite immaterial when, at the time of the injury, he was acting under the master's orders as a common laborer. *Mitchell v. Mystic Coal Co.*, 189—1018.

MECHANICS' LIENS.**Personal Contracts with Owner's Agent. Contracts by an agent**

- 1 in his own name, (1) pursuant to his contract with the owner, (2) for the benefit of the owner, and (3) with the owner's approval, bind the owner's property, even though the materialman originally supposed he was contracting with the owner's contractor. *Love Bros. v. Mardis*, 189—350.

Timely Filing. The issue whether a lien was filed within 30

- 2 days becomes quite unimportant when it is conceded that the materialman filed within 90 days, and the court finds that he was a principal contractor. *Love Bros. v. Mardis*, 189—350.

MINES AND MINERALS.**Miner's Working Place—Instructions. Instructions reviewed,**

relative to the reciprocal duties of operator and miner as regards the miner's working place, and held unobjectionable. *Adami v. Fowler & Wilson Coal Co.*, 189—995.

MORTGAGES

TO

MUNICIPAL CORPORATIONS

MORTGAGES. See ESTOPPEL, 2.

Priority Over Attachment Lien. An attaching creditor who
1 seeks to have his attachment lien declared senior to the
lien of prior mortgage-secured negotiable notes must show
that such notes were without consideration. Especially is
this true when the mortgage is prior in record to the
attachment lien. In the absence of such evidence, the law
will presume a valuable consideration. *Bain v. Ullerich*,
189—149.

Pre-existing Debt—Validity Against Defrauded Grantor. A
2 mortgage given to secure a pre-existing debt, without re-
lease of the debtor from personal liability, is of no validity
against the plea of rescission by the victim of a fraud-
induced contract of exchange. *Rhodes v. Uhl*, 189—408.

Assumption of Payment. The assumption of payment of a
3 mortgage on purchased land may not be avoided on the
plea that, subsequent to the assumption, the discovery was
made by the promisor that the mortgage covered lands
additional to that purchased. *Braig v. Frye*, 189—1104.

MOTOR VEHICLES. See EVIDENCE, 3; INSURANCE, 9, 13;
NEGLIGENCE, 9; PARTNERSHIP, 2.

MUNICIPAL CORPORATIONS. See PLEADING, 11.

OFFICERS, AGENTS, AND EMPLOYEES.

Civil Service Procedure and Certiorari. The discharge of public
1 officers who are subject to civil service regulations, and
appeals by the discharged officer to the civil service com-
mission, are governed by the following general principles:

1. The discharging officer may and should act on cred-
ible information of misconduct, even though the misconduct
does not constitute a crime.

2. On appeal by the discharged officer to the civil
service commission, the discharging officer may (and per-
haps should) disclose the grounds on which he acted.

3. The civil service commission, on the trial of the
appeal, may receive *hearsay* evidence.

MUNICIPAL CORPORATIONS Continued

4. The discharged officer, on appeal to the civil service commission, may not reserve his defensive and explanatory testimony, and thereafter employ it for the first time on hearing on certiorari. *Fronsdahl v. Civil Serv. Com.*, 189—1344.

Civil Service Regulations—Intoxication. Intoxication of an officer subject to civil service regulations is ample ground for his discharge. *Fronsdahl v. Civil Serv. Com.*, 189—1344.

PUBLIC UTILITIES.

Utility Rates Not Subject of Contract. Rates for gas, water, and electricity are not the subject of contract between a municipality and a private producer. (Sec. 725, Code Supp., 1913.) *Town of Woodward v. Iowa R. & L. Co.*, 189—518.

Presumption in re Ordinance Rates. Ordinance rates for gas, water, and electricity are presumptively reasonable; but a private producer may fix a higher rate, and, on injunction to restrain the enforcement of such higher rate, justify his conduct by showing that the ordinance rate is confiscatory, and that the new rate is no more than compensatory. *Town of Woodward v. Iowa R. & L. Co.*, 189—518.

Notice of Election in re Granting of Franchise. A notice of election to vote on the approval of a duly enacted ordinance granting a public utility franchise to a private party is sufficient if the *substance* of the proposed ordinance is set forth in the said notice. (Sec. 721, Code Supp., 1913.) *McLaughlin v. City of Newton*, 189—556.

Ballot in re Election on Franchise Ordinance. The ballot used at an election to vote on the approval of a proposed ordinance granting a public utility franchise must have printed thereon the ordinance *in full*. (Sec. 1106, Code Supp., 1913.) *McLaughlin v. City of Newton*, 189—556.

Ballot in re Election on Franchise Ordinance. The ballot used at a *special* election to vote on the approval of a proposed ordinance granting a public utility franchise need not be printed on *yellow* paper, as required by the statute.

MUNICIPAL CORPORATIONS Continued

(Sec. 1106, Code Supp., 1913.) *McLaughlin v. City of Newton*, 189—556.

Franchise Election—Different but Related Propositions on Separate Ballots. The requirement that different propositions relating to public measures, submitted to the people for approval or disapproval at the same election, be printed on the *same* ballot, even when the propositions are directly related, is held *not* mandatory. It is plainly stated, however, that the better practice would be to comply with the strict letter of the statute. *McLaughlin v. City of Newton*, 189—556.

PUBLIC IMPROVEMENTS.

Objection of Excessiveness—Non-necessity to Amplify on Appeal.

9 The plea before the city council of excessiveness in assessment will enable the property owner, on appeal from an adverse decision, to show, without amendment to his objections, that his assessment was arrived at by multiplying the maximum benefits per acre by a multiplier which represents more acreage of his land than was included within the district, especially when the assessment did not reveal such unauthorized computation. *In re Appeal of McLain*, 189—264.

Estoppel to Object to Excessive Assessment. Consent by a property owner that the city may build a sewer across his land, and an agreement by him to pay his "just and proportionate" part of the cost, do not work an estoppel to contest the amount assessed against him. *In re Appeal of McLain*, 189—264.

Reduction in Assessment Because of Excessive Cost. It may not be contended, on appeal from an alleged excessive assessment, that the improvement might have been built more cheaply, especially when it was built just as the objector had insisted. *In re Appeal of McLain*, 189—264.

Special Assessments—Presumption in re Enhancement of Value.
12 Principle recognized that a special assessment is presumed to enhance the value of the property to the extent of the legal assessment. *Nelson v. Robinson*, 189—1076.

MUNICIPAL CORPORATIONS Continued

STREETS AND ALLEYS.

Sidewalks and Crosswalks—Standard of Care. “Reasonable
13 care” in the maintenance of streets is a standard applicable to both sidewalks and crosswalks. *Blackmore v. City of Council Bluffs*, 189—157.

Defects From Snow and Ice—Notice. Record held to present a
14 jury question on the issue of notice to the city of the rough and uneven condition of snow and ice on the public street. *Blackmore v. City of Council Bluffs*, 189—157.

Paving Contract—Substantial Compliance With Resolution. The
15 construction of a concrete pavement 6 inches in thickness is a substantial compliance with a resolution of necessity fixing the thickness at 7 inches, in the absence of evidence showing that the reduction will materially impair the durability of the pavement. *Richardson v. City of Denison*, 189—426.

Negligence—Depression in Walk. The maintenance in a side-
16 walk of a depression with ragged and dilapidated edges, even though the depression is of slight depth,—some two inches,—may present a jury question on the issue of negligence. *Bailey v. City of Le Mars*, 189—751.

Applicability of 300-Foot Paving Limitation. The statutory pro-
17 vision, Sec. 792-g, Code Supp., 1915, limiting paving assessment to property situated a maximum of 300 feet from the street improved, has no application to paving constructed under Secs. 840-h to 840-r, inclusive, Suppl. Supp., 1915, which provide for paving outlying highways in cities—highways which “constitute main-traveled ways into and out of such cities.” *Brown v. City of Creston*, 189—1111.

SEWERS, DRAINS, AND WATERCOURSES.

Record Establishing District is a Finality—Assessing Excess
18 **Acreage.** A duly entered record of the lands included within a drainage or sewer district is the only competent evidence of the identity of the district. In assessing benefits, the council may not multiply the maximum benefits per

MUNICIPAL CORPORATIONS Continued TO

NEGLIGENCE

acre by a multiplier which represents the number of acres which the council *intended and supposed* it had included within the district, but had not. In re Appeal of McLain, 189—264.

Consent to Irregularities in Establishing Sewer District. Property owners may consent to *irregularities* in the exercise by the city council of its jurisdiction to establish drainage or sewer districts, but failure to include certain lands in the record establishing the district is not a mere irregularity, but a total *failure of jurisdiction* over such omitted lands. In re Appeal of McLain, 189—264.

NAVIGABLE WATERS.

Navigation Under Unsafe Conditions—Negligence. The owner of a boat on navigable waters who, on encountering such darkness as renders navigation unsafe, fails to anchor, as required by Federal statutes, is guilty of negligence *per se*. Watson v. Mississippi R. P. Co., 189—529.

NEGLIGENCE. See ANIMALS; LANDLORD AND TENANT, 4-9; PARTNERSHIP, 2; PLEADING, 11; PROCESS, 6; RAILROADS; RECEIVERS, 1.

ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

Negligence Arising Out of Contract Relation—Strangers to Contract. A temporary amphitheater, erected in the public street by a contractor for another, with negligence of such a nature that the same might have been readily discovered on quite reasonable examination, is not such an imminently dangerous structure as to come within any exception to the rule that *negligence arising out of contract relations will not give a cause of action to one who is a total stranger to the contract*. Larrabee v. Des Moines T. & A. Co., 189—319.

Extent of Permissible Reliance on Contractor. A photographer who has caused a temporary amphitheater to be constructed by a contractor, for photographic purposes, and has exclusive custody of such structure after its completion, may,

NEGLIGENCE Continued

perhaps, so rely on the skill of the contractor as to be excused from *inspecting* the structure and from *discovering* weakened timbers; but he may not be excused from *guarding* the structure in order to prevent the removal of supporting parts thereof, if such guarding appears reasonably necessary. *Larrabee v. Des Moines T. & A. Co.*, 189—319.

Non-Duty to Apprehend Unusual Occurrence. Even though a
3 person may, in a measure, know that his dog, of mature years, cherishes a lurking antipathy against a Ford automobile, yet such owner is under no legal obligation to apprehend that said dog, after wandering afield in the nighttime for a distance of 80 rods from home, may fall asleep upon a 2-foot bank bordering the public highway, and may feel displeased when his rest is disturbed by the sudden approach of his arch enemy, and may express his displeasure by jumping into the roadway and hurling one "bark" at his disturber, and may thereupon be unceremoniously run over, with far greater resulting damages to the Ford and its occupants than to the dog. *Damnum absque injuria*. *Mellicker v. Sedlacek*, 189—946.

"Last Chance" Rule—Nonapplicability. Principle recognized
4 that the doctrine of the "last clear chance" has application only in those cases where the injured person is *actually* discovered in a position of peril at a time when reasonable care might save him from injury. *Waters v. Chicago, M. & St. P. R. Co.*, 189—1097.

Nonattractive Nuisances. A plank shelf along the side of a
5 cofferdam, adjacent to a bridge abutment which was securely inclosed by a substantial barbed wire fence, located in the open country and fairly removed from habitation, is not an "attractive nuisance" in such sense as to render the owner responsible for the death of an immature child, who, as a mere licensee, at the best, went upon the shelf and fell therefrom into the water. *Massingham v. Illinois Cent. R. Co.*, 189—1288.

CONTRIBUTORY NEGLIGENCE.

Willful Failure to Exercise Customary Caution. One who delib-
6 erately refuses to do a feasible and accustomed thing,

NEGLIGENCE Continued

which would have avoided the accident, may not recover of another for the resulting injury. So held where one ran an engine from a loading platform upon a flat car, without equalizing, *with accessible blocks*, the difference in height of the platform and car. *Pederty Thresher Co. v. Chicago, M. & St. P. R. Co.*, 189—397.

Smoke-Enshrouded Condition of Crossing—Belated Train—Instinct to Protect Self. The smoke-enshrouded condition of a double-tracked railway crossing, coupled with the fact that no train was then due on the track where the fatal accident occurred, all aided by the recognized instinct of a human being to protect himself, may be sufficient to absolve the deceased from guilt of contributory negligence, as a matter of law. *Anderson v. Chicago, R. I. & P. R. Co.*, 189—739.

Contributory Negligence Per Se. One who, in full possession of sight and hearing, and without distracting circumstances, walks at night on a railway track and up a heavy grade, and permits himself to be hit from the rear by a heavy freight train, drawn by two engines without headlight, but with unusual noise, is guilty of contributory negligence *per se*. *Whelton v. Chicago, M. & St. P. R. Co.*, 189—918.

IMPUTED NEGLIGENCE.

Act of Unauthorized Person. The owner of an automobile is not liable for the negligent acts of another in operating the car without the owner's knowledge or consent. *Hall v. Young*, 189—236.

PLEADING.

Chosen Ground of Recovery. One who alleges a *specific* act of negligence as ground for recovery must stand or fall thereon. *Johnson v. Lincoln Hotel Co.*, 189—291.

Specification of Acts. Pleadings reviewed, and, though somewhat indefinite, held to charge that defendant, knowing that a surgical drainage tube was loose, and liable to slip into plaintiff's body, negligently failed to again fasten said tube to plaintiff's body. *Burris v. Titzell*, 189—1322.

NEGLIGENCE Continued

EVIDENCE.

Res Ipsa Loquitur. Principle recognized that the doctrine of
12 *res ipsa* is applicable only, as a general rule, when all the
instrumentalities which might cause an injury are under
the *exclusive* control and management of the defendant.
Larrabee v. Des Moines T. & A. Co., 189—319.

Condition After Injury. Evidence of physicians reviewed, as to
13 the physical condition of an injured party as late as two
years after an injury, and held properly received, over the
objection that it was too remote. Bailey v. City of Le Mars,
189—751.

Sufficiency. Evidence held to present a jury question on the
14 issue whether a manufacturer of food for human consump-
tion was negligent in its preparation. Davis v. Van Camp
Pkg. Co., 189—775.

TRIAL.

No Eyewitness Rule—Presumption (?) or Inference (?) An in-
15 struction to the effect that, in the absence of eyewitnesses,
the law "*presumes*" that an injured party exercised reason-
able care, is inaccurate, but not to such extent as to con-
stitute reversible error, when other instructions definitely
place the burden on plaintiff to show want of contributory
negligence. Anderson v. Chicago, R. I. & P. R. Co., 189—739.

Defining Reasonable Condition. The court need not "define the
16 condition in which a walk must be in order to be in a
reasonably safe condition," especially in the absence of a
request. Bailey v. City of Le Mars, 189—751.

"Last Clear Chance." The "last clear chance" doctrine is not
17 available to an injured party who, by his own pleadings or
otherwise, negatives wantonness or the essential fact that
the injured party was seen at any time prior to the injury.
Whelton v. Chicago, M. & St. P. R. Co., 189—918.

Jury Question on Undisputed Facts. Undisputed facts attending
18 an injury present a jury question, when different conclu-

NEGLIGENCE Continued

TO

NEW TRIAL.

sions may be drawn therefrom. *Reis v. Minneapolis & St. L. R. Co.*, 189—988.

Contributory Negligence of Servant. It is reversible error
19 (Sec. 3593-a, Code Suppl. Supp., 1915) to instruct that a
servant must affirmatively show freedom from contributory
negligence, *even though the servant has alleged such free-*
dom, and even though the record, negatively speaking, does
not reveal any act of contributory negligence. *Swan v.*
Dalbey, 189—1046.

Inapplicable Instructions. Instructions relative to the respon-
20 sibility of a physician for negligently allowing a nurse to
dress a wound, *without any allegation of negligence on the*
part of the physician, constitute prejudicial error. *Burris*
v. Titzell, 189—1322.

NEW TRIAL. See TRIAL, 32—34.

Petition for New Trial—Discretion. Conceding, *arguendo*, that
1 the court has a discretion in granting a new trial *on peti-*
tion, yet such discretion may not be carried to the extent
of granting a new trial in the absence of *substantial proof*
of the allegations of the petition. Evidence held wholly
insufficient to establish either fraud in obtaining a default
or a custom alleged to have been violated in entering the
default. *Western F. & C. Co. v. McFarland*, 189—717.

Fraud in Obtaining Default. A statement by counsel, when ob-
2 taining a default, (1) that, if good cause were thereafter
shown why said judgment should be set aside, he would
expect the court to set it aside, and (2) that the defendant
had been dilatory, furnishes no basis for granting a new
trial on petition, especially when it does not appear that
the court entered the default in reliance thereon. *Western*
F. & C. Co. v. McFarland, 189—717.

Newly Discovered Evidence—Failure to Investigate Known Facts.
3 Diligence in the matter of newly discovered evidence as
ground for new trial demands that a party proffering the
new evidence follow up and investigate during the trial

NEW TRIAL Continued

TO

NUISANCE

suggested facts brought to light during the trial. *Bailey v. City of Le Mars*, 189—751.

Withdrawal of Attorney as Unavoidable Casualty. The withdrawal by counsel of his appearance, without giving his client due, timely, and reasonable notice of his intention to withdraw, may constitute such "unavoidable casualty and misfortune" as to justify the court in setting aside the dismissal of the action. So held where the only warning ever given by the attorney to his client was to the effect that, if arrangements were not made as to his fees and expenses in case of trial, he would "feel" justified in withdrawing. *In re Estate of Coffin*, 189—862.

Misconduct of Counsel. Explicit direction by the court to the jury to disregard erroneous conduct by counsel will ordinarily justify the court in denying a new trial on the ground of such misconduct. *Mitchell v. Mystic Coal Co.*, 189—1018.

Presence of Relatives of Deceased. The fact that relatives are present on the trial of an action for damages for negligently causing the death of deceased, and that sympathetic appeal is made in connection with such relatives, is not ground for new trial. *Mitchell v. Mystic Coal Co.*, 189—1018.

Reluctance to Reverse Order. An order for a new trial, on the ground that the defeated party has not had a fair trial, will seldom be interfered with by the appellate court. *Whalen v. Brodkey*, 189—1255.

NOTICE. See APPEAL AND ERROR, 1, 8—14.

NUISANCE. See NEGLIGENCE, 5.

Abated Permanent Nuisance—Measure of Damages. The measure of damages for a nuisance, permanent in its nature but fully abated prior to the bringing of action, is the depreciation in rental value for the time between the creation of the nuisance and its abatement. *Conklin v. City of Des Moines*, 189—181.

Nonattractive Nuisance—Artificial Pond. An ordinary pond of water, unguarded and unfenced, within the corporate

NUISANCE Continued

TO

PARTNERSHIP

limits of a city, and entirely within a railway right of way, and formed by natural drainage from surrounding land, which settled into a barrow pit, and around which children habitually played, is not an attractive nuisance, in such sense as to render the railway company liable in damages because an immature child met death by falling therein. *Blough v. Chicago G. W. R. Co.*, 189—1256.

OFFICERS.

Vacancy—Permanent Removal from District. An office becomes vacant whenever the incumbent permanently removes from the district for which he was elected or appointed, even though he has *not* taken up a permanent abode elsewhere. *Independent Sch. Dist. v. Miller*, 189—123.

PARENT AND CHILD. See **ADOPTION**; **BASTARDS**; **DEEDS**, 2, 3; **PARTIES**, 2; **TRUSTS**, 3.

PARTIES. See **APPEAL AND ERROR**, 1.

Real Party in Interest. One in whose name a contract is made
1 for the benefit of another, or the beneficiary of such contract, may be a party plaintiff to enforce the contract. *Linemann v. Kirchner*, 189—336.

Beneficiary Under Contractual Divorce Decree. In an action to
2 enforce a contractual divorce decree, in so far as it obligated defendant to furnish his child with a college education, even though the child has attained its majority, the child is a proper party plaintiff. *Dunham v. Dunham*, 189—802.

PARTITION.

Collusion in Sale. Bidders at referee's sale in partition may band themselves together for a joint purchase of the property, so long as nothing is done to interfere with free competition in the bidding. *Melin v. Melin*, 189—370.

PARTNERSHIP.

Evidence. Evidence reviewed, and held to present jury question

PARTNERSHIP Continued

TO

PERJURY

- 1 on the issue of the existence of a partnership in operating a garage. Hall v. Young, 189—236.

Negligent Acts Outside Scope of Partnership. A partner in the
2 ownership and operation of an automobile is not liable for the negligence of another partner in using the car for a purpose wholly outside the scope of the partnership. Hall v. Young, 189—236.

Accounting—Erroneous Decree. On accounting and division of
3 partnership assets, it is manifest error to decree the division of the property in kind in certain fractional parts to each partner, and to require a partner who is a creditor of the firm to accept a naked lien on each allotted share for a fractional part of his claim, without any personal judgment for such claim, and without any remedy to enforce his claim. Ward v. Chew, 189—523.

Accounting. In a partnership accounting, involving a partner-
4 ship in the disposal of a stock of goods, the court, in determining profits, should proceed, in the absence of evidence of any greater value, on the basis of what one of the partners originally paid for the goods—not on the basis of what the goods invoiced when they were so purchased.
• Evenson v. Olson, 189—829.

Judgment on Accounting. A partner whose profit and interest
5 is in a stock of goods, and who acquiesces in a trade of such stock for land taken in the name of the other partner, is not entitled, on settlement, to a personal judgment against the other partner for his interest, but only to a lien on the land for the amount due him. Evenson v. Olson, 189—829.

Dissolution—Evidence. A partnership is not dissolved *per se*
6 by the act of one partner in ceasing to give his personal services to the firm's business, when his capital remained in the firm, and the remaining partner made no request for a dissolution. Lewellen v. Thomas, 189—1352.

PERJURY. See JUDGMENT, 1, 3.

PHYSICIANS AND SURGEONS

TO

PLEADING

PHYSICIANS AND SURGEONS. See NEGLIGENCE, 11;
WITNESSES, 1.

Responsibility for Negligence of Nurse. A physician may not be
1 held responsible for the negligence of a nurse over whom
he has no control. *Burris v. Titzell*, 189—1322.

Improper Operation from Non-expert Testimony. An operation
2 on the human body by a surgeon may be so grossly in ex-
cess of what was reasonably necessary that a jury may
find such fact, without the aid of expert testimony that
such operation was improper. So held on the issue
whether a surgeon unreasonably operated through the pa-
tient's back, in order to remove an obstruction near the
right nipple. *Burris v. Titzell*, 189—1322.

Exercise of Skill—Evidence. A physician or surgeon sued for
3 malpractice should be permitted to testify whether, in the
treatment of the patient, he exercised his best skill, knowl-
edge, and judgment. *Osnes v. Scanlon*, 189—1364.

Conclusion Evidence. A question is objectionable which calls
4 upon a physician witness to state whether a patient could
endure the pain of an indicated condition, "without seda-
tives and without the loss of any weight." *Osnes v.*
Scanlon, 189—1364.

PLEADING. See APPEAL AND ERROR, 23; FRAUDS, STATUTE
OF, 5; INSURANCE, 16; NEGLIGENCE, 10; TRIAL, 22; VENUE.

Demurrer to Answer Containing General Denial. A ruling sus-
1 taining a demurrer to an answer will not be set aside on
the point that the answer contained a denial of a certain
material allegation of the petition, when the record dem-
onstrates that said denial was abandoned in the trial court,
and that the parties, in disposing of the matter on de-
murrer, mutually proceeded on the assumption that the
allegation in question was true, as alleged by plaintiff.
Holmes v. Curl, 189—246.

Want of Verification—Waiver. Failure to move to strike an

PLEADING Continued

2 unverified answer works a waiver of the defect. *Lindsay v. Lindsay*, 189—326.

Pleading Conclusion. An allegation that "the contract alleged
3 * * * is so vague * * * that it cannot be enforced,
and [defendant] denies that said contract has any validity,"
is a pure conclusion, and properly stricken on motion.
Linnemann v. Kirchner, 189—336.

Unchallenged Pleading—Effect. An insufficient but *unchallenged*
4 pleading, if proven, will sustain a recovery, but this chal-
lenge may be made (1) by motion to direct verdict, or (2)
by motion for judgment. *Alexander Bros. v. Hawkeye &*
D. M. Ins. Co., 189—726.

Failure to Obtain Leave to Amend. An amendment will not be
5 stricken for want of leave, if leave would have been given,
if asked. *Dunham v. Dunham*, 189—802.

Evidence Beyond Paper Issue—Waiver. A litigant may not sit
6 by without objection, and permit his adversary to prove
a waiver, and thereafter contend that the evidence went
beyond the paper issue. *Fisher v. Skidmore Land Co.*,
189—833.

Admission Because of Failure to Deny—Waiver. A material
7 allegation is not deemed true because of the failure to deny
it, when the party pleading neither moves for default nor
for judgment, but proceeds to trial as though such allega-
tion had been formally denied. *Independent V. & S. Co. v.*
Iowa Merc. Co., 189—874.

"Cross-Bill" as "Defense." The filing in divorce proceedings
8 of a cross-bill on behalf of a client, and the trial of the
same, may constitute a "defense" of the client, within the
meaning of a contract relative to fees for "defending" the
client. *Bryant v. Mundorf*, 189—882.

Refusal of Unnecessary Amendment. Complaint may not be made
9 of the refusal of an unnecessary amendment. *Quaker Oats*
Co. v. Kidman, 189—906.

PLEADING Continued

TO

PRINCIPAL AND AGENT

Variance. An allegation that an employee's fall and resulting
 10 injury were caused (1) by the sickening effect of poisonous
 gases escaping from a defective stove, and (2) by the ex-
 plosion of such stove, with proof of only *one* of said causes,
 presents no fatal variance. *Swan v. Dalbey*, 189—1046.

Variance—Surplus Allegation in re Negligence. No fatal vari-
 11 ance is presented by alleging that a public utility company,
 in response to a request from deceased for electrical cur-
 rent, (1) erected the poles and strung the wires in the
 public highway to deceased's residence, (2) installed a
 transformer in connection with said poles and wires, (3)
owned said poles, wires, and transformer, and (4) so
 negligently maintained said electrical appliances as to
 cause the death of deceased, and by proving the first, second,
 and fourth allegations and, in lieu of the third allegation,
 proving that the deceased defrayed the cost of all said
 appliances; the record failing to show that deceased was
 charged with any duty to maintain said poles, wires, or
 transformer. *Coleman v. Iowa R. L. & P. Co.*, 189—1063.

PRINCIPAL AND AGENT. See FRAUDULENT CONVEYANCES;
 PROCESS.

Retaining Benefit and Denying Authority. A principal may not
 1 retain the benefits of a contract and then deny the author-
 ity of an agent to enter into such contract. *Love Bros. v.*
Mardis, 189—350.

Agent Serving Two Masters—Avoidance of Contract. When a
 2 contract is the result of services rendered by an agent
 serving both parties to the contract, it is voidable at the
 instance of the party who did not know that the agent
 was acting in a dual capacity. *Rodenkirch v. Layton*, 189—
 430.

Commission on Sales—Exempting Clause. A principal who,
 3 reasonably knowing that he would be unable to fill orders,
 contracts to pay his agent (who was without such knowl-
 edge) a commission on all orders obtained, will not be re-
 lieved of his obligation by an exempting clause in the
 contract that no commissions will be claimed "*by reason*"

PRINCIPAL AND AGENT Continued TO

PROCESS

of delay in filling orders." Rhea v. Adder Mach. Co., 189—1085.

Authority—Accepting Benefits. Authority in the principal's
4 local agent to execute a lease in the principal's name, may be shown by testimony that, after the lease was entered into, the principal recognized the same, paid the rent accruing thereunder, and accepted the full benefits thereof. Marckres Bros. v. Perry Gas Works, 189—1204.

PROCESS. See APPEAL AND ERROR, 1, 8—14.

Service in Actions Growing out of Agency. An action may not
1 be said to "grow out of" or "be connected with" an office or agency because of the fact that, after the purchase of the article *directly from the maker*, the agent (1) sold repairs to the purchaser and (2) attempted to remedy defects in the article. (Section 3532, Code, 1897.) Duhigg v. Waterloo Gas. Eng. Co., 189—547.

Dealer (?) or Agent (?) One who, under a contract for the
2 exclusive sale of an article in a given territory, makes C. O. D. purchases of the manufacturer, and sells at his own price, with a claim to a portion of the difference between the retail and wholesale price, in case his exclusive right is violated, and who attends to the manual delivery and replacement of defective parts furnished by the manufacturer under his warranty against defective material or workmanship, is a "*dealer*," and not an "*agent*," in the sense that service may be made on him in an action against the manufacturer growing out of a purchase from the latter. (Section 3532, Code, 1897.) Duhigg v. Waterloo Gas. Eng. Co., 189—547.

Agency and Action Arising out of. Evidence reviewed, and held
3 insufficient to show that one on whom service was made was other than a "dealer," and that, if agency be conceded, nevertheless the action did not "grow out of" nor was it "connected with" such agency. Duhigg v. Waterloo Gas. Eng. Co., 189—547.

Burden of Proof in re Service on Agent. A plaintiff who pro-
4 ceeds on the claim that defendant has created an agency

PROCESS Continued

TO

PROSTITUTION, HOUSE OF

in a county other than that in which defendant resides, and makes service on defendant by serving the agent, must, on special appearance by defendant to question the jurisdiction of the court, show that the defendant is a nonresident of the county in which the agency is located. (Sec. 3532, Code, 1897.) *Hall & Martin v. Chandler*, 189—851.

Insufficient Evidence of Agency. Service on an "agent" may
5 not be sustained, either on naked evidence (1) that the alleged agent did, at times, do or perform certain things or acts for the alleged principal,—i. e., collected rents,—or (2) that the alleged agent was "in charge of or looked after said building." *The authority of the alleged agent must be shown.* (Sec. 3532, Code, 1897.) *Dolan v. Keppel*, 189—1120.

Actions "Growing out of" Agency. An action for personal in-
6 jury, based on the alleged negligence of an owner in *constructing* a porch without a railing, may not, within Sec. 3532, Code, 1897, be said to "*grow out of*" or "be connected with" an agency which simply authorized the agent to "*be in charge of and look after*" said building. *Dolan v. Keppel*, 189—1120.

PROSTITUTION, HOUSE OF.

Declarations of Inmates. Declarations by the inmates of a
1 house are admissible on the issue whether it is a house of prostitution. (Sec. 4944-h9, Code Suppl. Supp., 1915.) *State v. Clark*, 189—492.

Abatement—Knowledge of Owner. A house of prostitution may
2 be abated and the house closed, irrespective of the *knowledge* of the owner of the premises. *State v. Clark*, 189—492.

Imposition of Mulct Tax—Knowledge of Owner. Premises
3 which are shown to be used for purposes of prostitution are presumptively liable to the \$300 mulct tax. Want of knowledge on the part of the owner of such prohibited use will defeat the tax, but the owner has the burden to so show. *State v. Clark*, 189—492.

RAILROADS

TO

RECEIVERS

RAILROADS. See CARRIERS; NUISANCE, 2; RECEIVERS, 1, 3, 4.

Crossing Accident—Conclusive Contributory Negligence. One who, in full possession of good health, sight, and hearing, on a clear day, and without distracting circumstances, drives upon a well known railway crossing, and is killed by a negligently operated engine, is *conclusively* guilty of contributory negligence, even though the surviving occupant of the vehicle testifies that they did look for an approaching train at all times after passing a point 75 feet from the crossing, when the record reveals the fact that, for said entire distance, the view of the track for at least 50 rods was unobstructed. *Waters v. Chicago, M. & St. P. R. Co.*, 189—1097.

RAPE.

Corroboration—Designedly Planned Opportunity. Evidence tending to show that the accused designedly planned the opportunity to commit a rape, the commission of which is properly shown, may furnish the required corroboration. *State v. Kessler*, 189—567.

Nonresistance as Bearing on Consent. A single threat to kill, *unaccompanied by any demonstration of brutal force or of dangerous weapons*, will not excuse a total failure of a female to make outcry or resistance, by word or act, when she is a woman of mature years, a widow, fully conscious, and in possession of ordinary physical powers. *State v. Morrison*, 189—1027.

Definition. Definition of rape reviewed, and held sufficient, under the record presented, though subject very properly to amplification. *State v. Morrison*, 189—1027.

RECEIVERS.

Negligence—Duty to Tenant on Company's Property. Evidence reviewed, in an action against a receiver of a railway for injuries to property by the removal of adjoining wall of

RECEIVERS Continued

leased premises, where there was nothing to indicate that the receivership was not for the general purpose of defending and protecting the property of the railway company, and held sufficient to go to the jury upon the question whether the receiver, who had been appointed after the removal of the wall, was negligent in failing to brace the tenant's wall, after notice that the foundation was giving away. *Divines v. Dickinson*, 189—194.

Validity of Sale to Receiver. A receiver may purchase, at a
2 referee's sale in partition, the property of which he is receiver, when his position as receiver has brought to him no knowledge not readily available to all interested parties, and there is no opportunity for conflict between his individual interest and the interest of such parties. *Melin v. Melin*, 189—370.

When Claims Barred—Earnings Devoted to Betterments. When
3 the earnings of a corporation under receivership are devoted solely to the betterment of the corporate property, claims against the receiver become claims against the corporation upon the retransfer of the property, at least to the extent of the betterments. *Anderson v. Chicago, R. I. & P. R. Co.*, 189—739.

Order for Filing Claims—Noncompliance—Effect. Claims against
4 the receiver of a corporation, not filed within the time provided by court order, are not, upon the discharge of the receiver, barred against the corporation by reason of said order, when there has been no sale and distribution of the corporate property. It is immaterial that, when the claims are sought to be enforced, there has been a change of stockholders. *Anderson v. Chicago, R. I. & P. R. Co.*, 189—739.

Technical Procedure—Waiver. When a creditor, under permis-
5 sion of the court, intervenes in receivership proceedings, and presses to a close, without objection, his claim for a preference, subsequently raised objections (1) that the presentation of the claim was not timely, (2) that no order was entered permitting the receiver to be sued, (3) that the receiver was not named as a defendant, and (4) that the other creditors were not notified, will be treated as waived. *Independent V. & S. Co. v. Iowa Merc. Co.*, 189—874.

RECEIVERS Continued

TO

REPLEVIN

Judgment Adjudicating Preference. A judgment against an insolvent, for money paid under a fraud-induced and rescinded contract, does not *ipso facto* adjudicate that the judgment plaintiff is entitled, in receivership proceedings, to the standing of a preferred creditor, especially when neither the receiver nor the remaining creditors were parties to the judgment proceedings. *Independent V. & S. Co. v. Iowa Merc. Co.*, 189—874.

General Creditors. A defrauded creditor of an insolvent, who fails in his claim for a preference over all other creditors, should not be denied the rights of a general creditor. *Independent V. & S. Co. v. Iowa Merc. Co.*, 189—874.

Right Acquired by Bidder. A bidder at a receiver's sale acquires no enforceable right until his bid has been accepted by the court. *Saunders v. Stults*, 189—1090.

REFERENCE.

Report as Special Verdict. The report of a referee, as to the facts, especially when confirmed by the court, has the force and effect of a verdict by a jury. (Sec. 3741, Code, 1897.) *Gardiner & Co. v. Hayward*, 189—1129.

REMAINDERS.

Vested (?) or Contingent (?) A devise of a life estate, with power to sell and with direction to divide all property "remaining" after the death of the life tenant among named persons, creates a *vested* remainder. *Hiller v. Herrick*, 189—668.

REPLEVIN.

Demand—When Necessary. Replevin for fixtures will lie without demand on the owner, who is *not* in possession, provided proper demand is made on the tenant, who *is* in possession. *Automatic S. Co. v. Central A. Co.*, 189—145.

SALES

TO SCHOOLS AND SCHOOL DISTRICTS

SALES. See FRAUDS, STATUTE OF, 3.

Calling for Quotations—Effect. A written request by a prospective vendee for quotation of prices, and a compliance therewith by the prospective vendor, followed at once by an order by such vendee for a *definite* quantity, does not constitute a contract of sale. Johnson Oil Ref. Co. v. Federal O. & S. Co., 189—1.

Implied Warranty in Sale of Human Food. A manufacturer who prepares and puts upon the market in sealed packages an article of food for human consumption, is held not only to the *highest degree* of care in preparing such article, but is also held to impliedly warrant to the ultimate consumer that the article is fit for human consumption. It follows that the consumer, in purchasing such an article, is not shackled by any rule of *caveat emptor*, and, if injured, without want of care on his part, by eating such article, he may maintain an action for damages against the manufacturer, both (1) for negligence and (2) for breach of implied warranty, even though there is no *privity of contract* between the parties. Davis v. Van Camp Pkg. Co., 189—775.

Express Warranty—Canned Goods. Written statements placed on a can of goods by the manufacturer reviewed, and held not to constitute an express warranty that the food was wholesome and fit for use. Davis v. Van Camp Pkg. Co., 189—775.

Statement of Opinion. The naked statement that an article, when fed to animals, "*would improve their growth and physical condition*," does not, as a matter of law, constitute a warranty, in the absence of a plea that the language was so intended. De Zeeuw v. Fox Chem. Co., 189—1195.

SCHOOLS AND SCHOOL DISTRICTS.

Vacancy in Office of Treasurer. The office of school treasurer is a "civil" office and, notwithstanding the provisions of Art. 9 of the Constitution, relative to the state board of education, becomes vacant whenever the incumbent ceases to be a

SCHOOLS AND SCHOOL DISTRICTS Continued

resident of the district. (Sec. 1266, Code, 1897.) Independent Sch. Dist. v. Miller, 189—123.

Consolidated Districts—Enlarging Proposed District. The county board of education, on appeal to it *in re* petition for a consolidated school district, has no jurisdiction to order the *inclusion* of territory not already embraced within the boundaries as set forth in the petition. (Sec. 2794-a, Code Supp., 1913, as amended by Ch. 149, Acts 38 G. A.) Brooker v. Ludlow, 189—760.

Quo Warranto. Quo warranto is the exclusive remedy for testing the validity of the incorporation of a consolidated school district. Hufford v. Herrold, 189—853.

Consolidation—Acquisition of Land by Federal Government. The acquisition by the Federal government of lands within a consolidated school district in no wise disturbs the legal incorporation of the district, even though the lands taxable for school purposes are reduced below 16 sections. Hufford v. Herrold, 189—853.

Attempt to Cede Lands—Delay in Selling Bonds. The legal incorporation of a consolidated school district is in no wise impaired (1) by the illegal attempt of the directors to cede part of the district territory to another district, nor (2) by delay on the part of the directors in disposing of bonds duly authorized for schoolhouse purposes. Hufford v. Herrold, 189—853.

Remedy in re Improper School Site. The discretionary action of school directors in selecting schoolhouse sites may be reviewed only on appeal to the county superintendent. (Sec. 2818, Code, 1897.) Hufford v. Herrold, 189—853.

Acquisition of Lands by Federal Government—Effect. The power of a consolidated school district (1) to sell its authorized bonds, and (2) to levy authorized taxes, is in no wise impaired by the fact that, subsequent to the authorization, the Federal government acquired large tracts of land within the district, and thereby removed such lands from taxation. Hufford v. Herrold, 189—853.

SCHOOLS AND SCHOOL DISTRICTS Continued TO SPECIFIC PERFORMANCE

Restraining Authorized Tax Levies. Authorized tax levies may
8 not be restrained on the ground that fraud existed in the original organization of the district. *Hufford v. Herrold*, 189—853.

SEDUCTION.

Divorced Woman and Married Man. Sexual intercourse, actually
1 resulting from protestations of love by a married man for a twice-divorced woman, of chaste character, reinforced by repeated promises of marriage as soon as a divorce can be obtained, designed for the purpose of inducing such intercourse, constitutes legal seduction. *Wiley v. Fleck*, 189—614.

Promise of Marriage by a Married Man. Evidence of a promise
2 of marriage by a married man is admissible as bearing on the sincerity and good motives of the promisor in his protestations of love. *Wiley v. Fleck*, 189—614.

SODOMY.

Acts Constituting. Sodomy may be committed by having copu-
1 lation in the mouth of a human being. *State v. Farris*, 189—505.

Indicting Accomplice as Principal. One who permits the crime
2 of sodomy to be perpetrated on his body may be indicted as a principal. Indictment held sufficient. *State v. Farris*, 189—505.

SPECIFIC PERFORMANCE.

Noncontemplated Special Assessments. A written contract giving a tenant the right to purchase the leased premises at a specified time during the term will not be so specifically enforced as to require the owner of the property to pay special assessments for improvements which were not within the contemplation of the parties when the right to purchase was granted. *Nelson v. Robinson*, 189—1076.

STATUTES

TO

TAXATION

STATUTES.

Amendment as Bearing on Construction. The rights of one class
1 of parties embraced within a statute may not be controlled
by an amendment dealing exclusively with another class.
In re Continental Cas. Co., 189—933.

Implication from Amendment. The construction of a statute as
2 to one class of persons may not be controlled by a merely
implied construction arising from an amendment to the
statute dealing with a different class of persons. In re
Continental Cas. Co., 189—933.

Validity in General—Constitutionality—Title. Ch. 372, 37 G. A.,
3 denouncing hostility to the government, is not unconstitu-
tional because of the failure of the title of the act to men-
tion the United States, as the crime denounced is against
the state, and not against the United States, and the title,
"An act relating to offenses against the state of Iowa,"
might have been sufficient, under the state Constitution,
even if it had created two distinct offenses (which it did
not do); as a statute, under such objections, will be given
4 a liberal, and not a critical or technical construction, and
5 all doubt as to the sufficiency of the title will be resolved
in favor of its validity. State v. Gibson, 189—1212.

TAXATION. See SCHOOLS AND SCHOOL DISTRICTS, 7, 8.

Shares of Bank Stock—Real Estate Deduction. The method pro-
1 vided by Sec. 1322, Code Supp., 1913, for the assessment of
the shares of stock of national, state, and savings banks
and loan and trust companies is, in view of its legislative
history, and purpose to render absolutely uniform the meth-
od of assessing taxes on banking capital, exclusive of any-
thing in the prior section of the Code of 1897, known as
Sec. 1324. It follows that from the total amount of
capital, surplus, and undivided profits there should be de-
ducted the amount of capital *actually* invested in real
estate, and not the valuation which the assessor has seen
fit to place on such real estate for taxation purposes. Se-
curity Sav. Bank v. Board of Review, 189—463.

TAXATION Continued

TO

TELEGRAPHS AND TELEPHONES

Double Taxation on National Banks. Principle recognized that
2 there can be no double taxation on the shares of stock of national banks. *Security Sav. Bank v. Board of Review*, 189—463.

Insurance—"Gross Premiums Received." In computing the
3 "gross amount of premiums received" annually by an insurance company "for business done in this state," as a basis for the state tax, consideration must be given solely to premiums *earned* by the company—not to premiums received, but returned to the insured on cancellation of the policy. (Sec. 1333, Code Supp., 1913.) In re *Continental Cas. Co.*, 189—933.

"Insurance upon Property in this State" Defined. A contract
4 between two foreign insurance companies doing a general insurance business in Iowa, under which each reciprocally pays to the other, in the state of their domicile, a *portion* of the premium received on its policies issued on property in this state, and under which the company receiving such portion agrees to pay to the company paying the portion a proportional amount of the loss, if any, does not constitute "*insurance upon property in this state*," within the meaning of Sec. 1333, Code Supp., 1913, and therefore no state tax is due on the portion so paid for indemnity. In re *Continental Cas. Co.*, 189—933.

TELEGRAPHS AND TELEPHONES.

Unrepeated Death Message—Recovery. A contract provision in
1 an unrepeated interstate telegraph message, duly approved by the interstate commerce commission, limiting recovery for delay or failure to deliver, to the amount paid for transmission, is reasonable and enforceable, and *applies to a death message*. *Frederick v. Western Union Tel. Co.*, 189—1338.

Contract Limitation on Recovery. A contract provision in an
2 unrepeated interstate telegraph message, limiting recovery for delay or failure to deliver (1) to the amount paid for sending the message, and (2) to an amount not, in any event, to exceed \$50, permits a recovery up to \$50, if the delay or failure to deliver was the result of *gross negligence*.

TELEGRAPHS AND TELEPHONES Continued TO

TRIAL

on the part of the telegraph company. *Frederick v. Western Union Tel. Co.*, 189—1338.

Damages for Mental Pain and Anguish. The rule of the Federal
3 courts that recovery for mental pain and anguish which is independent of any other injury may not be had, in an action for delay or failure to deliver an interstate telegraph message, is binding on the state courts in like actions. *Frederick v. Western Union Tel. Co.*, 189—1338.

TRESPASS. See ANIMALS; INJUNCTION, 1.

Burden of Proof. In an action to enjoin a trespass, plaintiff meets his burden of proof by showing his possession under a lease from the owner. Defendant then has the burden legally to justify *his* possession, i. e., by showing that plaintiff had leased to him. *Frisbie Bros. v. Beck*, 189—1126.

TRIAL. See APPEAL AND ERROR, 5-7, 22, 28; CRIMINAL LAW; FRAUDS, STATUTE OF, 6; LARCENY; NEGLIGENCE, 15-20; TRUSTS, 1, 2; WITNESSES, 7-9.

METHOD OF TRIAL.

Combining Equitable Issues Arising at Law and in Equity.

1 Equitable issues, practically identical, and arising in two actions, one at law (replevin) and one in equity, between the same parties, over the same subject-matter, may very properly be consolidated and tried in the equitable action, especially when a trial of the equitable issues will be determinative of the entire controversy. *Groen v. Ferris*, 189—21.

Equity (?) or Law (?) A quasi equitable prayer, following a
2 strictly defensive answer at law to a petition at law, presents no justification for a transfer to equity, when an analysis of the pleadings demonstrates that such prayer may be just as effectually satisfied at law as in equity. (Sec. 3435, Code, 1897.) *Darst v. Fort Dodge, D. M. & S. R. Co.*, 189—632.

TRIAL Continued

Transfer to Law on Failure to Prove Equity. One who pleads
3 himself into equity, but demonstrates, on the trial in equity, that the action is *solely* at law, may not complain of the action of the court in declining to retain further jurisdiction, and in transferring the cause to the law calendar; and especially so when defendant was asking for such transfer. *Gorman v. Joens*, 189—845.

COURSE AND CONDUCT IN GENERAL.

View of Premises. The court is within its discretion in refusing
4 to permit the jury to view the scene of an accident, at a trial over two years after the accident, and at a time when the condition of the walk had materially changed. *Bailey v. City of Le Mars*, 189—751.

Objections to Conclusion Statements. Objections to statements
5 in an affidavit for continuance (admitted in order to avoid a continuance), on the ground that the same were mere conclusions, reviewed, and *held* that the court had, by its ruling, eliminated all prejudicial matters. *Fisher v. Skidmore Land Co.*, 189—833.

Refusal to Order Interpreter. Refusal to order an examination
6 of a witness through an interpreter will not be disturbed, in the absence of a showing of abuse of discretion. *Adami v. Fowler & Wilson Coal Co.*, 189—995.

EVIDENCE.

Cross-Examination. Whether a witness "had warned his de-
7 ceased son of the danger of electrical wires" is not cross-examination of testimony "relative to the location of the lines and the phenomena attending them when coming in contact with other objects." *Graves v. Interstate Power Co.*, 189—227.

Order of Evidence. One may be permitted to show the amount
8 of his expenditures for which recovery is sought, *before* proving the contract giving right to recover therefor. *Linnemann v. Kirchner*, 189—326.

TRIAL Continued

Examination—Question Not Revealing Purpose. One may not
9 complain of the exclusion of a question which does not reveal what was sought to be proven, and counsel makes no statement of what he expects to prove. *Linnemann v. Kirchner*, 189—336.

Related Opening of Case for Additional Testimony. Opening the
10 case for additional testimony, in order to clarify obscure points, even as late as the pendency of a motion for a directed verdict, is within the fair discretion of the court. *Wiley v. Fleck*, 189—614.

Nonresponsive Answer. The nonexaminer of a witness may not
11 interpose the objection that the answers are not responsive to the questions. *Fisher v. Skidmore Land Co.*, 189—833.

Related Objections. It is discretionary with the trial court as
12 to receiving objections to a question after the witness has answered, and its ruling in overruling such objection will not be reviewed on appeal. *State v. Gibson*, 189—1212.

Nonresponsive Answer. An objection that an answer was not
13 responsive is not available to the party who is not interrogating. *State v. Gibson*, 189—1212.

Ouring Error. Error in excluding a material question is not
14 cured by the fact that the question indicates what the answer would have been, had an answer been permitted. *Osnes v. Scanlon*, 189—1364.

ARGUMENT AND CONDUCT OF COUNSEL.

Misconduct in Argument—Inadequate Objection. Objection to
15 improper argument is waived by the objecting counsel by tacitly directing the arguing counsel to proceed with his argument, after a controversy as to the propriety of the argument. *McKenny v. Davis*, 189—358.

Misconduct of Counsel. Explicit direction by the court to the
16 jury to disregard misconduct on the part of counsel has large curative qualities. *Adami v. Fowler & Wilson Coal Co.*, 189—995.

TRIAL Continued

Failure to Preserve Remarks in Record. The Supreme Court
17 will not reverse judgment of conviction because of improper
argument of counsel, where the improper remarks, al-
though excepted to, were not preserved by the reporter.
State v. Gibson, 189—1212.

INSTRUCTIONS—PROVINCE OF COURT AND JURY.

Submission of Established Defense. The vice of submitting to
18 the jury an unquestionably established defense is not cured
by the fact that the instructions were correct in form.
Spitler v. Perry T. L. & I. Co., 189—709.

INSTRUCTIONS—FORM, REQUISITES, AND SUFFICIENCY.

Correct but Inexplicit Instructions. Correct but inexplicit in-
19 structions are sufficient, in the absence of a request for
the more explicit one. So held where instructions correctly
stating the city's duty to maintain its streets did not draw
any distinction between the duty to maintain *sidewalks* and
crosswalks. Blackmore v. City of Council Bluffs, 189—157.

Correct But Not Explicit. A correct instruction, but one not just
20 as explicit and all-embracing as counsel would like to have
it, is sufficient, in the absence of a request for amplification.
Linnemann v. Kirchner, 189—336.

Conflicting Instructions. An instruction is not conflicting which,
21 in one part, declares that a broker suing for commission
may not recover if he produced a purchaser who was un-
able to make a required deposit, and in another part, de-
clares that he may recover if the owner stated that the
proposed purchaser was acceptable, irrespective of his
inability to make the deposit, but was not acceptable be-
cause he would not raise the bid on which the broker had
been authorized to sell. Fisher v. Skidmore Land Co., 189—
833.

INSTRUCTIONS—APPLICABILITY TO PLEADINGS AND EVIDENCE.

Submission of Nonpleaded Contract. On the sole issue whether

TRIAL Continued

22 plaintiff was entitled to recover on a conceded contract for services the amount pleaded by him, or a lesser amount, as indicated by defendant in his testimony, the court, in presenting both contentions to the jury, is not guilty of the vice of according to plaintiff the right to recover on a contract not pleaded. Even conceding error *arguendo*, the same is fully effaced by the act of the jury in finding exactly in accord with plaintiff's pleadings. Scanlan & Murphy v. Fahey, 189—1156.

Instructions Wholly Without Support. Instructions are erroneous when wholly without support in the pleadings and evidence. Mortenson v. Knudson, 189—379.

REQUESTED INSTRUCTIONS.

Cautionary Instructions—Non-indulgence in Sympathy. Instructions cautioning the jury against being swayed by sympathy are properly refused. Mitchell v. Mystic Coal Co., 189—1018.

INSTRUCTIONS—OBJECTIONS AND EXCEPTIONS.

Failure to Except. Exceptions to instructions not urged until after the instructions had been read to the jury were not in time, under Sec. 3705-a, Code Supp., 1913 (now repealed), and could not be considered in a motion for new trial, or upon appeal, without the statutory showing as to failure to discover the error before the giving of the instructions. Stratmeyer v. Hoyt, 189—85.

Insufficient Exception. An exception to the effect that a series of instructions *as a whole* did not completely instruct as to the respective duties of the city and pedestrians on cross streets, is not sufficient to present the point that different standards of care rest upon the city as regards sidewalks and crosswalks. Blackmore v. City of Council Bluffs, 189—157.

Gambling on Result of Answers. Objections to questions must be timely. A litigant may not gamble on the result of an answer—retain it if favorable, move to strike if unfavorable. State v. Christ, 189—474.

TRIAL Continued

Sufficiency of Objection. The dragnet objection that testimony 28 is "irrelevant, incompetent, and immaterial" is too indefinite to present a reviewable question on appeal, unless, from the nature and condition of the subject-matter in hand, the attention of the court is fairly called to some specific objection of an obvious or discernible nature. So held as to such objection to testimony tending to show (1) the reason why an owner of land had rejected an authorized bid for his land, and (2) that the proposed purchaser was able to meet and had met the requirements of the contract. *Fisher v. Skidmore Land Co.*, 189—833.

INSTRUCTIONS—CONSTRUCTION AND OPERATION.

Instructions Construed as a Whole. An instruction that electrical 29 wires must be so constructed and maintained "as to prevent injury and death," is not subject to the vice of imposing a liability upon "insurers," when the instructions as a whole clearly demonstrate that the court meant nothing of the kind, and that the jury could not have so understood. *Graves v. Interstate Power Co.*, 189—227.

Nonassumption of Agency. Instructions reviewed, and held not 30 to assume that a named party *was* an agent. *Pickens v. Milwaukee Mech. Ins. Co.*, 189—900.

VERDICT.

Impeachment. Jury-room arguments based on the evidence may 31 not be shown by affidavits. *McKenny v. Davis*, 189—358.

Passion and Prejudice. Even though appellant can demonstrate 32 that the verdict is, on *his* theory of the evidence, the result of passion and prejudice, yet he must fail if the record reveals substantial support for the verdict on appellee's theory of the evidence. *Chapman v. Lamp*, 189—771.

Excessive Verdict. Verdict for \$700 for assault and battery 33 sustained, as having substantial support in the evidence. *Chapman v. Lamp*, 189—771.

Excessive Verdict. Record reviewed, and *held* that a verdict for

TRIAL Continued

TO

TRUSTS

- 34 \$3,500 for negligently causing the death of a miner was not excessive. *Mitchell v. Mystic Coal Co.*, 189—1018.

TRUSTS.

Action to Enforce—Law (?) or Equity (?) A trustee who has
1 breached his agreement to furnish the trustor with the necessities of life may be sued *at law* by the trustor's guardian, to recover a sum sufficient to discharge obligations incurred by the guardian in furnishing such necessities to his ward. *Cavanagh v. O'Connor*, 189—171.

Parol Evidence. While parol evidence is inadmissible to *estab-*
2 *lish* an express trust in real estate, yet one who is admittedly the owner of real estate may, in *explanation* of his title, orally testify that his grantor never was the owner of the property, was simply a trustee for the one so testifying, and that the grantor's deed was simply in execution of the trust. *Grace v. Callahan*, 189—213.

Engrafting Trust on Legal Title. A trust will not be engrafted
3 on a legal title, in the absence of very clear and definite supporting testimony. Evidence involving dealings between a mother and son, with intermingling of funds from various sources, reviewed, and held insufficient to establish any trust relation. *Kelley v. Kelley*, 189—311.

Claimant Against Insolvent. One who has been defrauded of his
4 property, and seeks to establish a trust against the insolvent and his general creditors, must (1) actually point out his property which is the subject of the trust, or (2) actually show that his property has passed into other specific property, and that the same is now in the possession of the defendant. *Independent V. & S. Co. v. Iowa Merc. Co.*, 189—874.

Trustee's Power to Lease. A testamentary trustee, though in-
5 vested with legal title, and in actual possession and occupancy of the property with the consent of the trust beneficiaries, and though the property be a homestead, may not, in the absence (1) of necessity therefor and (2) of the consent of the trust beneficiaries, and especially after the trust

TRUSTS Continued

TO

VENDOR AND PURCHASER

period has expired and the right to distribution among the beneficiaries has matured, execute a valid lease of the trust property, either in an individual or a trust capacity. *Watland v. Good*, 189—1174.

VENDOR AND PURCHASER. See BROKERS.**REQUISITES AND VALIDITY OF CONTRACT.**

Agreement on Price Not Completed Sale. An accepted offer to
1 sell land at a specified *price* (especially when the offer and acceptance are by telegrams) does not constitute a complete contract of sale, regardless of agreement as to all other details necessarily, and *known and contemplated by the parties* to be, incident to the completed transaction. So held where the agreement embraced all details of the price, but did not cover the matters of an existing lease and easement. *Petersen v. Jensen*, 189—400.

CONSTRUCTION AND OPERATION OF CONTRACT.

Option (?) or Purchase (?) Option contract for the purchase of
2 lands reviewed, and held that the payment made thereunder constituted a part of the purchase price of the *land*, and not a part of the purchase price of the *option*. *Braig v. Frye*, 189—1104.

Option Contract. Contract reviewed, and held to be a mere
3 option to buy, even though the price paid therefor was apparently grossly excessive. *Braig v. Frye*, 189—1104.

Forfeiture of Contract. An option contract for the purchase of
4 realty becomes a contract of purchase whenever part of the purchase price is paid, and may then be forfeited only under the provisions of Sec. 4299 *et seq.*, Code Supp., 1913. *Braig v. Frye*, 189—1104.

MODIFICATION OR RESCISSION OF CONTRACT.

Delay as Barring Rescission. The right of a purchaser of prop-
5 erty, even though it be non-perishable—real estate—to re-

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scind the contract for false representations, howsoever reprehensible, is waived, as a matter of law, by a delay of a full year after acquiring full knowledge of all material facts. *Spitler v. Perry T. L. & I. Co.*, 189—709.

Nonprejudice as Avoiding Delay. Vendee's failure to attempt
6 rescission of a contract of purchase for a full year after securing full knowledge of all the facts, may not be avoided by the fact that vendor has not been prejudiced by the delay. For a much greater reason, there is no avoidance when vendor has, in the meantime, lost the rent of the property, and, in case of rescission, must lose the "wear and tear" on the property, for which rent vendee makes no money tender until after suit is brought. *Spitler v. Perry T. L. & I. Co.*, 189—709.

Ratification of Contract. A vendee may not rescind a contract
7 of purchase on which he has made a payment at a time when he knew, or ought to have known, the truth of all relevant facts. *Spitler v. Perry T. L. & I. Co.*, 189—709.

Waiver of Rescission. A purchaser may not rescind when, with
8 full knowledge of every material fact, he accepts attornment from the vendor's tenant, rents the property for a term of years, collects the rent, and exercises, generally, unrestricted acts of ownership over the property. *McCane v. Wokoun*, 189—1010.

REMEDIES OF VENDOR.

Waiver of Vendor's Lien. A vendor waives his vendor's lien
9 for unpaid purchase price (1) by levying, two years after the sale, an attachment on the land for damages for fraudulently inducing the conveyance, and (2) with a petition of intervention on file asserting a superior lien, by causing his attachment lien to be judicially confirmed, and (3) by delaying assertion of any right to a vendor's lien until shortly prior to the hearing on the petition of intervention. *Bain v. Ullerich*, 189—149.

REMEDIES OF PURCHASER.

Mutual Mistake in Acreage. Mutual mistake in the acreage of

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- 10 land bought at an agreed price per acre gives right to a *pro tanto* reduction in price, or to a *pro tanto* return, if the price is paid before discovery of the mistake. *Weekly v. Yost*, 189—536.

Wrongful Withholding of Possession—Damages. A vendee

- 11 who, in compliance with his contract, tenders his purchase-money note to the vendor, and for a series of years is wrongfully excluded from the premises, and in the meantime keeps his tender good, has the right, on obtaining possession, to elect to have a cancellation of the accrued interest on his note as damages, in lieu of accepting the rents and profits as damages. *Mitchell v. Mutch*, 189—1150.

Wrongful Withholding of Interest on Deposit. A purchaser who

- 12 has been wrongfully kept out of possession by the vendor has the right, on obtaining possession, to recover of vendor legal interest on a cash tender kept good during the period of detention. *Mitchell v. Mutch*, 189—1150.

Wrongful Withholding—Election to Accept Rent as Damages.

- 13 A purchaser who has been wrongfully kept out of possession by the vendor will not be held to have elected to accept as damages the rents and profits for the period of such detention, because of the fact that, prior to any default by vendor, the purchase terminated the tenancy of the tenant then in possession of the premises. *Mitchell v. Mutch*, 189—1150.

Obligation to Pay Taxes. A vendor who has covenanted to con-

- 14 vey good title, and thereafter, for a series of years, wrongfully withholds from the grantee both deed and possession, rests under a legal obligation to pay taxes on the premises accruing during the period of detention. *Mitchell v. Mutch*, 189—1150.

VENUE. See HUSBAND AND WIFE, 2.

Arbitrary Right to Change. A defendant sued in a county which

- 1 is not the county of his residence, but which is the county in which his written contract is performable, has an *absolute* right to a change of venue to the county of his res-

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idence, when he files (1) a sworn answer properly alleging fraud in the inception of the contract, as a complete defense, and (2) a bond to cover costs, in case he is unsuccessful on the trial. (Sec. 3505, Par. 6, Code Supp., 1913.) State v. District Court, 189—1167.

Fraud as Ground for Change. The appellate court, in matters 2 properly before it, will not pass on the technical sufficiency of an answer as a good pleading of fraud, as a basis for change of venue, when plaintiff has not seen fit to question the sufficiency in the trial court. State v. District Court, 189—1167.

Fraud and Forgery as Basis for Change. A defendant who pleads 3 fraud in the inception of the written contract sued on, as a basis for change of venue to the county of his residence, is none the less entitled to said change because he also pleads forgery or alteration of the contract. State v. District Court, 189—1167.

Indorser of Fraud-Induced Contract. Indorsers of a written con- 4 tract, sued in the county where the maker had contracted for performance, and being residents of the county of which the maker is a resident, may, in common with the maker, who is likewise sued, join in the maker's plea of fraud in the inception of the contract, and will, on the filing of the statutory bond, be entitled, equally with the maker, to a change of venue to the county of their residence. (Sec. 3505, Par. 6, Code Supp., 1913.) State v. District Court, 189—1167.

WATERS AND WATERCOURSES. See BOUNDARIES.

Natural Course of Drainage—Evidence. Evidence held to justify the decree of the trial court as to the course of natural drainage. Maxson v. Cress, 189—362.

WILLS. See INFANTS, 1; TRUSTS, 5; WITNESSES, 1.

TESTAMENTARY CAPACITY.

Abnormal Nature of Testator. Prima-facie incapacity to execute 1 a will is established by testimony tending to show:

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1. That testator was an inebriate.
2. That he practiced indescribably filthy and immoral habits.
3. That he was of violent passions, and devoid of self-control.
4. That he was quarrelsome, abusive, and profane.
5. That such conditions indicate mental decay. In re Estate of Swain, 189—28.

Intoxication and Mental Competency. Testimony insufficient to
2 show that testator was drunk at the time of the execution of a will may still remain in the record for its bearing on the general issue of mental competency. In re Estate of Swain, 189—28.

Jury Question as to Mental Incompetency. Evidence reviewed in
3 detail, and held to present a jury question on the issue of testamentary capacity. Dolan v. Henry, 189—104.

Unnatural Distribution as Bearing on Mental Competency. An
4 unequal and unnatural distribution of property by testator, no explanation appearing, presents a circumstance for consideration on the issue of testamentary capacity. Dolan v. Henry, 189—104.

Mental Capacity as Jury Question. Evidence tending to show
5 that an aged testator had been seriously bedridden for some two years prior to his death, and was in a stupor at the time the alleged will was executed, together with other attending facts and circumstances, held to present a jury question on the issue of testamentary capacity. In re Will of Hook, 189—287.

Unrecognized Expert Theory. An opinion that one is mentally
6 unsound, based on the theory that a sick person cannot be of sound mind, does not rise to the dignity of expert medical testimony. In re Will of Hook, 189—287.

CONSTRUCTION.

Action to Construe—Creditors. Creditors of one who might in-
7 herit if a will be construed in a given way may not maintain an action to construe such will. Collins v. Ahrens, 189—178.

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Equitable Conversion. A will wherein testator, after making
8 various devises to his children, directed that the "remainder" of his estate be *sold*, and the proceeds equally divided among his children, does not have the effect (because not so intended by testator) to convert into personalty, as of the date of the death of testator, a tract of land definitely devised to one of testator's sons "for life and after his death to his children," when the life devisee long survived the testator, and died without issue. In re Estate of Mount, 189—279.

Life Estate (?) or Fee (?) A devise to a wife, in words un-
9 questionably, but not *expressly*, creating a fee, if such words stood alone, but followed by a later nonrepugnant paragraph directing a division of all property "remaining" after the death of the wife equally among testator's children, must, in order to give effect to *all* that testator has declared, be construed as a life estate only, with power to sell. Hiller v. Herrick, 189—668.

Rejection of Apparent Limitation. A seeming limitation on an
10 otherwise clearly granted power to a life tenant to sell, will not be given such effect if the court can, in reason, determine that such was not testator's intention. So held where a wife was given, for life and in lieu of dower, the income of a small estate, with an added provision that "*she*" might sell designated property, "if for any reason my wife as executrix thinks best to sell," etc.; it being held that testator very clearly did not intend the words "*as executrix*" to be a *limitation*. In re Estate of Ullrich, 189—868.

RIGHTS OF DEVISEES.

Authority to Sell Property—Judicial Review. Even though there
11 be large warrant for the position that a will gives authority to a life tenant to sell without any court permission, the probate court may well assume jurisdiction of such an application, (1) when the application is made after the closing of the estate; (2) when the life tenant's interest depends on her continued celibacy; (3) when the interest of a minor is at stake; (4) when the proceeds of the proposed sale are, in a sense, to be invested "beyond the jurisdiction of the court;" (5) when, without such per-

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mission, it might be impossible to induce buyers to purchase; and (6) when some fair doubt exists as to whether the judgment of the life tenant as to the advisability to sell is final, and beyond judicial review. In re Estate of Ullrich, 189—868.

Devise (?) or Dower (?)—Election. A husband who was devisee
12 under his wife's will, and who, as executor, claimed to take under the will, and never claimed to take dower interest, will be held to have elected to take under the will. Wright v. Wright, 189—921.

WITNESSES. See CRIMINAL LAW, 3; FRAUDS, STATUTE OF, 6; LARCENY, 2; TRIAL, 6.

Will Contest—Testator's Physician as Witness. Physicians may
1 testify to knowledge acquired by them while treating testator during his lifetime, even though called by contestant. In re Estate of Swain, 189—28.

Transactions With Deceased. A witness who is incompetent to
2 testify to personal transactions or communications with a person since deceased, is not incompetent to testify to matters of observation, bearing on the physical condition of such person: i. e., (1) "that he was delirious;" (2) "that he was kind of murmuring and talking to himself about things that happened years ago;" (3) "that he talked incoherently." Dolan v. Henry, 189—104.

Competency—Review on Appeal. Record held insufficient to
3 justify a reversal because of the rejection of testimony bearing on damages, on the ground that the witness was not competent. Burgess v. Bremer County, 189—168.

Transactions with Deceased. The *interest* which will exclude a
4 witness from testifying to a transaction with a deceased must be *direct* and *immediate*. Linnemann v. Kirchner, 189—336.

Transactions with Deceased—Disqualifying "Interest." A
5 guardian who, under a claim that decedent obligated himself to pay for the care of the guardian's wards, prays for

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an allowance *for the wards* from decedent's estate is, irrespective of her position as a plaintiff, incompetent to testify to the terms of the contract with decedent, *or to any essential fact dependent on the contract*, when it appears that, if the prayer be granted, a fund will be created from which the guardian will be personally reimbursed for large outlays made for her wards. *Linnemann v. Kirchner*, 189—336.

Transactions with Deceased—Surviving Husband and Heir. One
6 who, as surviving husband and heir, is part owner of a claim against a deceased, is incompetent to testify to personal transactions and communications with the deceased, touching the validity of the claim. *Mortenson v. Knudson*, 189—379.

Competency—Transactions With Deceased. In order to exclude
7 the evidence of an interested party as to a transaction with a deceased person, the objection must be to the incompetency of the *witness*, not to the incompetency of the *evidence*. *Schleuter v. Reinke*, 189—452.

Character Witnesses—Cross-Examination. A defendant who, in-
8 stead of confining his good-character witnesses to the trait involved in a charge of rape, questions them, without objection by the State, as to his character for (1) morality, (2) decency, and (3) character, may not complain if the State cross-examines as to defendant's (1) drinking habits, and (2) whether they had heard of defendant's wife's securing a divorce for cruelty and drunkenness, when the record reveals (a) that, in some instances, no objections were made, (b) that, in other instances, the objections were indefinite, and (c) that the error points on appeal were quite delayed. *State v. Kessler*, 189—567.

Cross-Examination—Explanation on Redirect. Where a witness
9 gave an opinion during his cross-examination by defendant, the State, on its redirect examination, was entitled to have the witness explain the facts upon which said opinion was based. *State v. Gibson*, 189—1212.

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